January 31, 2023

Wisconsin Department of Transportation – Southeast Region
Attn: Josh LeVeque
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submitted electronically at
https://wisdot.box.com/s/aw1irc2zabochnbc5h46ugslf85gqdrn

RE: Comments on I-94 East-West Corridor Study

Dear Mr. LeVeque:

The undersigned organizations and advocates, who have long sought to ensure transportation equity and racial justice in the Milwaukee area, submit these comments on the I-94 East-West Supplemental Draft Environmental Impact Study ("SEIS" or "SDEIS"). Rather than exacerbating the errors and inequities of 20th century highway building, the agencies can and must build for the future to protect our environment, address the impacts of climate change-causing emissions, and ensure the environmental justice that state and federal leaders say they want.[1] Expanding the highway's footprint, largely in order to shave a few minutes off travel to and from the still-segregated western suburbs, is the wrong direction to move.

Analyzing (and implementing) an alternative that meaningfully incorporates a multimodal system in the corridor is crucial for the environment and health as well as a matter of equity, given profound and longstanding segregation and racial disparities in the region, repeated declines and plateaus in actual and in projected Vehicle Miles Traveled (VMT), and studies that show diverting even a small percentage of single-occupancy vehicle traffic to transit can significantly reduce traffic congestion. And it is crucial because the information the agencies use

[1] *See, e.g.*, Ex. 1, State of Wisconsin (2020), Governor's Task Force on Climate Change Report, Madison, WI, at 45 ("utilizing a smart-growth planning approach encourages and improves regional accessibility, housing and neighborhood density, mixed-use development, street connectivity, walkability, and public transit proximity. This type of integrated approach to land-use planning will increase economic, social, and environmental benefits across the state."). Moreover, in proclaiming Feb. 4, 2023 as Transit Equity Day, Gov. Evers also recognizes that public transportation and paratransit can combat climate change and that public transit infrastructure is vital to the social and economic well-being of Wisconsin residents. Ex. 2, Gov. Tony Evers, Proclamation of Feb. 4, 2023 as Transit Equity Day. Ex. 3, Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," (Jan. 20, 2021), ("Our Nation has an abiding commitment to empower our workers and communities; promote and protect our public health and the environment; and conserve our national treasures and monuments, places that secure our national memory. Where the Federal Government has failed to meet that commitment in the past, it must advance environmental justice. . . . It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; . . . to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; . . . and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals")

to justify the expansion – including safety information and traffic "projections" – is incomplete and misleading, and does not grapple with the real circumstances on the ground and expected changed behavior. Nor does it grapple with, much less seek to mitigate, the looming threat of climate change. Rather than throwing up their hands and proceeding ahead with the selected alternative *with the knowledge that it will have a discriminatory effect,* the agencies must fairly develop and analyze a transit-inclusive "reasonable alternative" that repairs or reconstructs the highway and makes prioritized safety improvements, but does not expand capacity or significantly enlarge the concrete footprint, and *does* expand public transportation capacity.[2]

The agency must also appropriately consider the social, economic, and interrelated indirect and cumulative effects of the project. Instead, the SEIS repeatedly ignores or minimizes the nature and extent of multiple, specific, adverse racial[3] (and other) effects, making no meaningful effort to even offset or mitigate, much less avoid, them. Instead, it makes excuses to justify continuing and exacerbating those effects. And when, as here, those adverse effects exist, the agencies must avoid, minimize or mitigate those effects – not brush them aside. Moreover, rather than claiming there is nothing they can do to change the situation, the agencies need to make absolutely clear to stakeholders that the project will be discriminatory and thus cannot go forward unless those actions are taken.

[2] All subsequent references to a "transit alternative" in these comments are to such an alternative (not to transit *only*. Proper consideration of a repair and transit alternative – and proper disaggregation of effects related to repair, reconstruction and safety improvements, from capacity expansion - would establish that poor pavement or unsafe roads are not inevitable results of failing to add lanes. Similarly, such an alternative could maintain a key link in the local, state and national transportation network. As also discussed below, the 6-lane alternative the agencies studied is *not* the same as the alternative that has been requested by the community, since it still opts to significantly expand the concrete footprint of the project and create "shoulders" that it can (and likely will) in the future convert to an 8 lane option, and since it also fails to incorporate a transit increase as part of (not the entirety of) the project. To be clear, we do not oppose, and in fact do support, *reconstruction of this segment of the highway with focused safety and design improvements, without significant expansion of the existing footprint, combined with substantial long-term investments in expanded public transit to provide more accessible transportation for the entire community.*

[3] Throughout these comments, terms such as "racial disparities" and "racial effects" also encompass disparities, effects and the like on the basis of Hispanic/Latinx status.

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I. The Region is racially segregated, and Black and Latinx residents are far more disadvantaged than whites and far more dependent on transit.

Minorities are a "social group," WisDOT Facilities Development Manual (FDM) 25-5-25 Affected Social Groups (5. Minorities), and segregation and discrimination are "social" effects within the meaning of NEPA. People of color – especially Black and Latinx people – have long received the fewest benefits of transportation system investments, and the SEIS admits that expanding highway capacity while public transit capacity declines will have a disproportionate adverse impact on persons of color in the region.[4] Thus there is no doubt that the agencies have actual knowledge of these effects.

SEWRPC has also made clear that "[b]enefits and impacts of investments in the Region's transportation system should be shared fairly and equitably and serve to reduce disparities between white and minority populations." Vision 2050, Vol. III, at 4.[5] The FHWA agrees that the "desired outcome" is providing "[f]air distribution of the beneficial and adverse effects of the proposed action." FHWA, "Guidance on Environmental Justice and NEPA[6]" ("EJ/NEPA"). WisDOT's own Title VI plan includes similar requirements, to "evaluate the equitable distribution of the benefits/burdens of the transportation plans and activities, as well as transportation system investments, on these populations." [7]

> Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.

49 C.F.R. § 21.5(b)(7). As noted below – and discussed exhaustively in prior comments

[4] SEIS at 3-205.

[5] All references to Volume III of the Vision 2050 Plan are to the 2020 update of that plan.

[6] The SEIS, DEIS and FEIS themselves, and documents listed as references in them, will not be attached to these comments as our understanding is that they are already in the record. For some voluminous documents - such as FHWA guidelines - that we append as exhibits, we generally are only attaching the relevant portions of those documents. Also incorporated by reference but not attached are the comments and exhibits thereto many of our organizations submitted on the Draft Environmental Impact Statement ("DEIS comments") on this project on January 27, 2015, and on the Final Environmental Impact Statement ("FEIS comments") on April 15, 2016. When we cite to "DEIS Comments" or "FEIS Comments" we are also including by reference any exhibits attached thereto. We request that the agencies contact us if any documents we reference are not in the record or are otherwise needed so that we can send (or re-send) them.

[7] Ex. 4 Wisconsin Department of Transportation, "2023 Title VI Implementation Plan with Assurances" (Oct. 2022) ("WisDOT Title VI Plan") at 10. Notably, neither this nor any other Title VI document is listed as a reference in the SEIS, and it appears that Title VI simply was not considered. "It is critical to recognize that Title VI imposes statutory and regulatory requirements that are distinct from other obligations." Ex 5 U.S. Dept of Transportation Order 1000.12C, U.S.DOT Title VI Program (June 11, 2021) ("Title VI Order") at Ch. I, Sec. 7.

regarding this project – there is no question that there is pervasive prior discrimination in the region.

Moreover, had the agencies– as they should have done – considered a transit-inclusive alternative, it would also have had to evaluate and compare the relative effects of *that* alternative, including the relative effects for persons of color. 40 C.F.R. §§ 1502.14(a), (b). There is little doubt that such an analysis would have shown that a transit-inclusive alternative would have had more positive effects and more mitigating effects, and fewer adverse effects, on the environment and on persons of color.

A. A significant majority of the population of the primary study area is Black and Latinx, while the secondary study area is overwhelmingly white.

The agencies' refusal to meaningfully consider an alternative that included transit (not one that consisted only of transit), and their failure to avoid, minimize or mitigate known racial inequities is even more discriminatory because a clear majority of the population in the primary study area[8] – 57% - are persons of color. SEIS, Table 3-45. This is well above the minority population percentage of Milwaukee County and by orders of magnitude exceeds the minority population of Waukesha County, which in 2020 had a population that was 85.5% white non-Hispanic, and only 1.6% Black and 5.4% Latinx.[9] It also well exceeds the minority percentages in the secondary study area.[10]

The proposed project will cut directly through the region's black and Latino communities (between the overwhelmingly black north side and the overwhelmingly Latino south side). If the project goes forward as the agencies plan, the majority of persons of color in the primary study region will bear most of the impacts of highway construction and expansion, while whites, especially white suburbanites in the secondary study area, will reap most of the benefits.[11]

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[8] The agencies define the "primary study area" as portions of Milwaukee, Wauwatosa, West Allis and West Milwaukee adjacent to the project corridor, and the "secondary study area" as all of Milwaukee and Waukesha counties. SEIS 3.28.1.3. We also note that it is not clear whether when the SEIS refers to "white" persons it means *all* white persons, or just white non-Hispanic persons. *See, id*. at Sec. 4.3. If it is the former, then the data for "whites" would *include* Latinx persons and thus not actually represent the number of non-minority persons. We note that the agencies made this same mistake previously. See FEIS Comments at 2.

[9] Calculated from Ex. 6, U.S. Census Bureau, 2020 Redistricting Data for Milwaukee and Waukesha Counties.

[10] An analysis of the racial demographics of the entire secondary study area – *i.e.,* Milwaukee and Waukesha Counties combined – shows a total 2020 population of 1,346,467, of which 60%, was white non-Hispanic, 13% was Hispanic, and 18.3% was Black, compared to 43%, 27.5% and 19.2% , respectively, of the population in the primary study area. Calculations from Ex. 6 and SEIS Table 3-45. Thus the secondary study area – which will benefit from the project - is obviously much more white than the primary study area – which will bear more of the burdens. The SEIS did not collect or analyze such racial data.

[11] As discussed *infra* Sec. II.D, rather than basing its analyses of effects on its own defined primary and secondary study areas, the SEIS creates other comparisons – apparently in order to "prove" the lack of an adverse effect on protected classes.

B. The region is racially segregated.

Racial segregation in the region is longstanding and predates the original construction of I-94. "In 1960, African American residents made up 15 percent of Milwaukee's population, yet the city was still among the most segregated of that time."[12] The segregation is itself rooted in a long history of discriminatory governmental policies and actions – ones that have continued into the present century. These have included the long history of government policies such as redlining to widespread community opposition to integration to white flight out of the city and county of Milwaukee to racialized opposition to constriction of affordable housing in suburban communities. *See, e.g.,* DEIS Comments at 2-3, 21-22, 34-39; FEIS comments at 1-4, 6-7, 13-24. "African Americans in Milwaukee were largely denied suburban home loans by the federal government through redlining. Restrictive covenants also ensured that homeowners could not sell their homes to minorities. They were also denied careers and opportunities that would allow them to buy new homes, especially as job centers shifted to suburban communities."[13] Well over a half century later, from 2015-19, although the Milwaukee-Waukesha-West Allis metropolitan area population was only 67% white overall, the typical white resident lived in a neighborhood that was 83% white and only 5% Black and 7% Latino.[14] As noted supra Sec. I.A, Waukesha County has even lower Black and Latinx population percentages.

> [R]acial segregation in Milwaukee today remains stubbornly high, still at the level of "extreme segregation" and higher than in any of the nation's 50 largest metropolitan areas. One key element underpinning this segregation … [is that] Milwaukee has the lowest rate of Black suburbanization of any large metro area in the country… [M]ost large metropolitan areas have experienced significant increases in Black suburbanization since the 1980s; indeed, on average, in the nation's 50 largest metropolitan areas today, over 53 percent of Black residents live in the region's suburbs (compared to just 29 percent in 1980). By contrast, while the rate of Black suburbanization in Milwaukee has increased from a near-apartheid 2.5 percent in 1980 to 11.4 percent in 2018 --with small but discernible growth in the Milwaukee County inner suburbs of Brown Deer, Glendale, Shorewood, and Wauwatosa-- the region nevertheless remains the only large metropolitan area in the U.S. where almost 90 percent of the region's Black

[12] Ex. 7, Leah Foltman and Malia Jones, "How Redlining Continues To Shape Racial Segregation in Milwaukee: 1930s Lending Map Reveals the Policy Roots of Housing Discrimination," *WisContext* (Feb. 28, 2019).

[13] Ex. 8, "Transportation Connection (Pt. 5) - Highways as a Land Use," 1000 Friends of Wisconsin (Aug. 4, 2020).

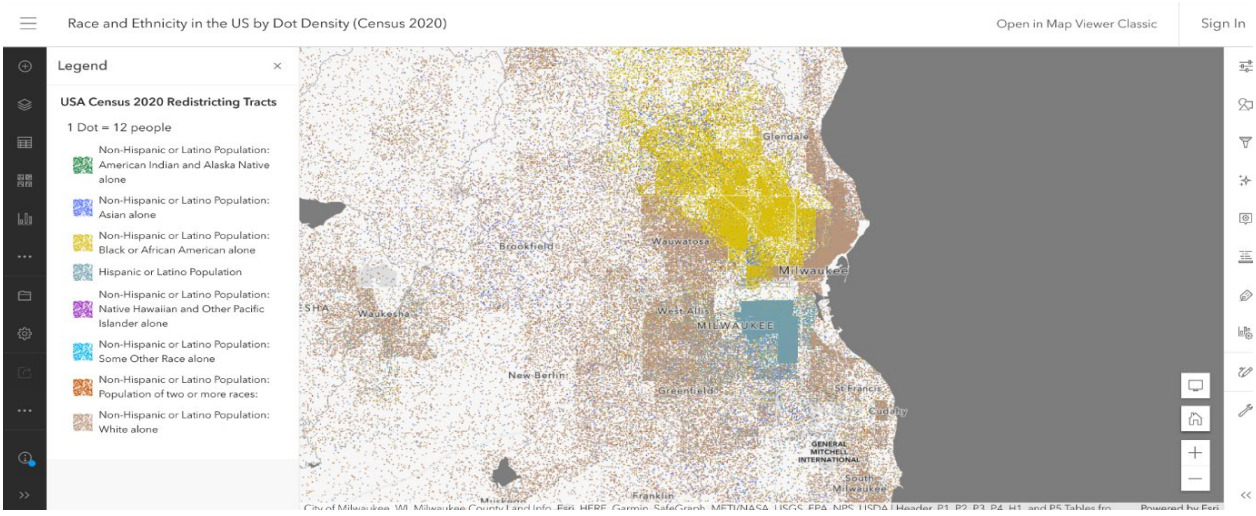
[14] Ex. 9,Frey, William, "Neighborhood Segregation Persists for Black, Latino or Hispanic, and Asian Americans," *Brookings Institute* (Apr. 6, 2021) at 12.

> population lives in the central city. . . [N]o place else – not even strongly segregated metros like Detroit, Cleveland, or Buffalo -- is even close.[15]

Nor is segregation limited to the region's Black population.

> [M]etro Milwaukee's index of Latino-WNH [white non-Hispanic] segregation, using 2010 census population data, was 57.0 – on the cusp of what is considered "high segregation. . ." [and] ranked 7th highest among the nation's 50 largest metropolitan areas. Moreover, . . . the rate of Latino-WNH segregation in metro Milwaukee has remained unchanged since 1990, despite the substantial growth of the region's Latino population and some modest Latino suburbanization. Clearly, demographic growth in Latino Milwaukee is generally occurring along the lines of historical patterns of segregation.[16]

The 2020 census data confirm that the Milwaukee metropolitan area remains among the highest in the country for black-white segregation.[17] It also showed that while Latino-white segregation declined in much of the country, in the Milwaukee region that segregation is actually slightly worse than it was in 1980 and is 21st out of the 200 largest metro areas for Latino-white segregation. *Id.* at 27. A graphic representation, based on 2020 census data,[18] makes this obvious.



[15] Ex. 10, Levine, Marc V., "The State of Black Milwaukee in National Perspective: Racial Inequality in the Nation's 50 Largest Metropolitan Areas. In 65 Charts and Tables," *UW-Milwaukee Center for Economic Development* (2020) at 11.

[16] Ex. 11, Levine, Marc V., "Latino Milwaukee: A Statistical Portrait" (2016). *UW-Milwaukee Center for Economic Development* (2016) at 22.

[17] Ex. 12, John R. Logan and Brian Stults,"The Persistence of Segregation in the Metropolis: New Findings from the 2020 Census," *Diversity and Disparities Project, Brown University* (2021) at 6, 7, 17.

[18] Map obtained from ARC GIS: https://www.arcgis.com/index.html

"The effects of racist practices did not disappear as a result of laws prohibiting discrimination — redlining reduced opportunities for generational wealth accumulation among minority populations, creating decades of momentum in discrimination. Even if racism completely stopped in policy and interpersonal terms, continued disparities in outcomes would persist because of the deep imprint of this historical policy."[19] Moreover, this project is expected to induce further development in extremely segregated Waukesha County. SEIS Secs. 3.28, 3.9.4.5. Regardless of the potential magnitude of that development, the agencies thus are taking steps that they know will facilitate development in an extremely segregated county, which has long resisted measures such as affordable housing and transit access that it knows are needed to ensure equity.

That is particularly true because racial hostility throughout Waukesha County is not only in the past. For example, a white supremacist organization is headquartered in New Berlin.[20] In 2020, the founder of an organization in Menomonee Falls - which had endorsed multiple sitting elected officials - sent an unsolicited racist column to village residents.[21] In 2020, a student sued the Kettle Moraine school district after experiencing pervasive racial harassment, including racial slurs.[22] In 2022, a student in the Elmbrook public school district posted a racist video- which echoes recent racist experiences reported by alumnae of Waukesha County public school districts like Elmbrook and New Berlin ("The Okoros say that they and other Black students experienced racist incidents while enrolled in the Elmbrook School District, including being called the N-word, having their reports of racism ignored by administrators and simulating slavery in class."; "Another memory Tucker shared from New Berlin West occurred earlier this year, when some students were flying Confederate flags in the student parking lot, she says, and the school's administration allowed it."[23]). In 2022, a white supremacist organization hung a racist banner from the Waukesha transit center.[24] Just this month, an alderman in the Waukesha County of Brookfield vociferously opposed affordable housing, a position compared to the racialized 2012 opposition to affordable housing in neighboring New Berlin that led to a Fair Housing Act lawsuit from the US Department of Justice Civil Rights division.[25]

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[19] Ex. 7 "How Redlining Continues To Shape Racial Segregation."

[20] Ex. 13, Isiah Holmes, "Wisconsin Communities See Uptick in White Supremacist Activity," *Wisconsin Examiner* (April 11, 2022).

[21] Ex.14, Cathy Kozlowicz, "The Founder of the Menomonee Falls Taxpayers' Association Sent a Racist Column to Residents," *Milwaukee Journal Sentinel* (Aug 14, 2020).

[22] Ex. 15, Alec Johnson, "Lawsuit Against Kettle Moraine School District Alleges a 'Hostile Learning Environment' of Racism and Bullying," *Milwaukee Journal Sentinel* (Oct. 16, 2020).

[23] Ex. 16, Jude Cramer, "How Milwaukee-Area Alumni Are Fighting for Anti-Racist Education Reform," *Milwaukee Magazine* (July 14, 2020).

[24] Ex 17, Nick Bohr, "Group Hangs Racist Banner in Downtown Waukesha," *WISN.com* (Mar. 21, 2022).

[25] Ex 18 Isiah Holmes, "Brookfield Alder in Hot Seat After Comments Against Affordable Housing Project," *Wisconsin Examiner* (Jan. 23, 2023); DEIS Comments at 35 and Ex. A.

C. The Freeway helped create and exacerbate racial divides – and racialized hostility to transit continues them.

> [T]he nation's highway system contributed to today's intense racial segregation and concentrated racialized poverty, and created physical, psychological, and economic barriers that persist to this day. Class and racial inequality, economic deprivation and depression, residential isolation, and segregation are all a part of the legacy of highway politics that focus on growth and expansion at the expense of Black communities, building roads to whites-only suburbs through the heart of Black neighborhoods.
>
> While highways facilitated the economic development of white communities, they also facilitated the physical and economic destruction and underdevelopment of Black communities. Of course, the interstate highway system did not cause every problem facing urban communities. But, undeniably, its construction compounded discrimination, exclusion, and exploitation, and triggered a process that weakened Black neighborhoods.[26]

This was certainly true in Milwaukee.

> The size and shape of the Milwaukee's inner core were determined in fundamental ways by redlining, restrictive housing covenants, job discrimination, and other practices that combined to keep people of color impoverished and in place.
>
> African Americans were largely confined to the center of town, where all roads meet, including the freeways of the brave new postwar world. When planning for the system began, the damage was compounded. Black neighborhoods were literally the paths of least resistance; low property values and weak political opposition made them easy targets for the transportation engineers.[27]

Whatever the case on a particular segment of the freeway, the cumulative adverse effects - from which communities have yet to recover - are longstanding. Moreover, Milwaukee residents of color were displaced by 1950s and 60s era "renewal" projects – including highways – at a rate far disproportionate to their presence in the population.

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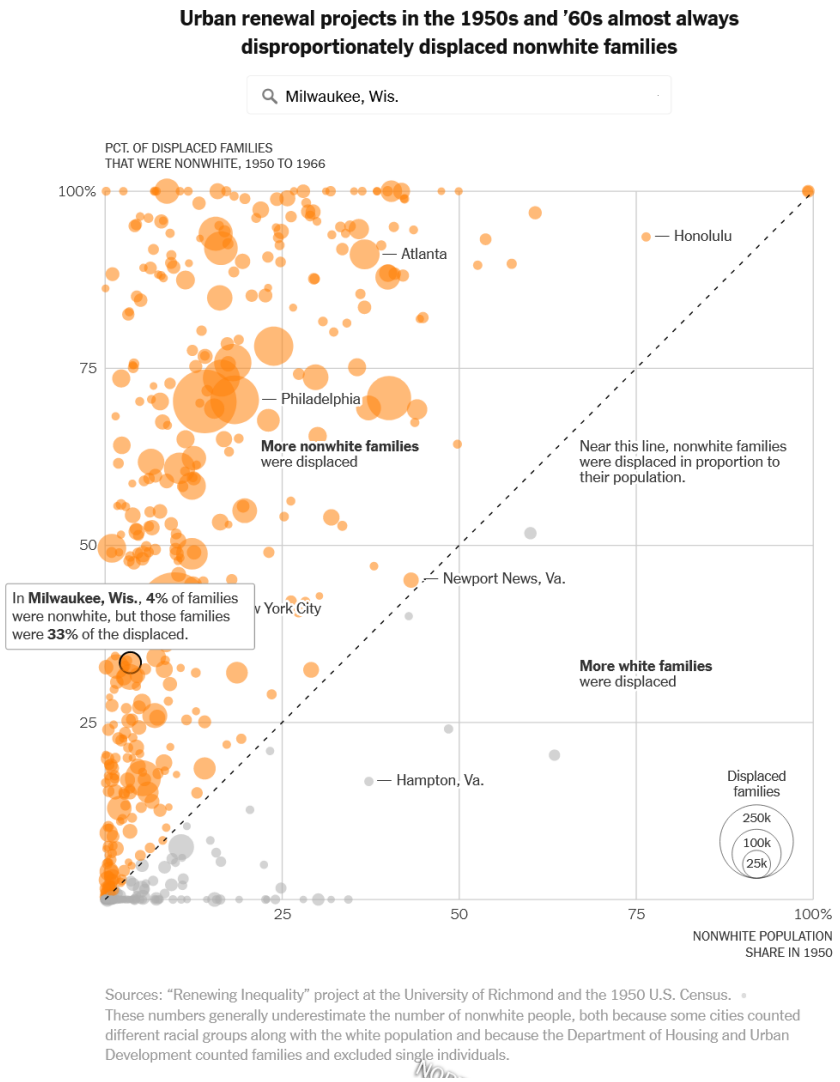
[26] Ex. 19, Deborah N. Archer, "Transportation Policy and the Underdevelopment of Black Communities," Iowa Law. Rev. Vol. 106:2125 at 12.

[27] Ex 20, John Gurda, "Racist Planning Decisions Led Milwaukee's Freeway System Along A Path of Least Resistance, with Great Damage to Communities of Color," *Milwaukee Journal Sentinel* (Aug. 9, 2022); *see also*, DEIS Comments at 34-37; FEIS Comments at 6-8, 16-18.



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Further, because the original freeway planning and construction occurred prior to the 1968 passage of the Fair Housing Act, there was no legal barrier to suburban segregation. To the contrary, "[m]any homeowners whose houses were seized by eminent domain and destroyed by the government were also denied the ability to purchase new homes in whites-only suburbs. Displaced residents often had no choice but to move into shoddily maintained public housing, robbing them of their chance to pass down wealth in the form of real estate from parent to child, thereby cementing a cycle of generational poverty."[29] Thus white persons benefited from highway construction by being able to access suburban homes and opportunities using the new freeway system, while persons of color did not. In fact, "[a]cross cities, population declined in

[28] Map details regarding Milwaukee generated from image in Ex. 21, Adam Paul Susaneck, "Mr. Biden, Tear Down This Highway," *New York Times* (Sept. 8, 2022).

[29] Ex. 21 "Tear Down This Highway."

central neighborhoods near freeways, but increased in outlying neighborhoods near freeways."[30] The profound racial segregation of Waukesha County is not unrelated.

But it was not only the initial construction that created or exacerbated segregation: the existence of the freeways themselves continues and deepens this problem.

> Milwaukee, one of the most segregated cities in the U.S., is carved up by all of these forces: by highways, local roads and railroads, by parks and rivers, often multiple geographic barriers reinforcing each other in the same part of town. As the city's Hispanic population has grown, it has been similarly contained south of downtown, in a patch of the city hemmed in on all four sides by railroads tracks and buttressed by highways and water.[31]

Moreover, as we extensively documented previously,[32] resistance to transit is not, as the SEIS claims at 1-3, just due to a lack of a "local consensus" but also grounded in racialized suburban hostility to transit. This included, in the early 2000s, blocking transit expansion by raising suburban fears that "'urban criminals could use the trains to prey on suburbanites' by saying that 'light rail brings strangers who are not only a threat to your property, but to your children.'" DEIS Comments, Ex. A at 34; *see generally,* DEIS Comments at 21-27. There is no evidence that attitude has changed. In 2014, the Waukesha County board rejected and amended multiple elements of SEWRPC plans that were expressly targeted at ensuring full implementation of the public transit provisions of the long range transportation plan and at ensuring fair and affordable housing in the region.[33] Nor was Waukesha willing to support the Job Lines bus routes developed to allow central city residents of color to access suburban jobs.[34] And less than a year ago, a white supremacist group hung a racist banner *off of the Waukesha Transit Center.*[35] That history has been, but cannot continue to be, ignored in evaluating how the region's transportation system as a whole has developed.[36]

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[30] Ex. 22, Jeffrey Brinkman and Jeffrey Lin, "Freeway Revolts!" WP19-29, Federal Reserve Bank of Philadelphia (July 2019) at 17; Ex. 23, Farrell Evans, "How Interstate Highways Gutted Communities and Reinforced Segregation," *history.com* (Oct. 20, 2021); Ex. 24, David Jasenski, "Did I-94 End Milwaukee's Population Growth?" *Urban Milwaukee,* (Sept. 22, 2021).

[31] Ex., 25, Emily Badger and Darla Cameron, "How railroads, highways and other man-made lines racially divide America's cities," *Washington Post* (July 16, 2015).

[32] DEIS Comments at 21-27, FEIS Comments at 7, 16-17.

[33] DEIS Comments, Ex. BBB.

[34] Ex. 26, "Disappointing End for JobLines Bus Route," *Milwaukee Business Journal* (Aug. 2, 2019).

[35] Ex. 17, "Group Hangs Racist Banner in Downtown Waukesha."

[36] See also *supra* Sec. I.B.

D. There are long-standing racial disparities in transportation system usage.

While freeways expand – at a taxpayer cost of billions and billions of dollars – the transportation system upon which persons of color disproportionately depend languishes.

As the agencies know, Milwaukee County Latinx residents, and even more so Black residents, are more likely than whites to live in households with no vehicles. SEIS Table 3-19. "In the I-94 East-West Corridor, there are high percentages (40-59.9 percent) of households with no vehicles adjacent to I-94 on the south side, and northeast of the Stadium Interchange," *id.* at 3-99. These percentages of persons without vehicles in the corridor are substantially higher than in Milwaukee overall – and are concentrated in Black (northeast) and Latinx (south side) communities.

Further, data from the secondary study area (Milwaukee and Waukesha counties combined), something the SEIS entirely failed to collect or analyze, shows that 10.7% of Blacks and 3.2% of Latinx, versus only 1.7% of whites, use public transit to get to work. In other words, Latinx persons - as well as Black persons – are more likely than whites to depend on transit. Conversely, only 70.7% of Blacks and 73.4% of Latinx persons in the secondary study area, versus 81% of whites, travel to work in single occupancy vehicles.[37] In addition, the "proportion of public transit passengers that are minorities has increased since 1991, and particularly since 1972 when less than 5 to 15 percent of transit passengers were minorities." Vision 2050, Vol. I, Ch. 5 at 286. The agencies are well aware that these disparities are long-standing.[38]

Yet for decades highway planners and builders and predominantly white suburban communities and elected officials – while advocating for highway expansion – have resisted efforts to expand and improve the public transportation system upon which Black and Latinx persons disproportionately depend.[39] This is true despite WisDOT's promise more than two decades ago to use its "best efforts" to expand transit. DEIS Comments Ex. D. As the agencies have long known – and as researchers presciently observed almost two decades ago:

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[37] Calculated from Ex. 27, U.S. Census Bureau 2020, *ACS 5 Year Estimates, Means of Transportation to Work by Workplace Geography for Milwaukee and Waukesha Counties (for Black, Hispanic and White Non-Hispanic Persons)* ("ACS Transportation.") The SEIS, Table 3-20, only calculates the mode of travel to work by race for residents of the *city of Milwaukee* and then uses that for a claim that Latinx persons are less transit dependent than whites. As discussed *infra* Sec. II.D, limiting an analysis to city of Milwaukee residents is inappropriate. Further, the fact that the agencies failed to calculate mode of travel by race for their own defined "secondary study area" of Waukesha and Milwaukee Counties - a calculation confirming that racial disparities do exist - suggests either a lack of attention to and concern for these issues, or an effort to obscure them.

[38] *See, e.g.,* DEIS Comments at 3-5, n.62; FEIS Comments at 8-9, 12. Whether or not a majority of persons of color commute to work by car, an environmental justice and Title VI analysis is based upon whether protected groups are "more likely" than others to experience a particular adverse effect – and there is no question that exists here, regardless of what the SEIS argues "most" Black and Latinx persons do for transportation.

[39] *See* DEIS Comments at 2-9. 21-22, 34-39; FEIS Comments at 6-11.

> [c]hoices presently being made about the future of transportation in Southeastern Wisconsin will shape the region's transportation infrastructure for years to come. If we continue along the present trajectory—massive public investments in highway reconstruction and reduced funding for public transit—the outcome is clear. Ultimately, we will find ourselves with two transportation systems, separate and unequal—one, a state-of-the-art highway network whose principal beneficiaries are white, middle-class suburban residents; the other, an underfunded public transit system serving as the transportation of last resort for the region's least privileged residents. It will take significantly greater vision and foresight than policymakers have recently shown to reverse the course we are presently on. Should we fail to do so, the price will be a region increasingly divided by race and class.[40]

SEWRPC has reiterated similar concerns, and advocated for prioritizing transit, for many years. *See, e.g.*, DEIS Comments 5-7, 24-28, n. 62, n.79; FEIS Comments at 9-11. But rather than prioritizing transit expansion – or even moving transit forward at the same pace as highway construction - governmental entities have allowed transit to languish.[41]

Again in the Vision 2050 Plan – a resource upon which the agencies rely to justify highway expansion – SEWRPC makes the need for transit in general, and as a matter of racial equity in particular, abundantly clear.[42]

> The 35 percent reduction in transit service and minimal addition of higher quality transit service[43] expected under the FCTS would result in significantly less access

[40] "Transportation Equity and Access to Jobs in Metropolitan Milwaukee" (UWM-Center for Economic Development, 2004) at 4.

[41] For example, "between 2017 and 2019, the Region has experienced reductions in transit service, particularly MCTS service, including the elimination of bus routes between the City of Milwaukee and employment centers in Waukesha County implemented as part of the Zoo Interchange litigation settlement, reductions in Freeway Flyer service, and elimination of special school service . . ." Vision 2050, Vol. III, at 19.

[42] What SEWRPC actually *recommended* was a substantial expansion of public transportation, including transit that would connect communities of color to suburban jobs, while noting that failure to provide such expansion would result in a disparate negative impact on those communities. Vision 2050, Vol. III, at pp. 2, 277. 78. 119, and 120. While the agencies repeatedly tout SEWRPC "recommendations" for highway expansion, they actually only focus on the "Fiscally Constrained Transportation System" with its discriminatory projected transit declines. Ignoring SEWRPC recommendations that would benefit communities of color while emphasizing and implementing the ones that disproportionately benefit white persons, is itself a discriminatory method of engaging in the planning process.

[43] It also is clear that the "minimal" addition of "higher-quality transit service" (such as the East-West BRT line that the SEIS discusses in Sections 3.3.1.1 and 3.3.2.1), is inadequate and is already incorporated into the FCTS that itself will have a disparate impact. *See,* Vision 2050, Vol. III, App. N at 262 ("The only improvement or expansion in transit service under the FCTS is the East-West Bus Rapid Transit (BRT) project between downtown Milwaukee and the Regional Medical Center and the lakefront and 4th Street extensions of the Milwaukee Streetcar.")

> to jobs, healthcare, education, and other daily needs, and an overall reduction in transit service quality when compared to both VISION 2050 and the transit system that exists today. For the 1 in 10 households in the Region without access to an automobile, households that are more likely to be minority or low income than their overall proportion of the Region's population, mobility and access to jobs and activities within the Region would be limited. In addition, a large number of the Region's jobs would be inaccessible to those households without an automobile due to excessive transit travel times. This inaccessibility to jobs for households may be even more limited than indicated in this analysis, as it is difficult to account for the potential reduction in job access due to reduced hours of the day in which transit service is available or due to the potential elimination of service on weekends. This inaccessibility to jobs via transit particularly impacts minority populations, low-income populations, and people with disabilities, who utilize public transit at a rate proportionately higher than other population groups.[44]
>
> Therefore, should the reasonably available and expected funding that dictates what portions of the updated VISION 2050 are included in the updated FCTS remain unchanged, a disparate impact on the Region's minority populations, low-income populations, and people with disabilities is likely to occur. . . Not addressing this funding shortage limits access to jobs, education, and other opportunities for households without, or with limited access to, an automobile, perpetuating the Region's racial and economic segregation and the long-standing disparities that are at least partially attributed to that segregation.[45]

Yet as they have in previous environmental documents,[46] the agencies focus on the transit dependence of "low income populations,"[47] or "people" who use I-94 by bus,[48] without addressing the clear *racially* disparate transit dependence of Black and Latinx residents.[49]

The agencies further obscure the issue of racial disparities by claiming that persons of color will equally benefit from the highway project. They argue that "the percentage of low-income and/or minority users of I-94 in the study area is similar to the percentage of low-income

[44] Vision 2050, Vol. III, App. N at 356.

[45] *Id*. at 246.

[46] *See, e.g*., DEIS at 3-143, 3-144.

[47] SEIS at 3-101.

[48] *Id.* at 3-98.

[49] While the agencies also argue that transit dependent persons will benefit from reduced congestion for buses that use I-94, as discussed *infra* Sec II.A,, those are overwhelmingly, if not entirely, buses for white suburban commuters to access Milwaukee. There is no reasoned analysis or support for a claim that persons who do not drive and do not use I-94 will benefit from reduced congestion - and certainly none that they will benefit to the same extent as those disproportionately white drivers.

and minority populations in the Milwaukee metropolitan areas." SEIS at 3-63, *see also* 3-195. *The record does not support their claim because there is no data in the record to show from where those vehicles actually originated, or what their actual destinations were.* The data they reference only counts numbers of vehicles and the direction they were coming from as they got onto an I-94 entrance ramp or entered a nearby intersection[50] to the highway, and the number of vehicles that left at each exit and the direction they were headed at the exit ramp or the nearest intersection. Vehicles can - and of course routinely do - start a journey to a highway some distance from the highway and traverse other census blocks (including ones populated by persons of color) to get onto or off of the highway, but that does not mean the drivers live in (or share the demographics of) people in those census blocks near the highway. Nor is there *any* data to show the *race* (or income) of the persons in those vehicles. And while the agencies cite a purported study from the Wisconsin Department of Workforce Development to show that "reverse commuting" is extensive and thus justifies the expansion, SEIS at 3-194, that study is also absent from the record,[51] nor is there any indication that study contains race or income information even if it were in the record.[52]

E. Black and Latinx residents have more pollution exposure and poorer health than white residents.

There is no question that, *inter alia,* air and noise pollution can cause serious adverse health effects. *Infra* Secs. V.A, H. Research studies have shown that persons of color are more likely to be exposed to air pollution – including pollution caused by motor vehicles – than white persons.

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[50]The only intersections captured by this data are the first or second intersections north or south of I-94, except at the north and south ends of highway 175 where there is a single data point north of Wisconsin Avenue and one south of National Avenue.

[51] It is unclear whether the agencies are discussing what is labeled in the list of references as "Journey to Work: Commuting and 'Reverse Commuting' between Milwaukee and Waukesha County," by Tom Walsh (2019). However, this study is not on the DWD website, nor did a word search of "Walsh," "DWD," or "reverse" find the report (or these terms) in any of the four volumes that comprise the supporting documentation of the SEIS.

[52] The SEIS at 3-204 also argues that expansion is needed because, it claims, some stakeholders believe there is a continued trend of residents living in downtown Milwaukee and Milwaukee County working in Waukesha County, which purportedly results in increased levels of reverse commuting. This speculation provides no meaningful data on *where* in Milwaukee County such persons live (or on what number or percentage of downtown residents – as opposed to other County residents – reverse commute). There is no study in the record, and certainly no data on the race of any such reverse commuters. There also is no data at all on whether or how these "reverse commuters" use I-94 or would purportedly experience traffic congestion from not widening this segment, or whether they "reverse commute" using I-94 at all. For example, many Milwaukee County "reverse commuters" may well live in areas bordering Waukesha County and not use I-94 for long distances (or at all) to get to work. We raised nearly identical objections previously, *see,* DEIS Comments, n. 27, but this speculation is just repeated, not remedied, in the SEIS.

> [M]ost emission source types—representing ~75% of exposure to PM2.5 in the United States—disproportionately affect racial-ethnic minorities. This phenomenon is systemic, holding for nearly all major sectors, as well as across states and urban and rural areas, income levels, and exposure levels. Industry, light-duty gasoline vehicles, construction, and heavy-duty diesel vehicles are often among the largest sources of disparity, but this can vary widely by source type and location. Because of a legacy of racist housing policy (fig. S2; supporting results) and other factors, racial-ethnic exposure disparities have persisted even as overall exposure has decreased.[53]

The disparity holds true in Wisconsin, where Black and Latinx persons are more likely to be exposed to PM 2.5 pollution than Blacks and Latinx persons nationally, as well as than white and Asian persons nationally and in Wisconsin.[54] Wisconsin "has one of the largest exposure disparities for people of color populations in the country, largely from industrial and transportation [] sources," and most of that occurs in Milwaukee. *Id*. at 6-7.

Similar is a "finding that, on a relative basis, NO2 air pollution disparities by race-ethnicity persisted in the United States over time is consistent with a recent U.S. cohort study that reported that estimated NO2 concentrations during 1990 to 2009 were ~10% higher for blacks and Hispanics than whites, even after controlling for individual socioeconomic characteristics (income, employment, homeownership) and metropolitan area characteristics (residential segregation, industry)."[55]

Maps generated by the government's own environmental justice screening tool also raise serious concerns over disparate adverse effects from pollution in the project area. This tool "highlights block groups with the highest intersection of low-income populations, people of color, and a given environmental indicator."[56] The maps generated encompassing the project area, using the environmental justice screen mapping tool[57] and (where available) statewide comparisons, are stark. While they show substantial exposure levels throughout the project area, they also strongly indicate that appreciably greater burdens are imposed in the neighborhoods

[53] Ex. 28, Christopher Tessum, et al, "PM2.5 Polluters Disproportionately and Systemically Affect People of Color in the United States," *Science Advances* (April 2021) at 3.

[54] Ex 29, Paul Mathewson, "Recent Study Provides Insight Into Sources and Relative Burdens of Harmful Particulate Matter Air Pollution," *Clean Wisconsin* (May 16, 2022) at 2.

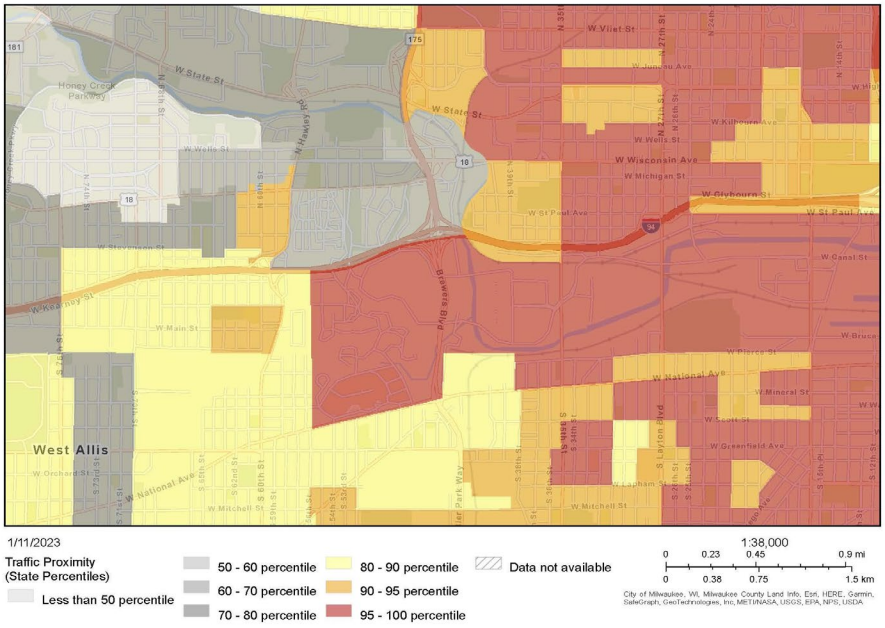
[55] Ex. 30, Lara Clark et al., "Changes in Transportation-Related Air Pollution Exposures by Race-Ethnicity and Socioeconomic Status: Outdoor Nitrogen Dioxide in the United States in 2000 and 2010," *Environmental Health Perspectives* (2017) at 8.

[56] Ex. 31, U.S. E.P.A., "EJScreen Map Descriptions."

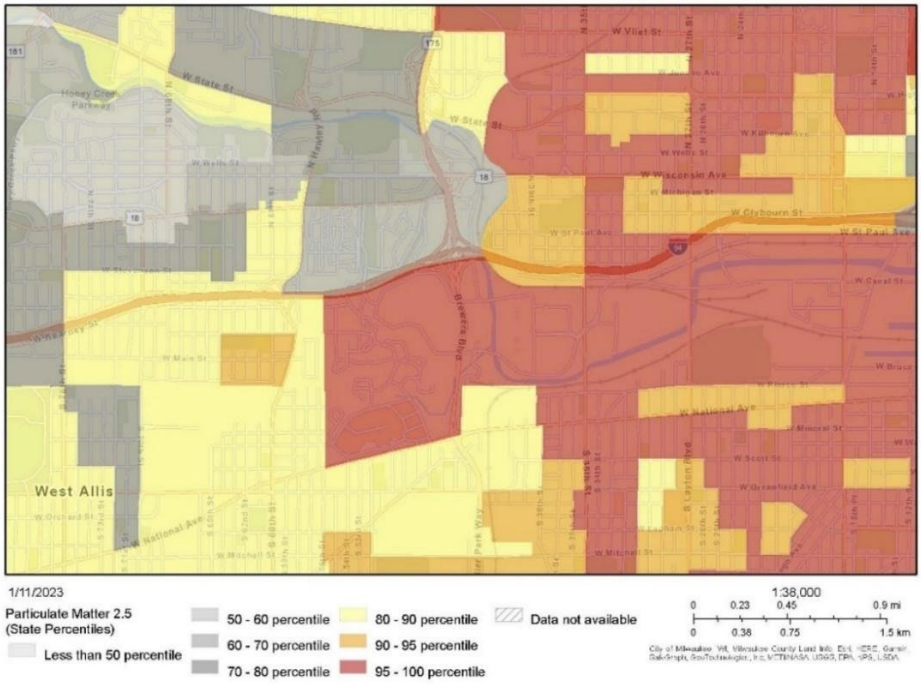
[57] Maps created with: https://ejscreen.epa.gov/mapper/

where more people of color reside, *i.e.*, east of the Stadium Interchange.[58]Thus they show *disproportionate* effects, whether or not other persons are also subjected to pollution.

EJ Index - Traffic Proximity (Statewide Comparison)

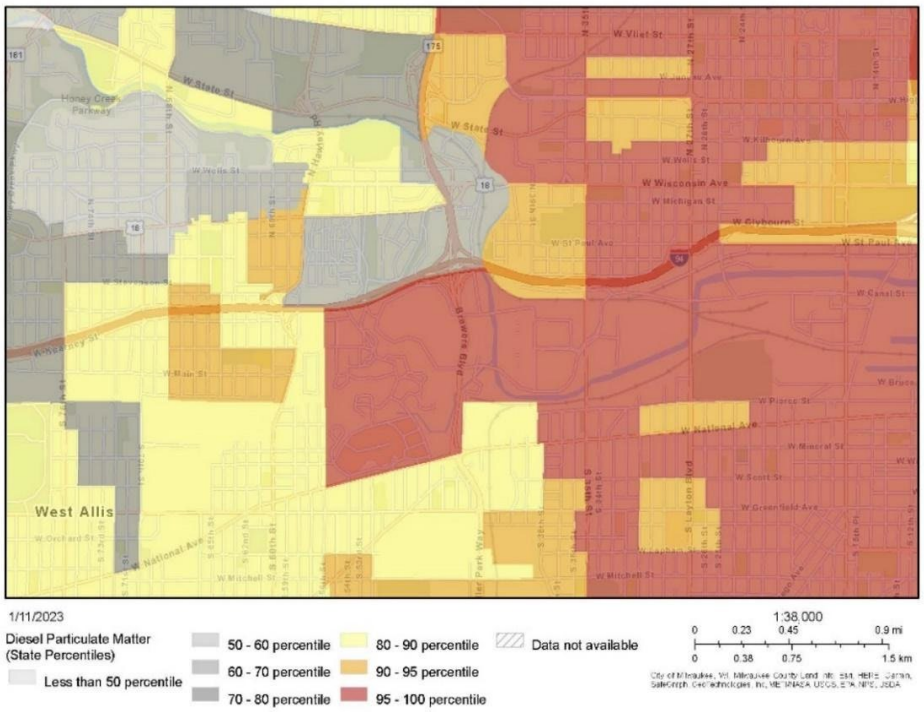


EJ Index - Particulate Matter 2.5 (Statewide Comparison)

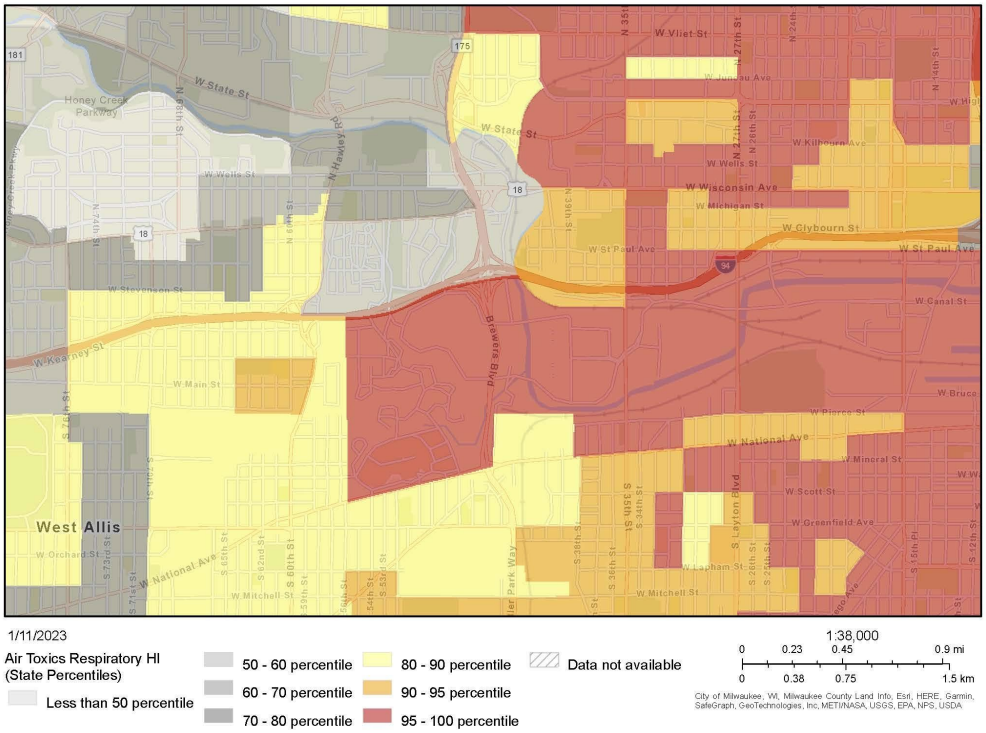


[58] The Hispanic or Latino population is generally south of I-94, east of the Stadium Interchange, and the African American population generally resides north of I-94 and east of the Interchange. SEIS at 3-63.

EJ Index - Diesel Particulate Matter (Statewide Comparison)



EJ Index - Air Toxics Respiratory HI (Statewide Comparison)



At the same time that they are exposed to more pollutants and burdened more by such exposure, Black and Hispanic persons in Wisconsin are less likely than whites to have health insurance and more likely than whites to report only fair or poor health.[59] While Wisconsin is in the top quartile for health care access and use for whites, it ranks in the bottom quartile for access and use for Blacks and Latinos.[60] Black and American Indian persons in Wisconsin have significantly higher prevalence of asthma; Black, Latino and American Indian persons are more likely to have asthma-related emergency room visits than whites; all minority groups are more likely to be hospitalized for asthma than whites; and Blacks and other non-white groups have higher mortality rates than whites.[61]

Even the SEIS, Sec. 3.9.4.5, admits that persons of color in general and Blacks in particular have higher rates of asthma and more hospitalizations than whites and that those could be affected by air pollution - but then argues there will be only minimal effects because of purportedly less traffic congestion (but see *infra* Sec. IV.D.ii) - and because people can follow "proper asthma management," *completely ignoring the facts that persons of color have less health care access and are more likely to end up in the emergency room or hospitalized*.

> Many social, economic, and environmental factors—social determinants of health—affect populations of color to a larger extent than white populations. This puts people of color at greater risk of negative outcomes from asthma. These social determinants of health include, but are not limited to:
>
> Poverty
> Access to healthy housing options
> Limited access to comprehensive asthma care
> Lack of asthma education
> Exposure to indoor and outdoor pollutants
> Stress.[62]

See also, e.g., DEIS Comments Ex. M at 13 ("a large proportion of the population living within 150 and 300 meters from Interstate 94 are either a member of a racial minority group or below the poverty level, meeting the Environmental Justice population criteria. The CDC indicates a 'triple jeopardy' effect amongst these populations, who are known to suffer from poor nutrition and inadequate health care coverage and also tend to be at higher risk of exposure to residential air pollution, suggesting disproportionately larger adverse health effects from an increased

[59] Ex. 32, "2021 Wisconsin Population Health and Equity Report Card," University of Wisconsin Population Health Institute (2021), at 8-10.

[60] Ex. 33, David Radley et al., "Achieving Racial and Ethnic Equity in U.S. Health Care: A Scorecard of State Performance," *The Commonwealth Fund* (Nov. 2021) at App. B1D.

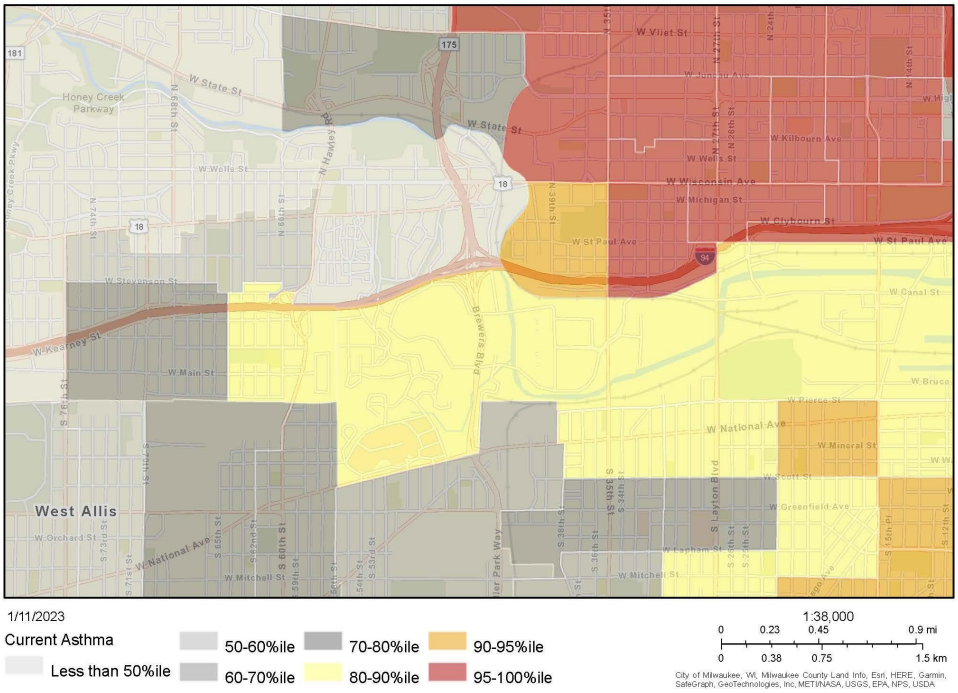
[61] Ex. 34, "2020 Wisconsin Asthma Burden Report," Wis. Dept. of Health Services (June 2020), at 14, 16-17.

[62] Ex. 34, Asthma Burden Report at 3.

exposure to air pollution." [63]). Again, the agencies disregard these issues with a claim that non-minority persons in the project area will also be exposed to pollutants, SEIS at 3-91- instead of addressing, avoiding, minimizing or mitigating them.[64]

And, as is the case with the pollution screens, the health outcomes on the EJ mapping tool are stark. For example, they show appreciably greater prevalence for asthma (especially in the Black neighborhoods) and heart disease (especially in the Latinx neighborhoods).[65]

Health Disparities - Asthma Prevalence (National Comparison)

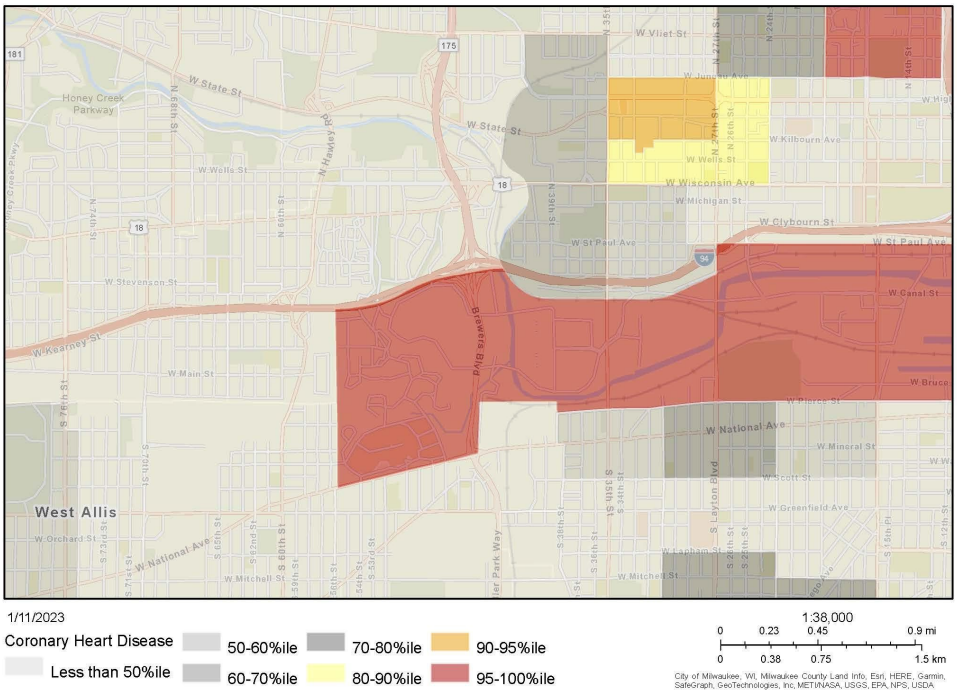


[63] Residents near the highways are poor – 26% of those in the study area have incomes below the poverty level, a higher percentage even than in the City of Milwaukee (25 percent), as well as than in Milwaukee County (18 percent), West Allis (11 percent), Wauwatosa (6 percent), and West Milwaukee (13 percent). SEIS at 3-49. For that reason, they may also lack the ability to keep even indoor air cleaner, for example with air conditioning or to be able to access healthy housing options, and may have higher stress. *Compare,* Ex. 34, Burden of Asthma Report at 3. *See also* Ex 35, Talis Shelbourne, "Air Pollution Worse and More Dangerous to Urban Dwellers with Asthma, New Study Finds," *Milwaukee Journal Sentinel* (Jan. 17, 2023). Again, the failure to even consider these issues is deficient.

[64] Continual exposure to traffic noise can also cause health effects, including increasing the risk of depression. Ex. 36, Orban E, et al., "Residential road traffic noise and high depressive symptoms after five years of follow-up: results from the Heinz Nixdorf Recall Study," *Environ. Health Perspect*. 124:578-585; *see also infra* Sec. V.H. We also note that one of the two areas where noise levels are *already* higher than levels that could result in construction of a noise barrier is at W. Park Hill Rd. and N. 31st Street, which is east of the freeway and thus in a more minority neighborhood. It is therefore critical that noise and health risks, and any racial or environmental disproportion of them, be assessed.

[65] For the health metrics, the EJ screen mapping tool only allows for comparison to national rates.

Health Disparities - Coronary Heart Disease (National Comparison)



F. There are profound racial disparities in poverty and employment.

It is critical to recognize that the region also has significant racial disparities in unemployment and labor force participation, especially given that the SEIS tries to elide the extent of the project's racially discriminatory effect – and of the reductions in that effect that a transit alternative would provide – by focusing on the race of people who *commute to work* and then arguing that most persons of color commute by car.[66] Not only does that metric ignore the *disproportion* in vehicle access and transit dependence, it ignores the substantial racial disparities in unemployment – disparities that, of course, are not captured by "commute to work" data.

For example, in Milwaukee County 8.7% of Blacks and 5.2% of Latinos, compared to 3.1% of whites, are officially categorized as unemployed, while in Waukesha county the figures are 4.6%, 3.3% and 2.6%, respectively.[67] There are also substantial white-Hispanic labor force

[66] SEIS at 3-103.

[67] Ex. 37, U.S. Census Bureau 2021, *ACS 5-year estimates, Labor and Employment Status in Milwaukee and Waukesha Counties* [S2301]. *See also, e.g.*, Ex. 38, Asha Prihar, "Wisconsin's Economy Rife with Racial Inequity, Study Finds," *Milwaukee Journal Sentinel* (June 20, 2021) ("Among the 50 states. . .Wisconsin had the highest disparities between its Black and white residents in both median annual household income and labor force participation rate."); Ex. 10, Levine, "State of Black Milwaukee" at 41 ("In metro Milwaukee, slightly fewer than two-thirds of prime-years Black males were employed in 2016- 18, the third-lowest Black male rate among the nation's largest metropolitan areas. . . the employment rate for prime-age white males (90.1 percent) is almost 24 percentage points higher than for Black males.")

disparities for women, with Latinas of prime working age having labor force non-participation rates similar to those of Black women and much higher than those of white women.[68] And although Latino men of prime working age participate in the labor force at rates similar to those of white non-Hispanic men, their earnings – for both citizens and non-citizens – are much lower than those of white non-Hispanic men, and in some cases even lower than for Black men (whose earnings are themselves much lower than those of white non-Hispanic men).[69] The same is true for Latina women. *Id.* at 144.

Income as well as employment is important. As SEWRPC has made clear, owning a car is expensive. Vision 2050, Vol. III, Ch. 1 at 35 (a household using public transit instead of a car could save $4500 per year). As another example, poverty and limited incomes can also restrict the ability to obtain health care, to live in safe and clean housing, or to obtain air conditioning - and thus can exacerbate the kinds of pollution exposure and health problems discussed *supra* Sec. I.E. In the metropolitan area, more than three in ten Blacks - 30.5 % - and nearly two in ten Latinx persons - 19.3% - live below the official poverty level, compared to only 6.6% of whites.[70] The Urban Institute's financial health and wealth calculator, which includes income *and* assets, shows shocking disparities between the median net worth of the predominantly Black central city area just north of the project and the predominantly Latinx area south of the project - where median net worth is well below $10,000; net worth in the western suburbs of Milwaukee County - more than $100,000; and net worth in Waukesha County - from more than $200,000 to about $400,000.[71] Thus persons with lower incomes and fewer resources - *i.e.,* Black and Latinx persons - are likely to disproportionately suffer a greater *magnitude* of harm from the project.

II. The SEIS Does Not Comply with Title VI or Environmental Justice Procedures and Obligations.

> Transportation equity refers to the way in which the needs of all transportation system users are reflected in the transportation planning and decisionmaking process. In particular, transportation equity focuses on the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households, older adults, and individuals with disabilities. Transportation equity means that transportation decisions deliver equitable benefits

[68] Ex. 11, "Latino Milwaukee"at 112, 122.

[69] *Id*., at 143.

[70] Ex. 39, Calculated from U.S. Census Bureau 2021, *ACS 5 year estimates, Poverty Status in past 12 months, for Milwaukee Metropolitan Area* [B17020].

[71] Ex. 40, Maps generated by "Financial Health and Wealth Dashboard," *Urban Institute* (Oct. 6, 2022). Maps generated with:https://apps.urban.org/features/financial-health-wealth-dashboard/,viewed and used on Jan. 25, 2023. The exhibit includes data by race for the central and south side segments; this was not available for areas outside of the city of Milwaukee. We know, however, that the west suburbs in general and Waukesha County in particular are overwhelmingly white. *See, e.g., supra* Sec. I.A.

> to a variety of users and that any associated burdens are avoided, minimized, or mitigated so as not to disproportionately impact disadvantaged populations.[72]

DOT's Title VI Order is meant to "ensure without limitation [that] the benefits and services of DOT supported or assisted programs are made available to and are fairly and equitably distributed among beneficiaries without regard to race, color, or national origin (including limited English proficiency)."[73]

Title VI of the Civil Rights Act covers both intentional discrimination and actions that have a racially disparate impact by recipients of federal funding, including federal transportation funding.[74] Further, "…[w]here prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, *the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice* or usage.. ."[75]) 49 C.F.R. § 21.5(b)(7) (emphasis added).

> "Disparate impact" refers to a facially neutral policy or practice that disproportionately affects members of a group identified by race, color, or national origin (including limited English proficiency), where the recipient's policy or practice lacks a substantial legitimate justification *or where there exists one or more alternatives that would serve the same legitimate objectives but with less disproportionate effect on the basis of race, color, or national origin* (including limited English proficiency).

Ex. 5, Title VI Order, Ch. I, Sec. 8.f (emphasis added). So do environmental justice policies.

> Disproportionately high and adverse effect on minority and low-income populations means an adverse effect that:
>
> (1) is predominately borne by a minority population and/or a low income population, or
> (2) will be suffered by the minority population and/or low-income population and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and/or non-low-income

[72] Ex 41, "The Transportation Planning Process Briefing Book," FHWA (2018) at 23.

[73] Ex. 5, Title VI Order at Ch. I, Sec. 4.a.

[74] *See, e.g.*, 49 C.F.R. § 21.5(b)(2).

[75] As discussed *supra* Secs. I.C,D, there is a long history of racial discrimination in the transportation system in the region - both in construction and in access and usage.

population.[76]

And, as with Title VI, environmental justice obligations also ask "Does the NEPA analysis consider EJ in the impacts of *each* project alternative?," not only the preferred alternative.[77] And, again, where a disparate impact exists the agencies are obligated to avoid, minimize or mitigate the harm.[78]

Unfortunately, here, rather than addressing clear and well-known disparities - including ones identified by SEWRPC - the agencies argue that "Non-minority and non-low-income populations would be impacted to the same degree, the impacts are substantially mitigated, and the benefits offset the short-term residual impacts that may occur." SEIS at 3-103. They are simply wrong.[79] In making that decision, they also refused to meaningfully consider any alternative other than the (very similar) 6 and 8 lane alternatives they set out. They certainly refused to consider the kind of alternative that makes some highway improvements and improves transit, that affected communities seek.

A. The SEIS excludes a transit-inclusive option as a reasonable alternative despite recognizing that there is a disparate impact from failing to develop such an alternative.

SEWRPC's Vision 2050 Plan made clear that significantly improved public transit was necessary to achieve environmental justice goals - and that failing to expand transit would adversely affect people of color and people with disabilities, as well as low-income people.

> For the 1 in 10 households in the Region without access to a car, households that are more likely to be minority or low income than the overall proportion of the Region's population, transit is vital to providing access to jobs, healthcare, education, and other daily needs. Improving and expanding public transit would significantly improve this access for people of color, low-income residents, and people with disabilities. Conversely, a continuing decline in transit due to a lack of funding, as the financial analysis later in this chapter expects, would likely result in a disparate impact on these population groups.

Id., Vol. III, at 34. The SEIS - as it must - also recognizes SEWRPC's finding that the failure to

[76] U.S. Department of Transportation Order 5610.2C, "U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," (May 16, 2021) at 8 ("EJ Order").

[77] Ex 42, "Environmental Justice Reference Guide," FHWA (2015) at 1.

[78] Ex. 5, Title VI Order, Ch. II, Sec. 2.c.

[79] The agencies only compared effects from the 6-lane and 8-lane alternatives they chose. SEIS at 3-103. They did not, however, compare effects with the kind of transit-inclusive plan that affected communities have long sought.

include and improve transit creates a racially disparate effect:

- 3-99 ("the predicted 35 percent reduction in transit service in the FCTS would, in SEWRPC's analysis, be a disparate impact on the region's low-income, minority, and disabled populations.")

- 3-205 ("The equity analysis completed for the 2020 Review and Update of VISION 2050 states that the significant improvement and expansion of transit recommended by VISION 2050 would drastically improve access to jobs by transit and expand opportunities for people without access to a vehicle including people of color, low-income populations, and people with disabilities (SEWRPC 2020a). However, the equity analysis concludes that without additional funding to implement the VISION 2050 public transit element, *a disparate impact on these population groups is likely to occur within the region* as access to jobs outside Milwaukee County for transit-dependent populations will continue to be limited (SEWRPC 2020a)." (emphasis added).

Thus, the agencies' refusal to consider a transit-inclusive "reasonable alternative" and/or a long-term, transit-inclusive form of "mitigation," disproportionately and adversely affects communities of color, and exacerbates the fact that for decades there have been billions of dollars spent on highway expansion while transit declines.[80] [81]

Moreover, even the purported direct transit-related benefits of the project will overwhelmingly accrue to white persons. While the SEIS asserts there will be safety, travel time and reliability benefits for transit routes that use I-94, SEIS at 3-98, 3-102, what it fails to mention, much less analyze, is that the commuter transit services that use I-94 are almost entirely for white suburban commuters.[82] Thus to the extent that the project directly benefits transit at all,

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[80] The East-West BRT, mentioned in the SEIS at 3-200, was included in the FCTS and thus not seen by SEWRPC as more than a "minimal" effort, not an improvement sufficient to address the documented disparities. The SEIS also mentions "MCTS Next" as an example of improved bus service, *id.*, but fails to say anything about the fact that in 2023 MCTS will need to eliminate some routes and reduce frequency on others. Ex. 43, "MCTS Announces Changes to Service in Its 2023 Budget," *www.ridemcts.com* (Nov. 21, 2022). The SEIS at 3-200 also mentions the Hop streetcar - a form of transit that goes from Milwaukee's (primarily white) lower east side through downtown to the Intermodal Station, and which thus benefits primarily white neighborhoods.

[81] *See also, e.g.,* DEIS Comments at 1-19; FEIS Comments at 4-6.

[82] The intercounty buses the SEIS mentions at Sec. 3.3.1.1, Wisconsin Coach Lines and the Washington County Commuter Express, serve persons from predominantly white communities. For example, Brookfield, Delafield, Pewaukee, Oconomowoc, and West Bend all have fewer than 2% Black and 5% Latinx residents. The City of Waukesha is also predominantly white, with a 3.4% Black and 14% Latinx population. Ex 44, U.S. Census Bureau, *2020 Redistricting Data for Selected Suburban Communities*. Moreover, the route schedules are almost entirely set for commuters from those white communities to get to Milwaukee, not for Milwaukee workers to get to suburban jobs. Ex 45, Schedules for Certain Milwaukee-Area Commuter Buses. The MCTS 44U bus is seasonal, weekday daytime service only that goes from UWM to State Fair park and ride without any stops in Black or Latinx neighborhoods (or in the project corridor), and ends at Hales Corners, which has a population that

those benefits also will disproportionately (and primarily) accrue to white persons and communities, not to persons of color – thereby exacerbating, not reducing, disparities.[83] We also note that the proposed bike/pedestrian improvements will also disproportionately accrue to the benefit of white persons, who are more likely to commute by walking or bicycling than Black or Latinx persons.[84]

Thus people of color are *less likely* than whites to benefit from the proposed alternative and will receive fewer benefits than white people – including the overwhelmingly white population in the secondary study area in general and Waukesha County in particular. In other words, the failure to have a transit-inclusive alternative *disproportionately* (*i.e.,* to an appreciably greater extent) affects people of color.[85] *See, e.g.,* EJ/NEPA ("Compare the impacts on the minority and/or low-income populations with respect to the impacts on the overall population within the project area. Fair distribution of the beneficial and adverse effects of the proposed action is the desired outcome.") These minority communities will not receive a "[f]air distribution of the beneficial . . . effects of the proposed action. . . ."[86] EJ/NEPA. That is a serious omission and a method of administration that has a racially discriminatory effect. See 49 C.F.R. § 21.5(b)(2), and is occurring in the context of a long history of discriminatory practices. 49 C.F.R. § 21.5(b)(7).

Yet the agencies choose to push their plan forward anyway, knowing that transit has declined while highway capacity expansion, including capacity expansion on regional freeways, has proceeded apace,[87] and that this increases the disparate effects. Their version of "mitigation"

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is 2% Black and 7.8% Latinx. Ex. 44 "Suburban Communities"; Ex 45 "Milwaukee-Area Commuter Buses.". Nor is there evidence that other forms of "transit" mentioned, SEIS at 3-12 such as airport express buses or Greyhound buses, are in any significant way used for job access, much less that they are used by people of color.

[83] Expansion of bicycle and pedestrian options is environmentally beneficial - including for air quality and climate change reasons - and should be included in the project as it thus may provide some benefits to the disproportionately minority persons living in and near the corridor. However, a higher number and percentage of white persons than Black or Latinx persons commute using these methods - and thus providing them does not remedy racial disparities in transportation system access. Calculated from Ex. 27, ACS Transportation.

[84] Calculated from Ex. 27, ACS Transportation.

[85] The SEIS also tries to obscure the extent of the project's racially discriminatory effect – and of the reductions in that effect that a transit alternative would provide – by focusing on the race of people who *commute to work* and then arguing that most persons of color commute by car. *Id*. at 3-103. This completely ignores the fact that persons of color in the region, especially Black persons and Latinx women, are far more likely to be out of the labor force than white persons and thus not commuting at all. *Supra* Sec. I.F. Further, 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.

[86] Neither will persons with disabilities, who also are more likely to need public transit access. *See, e.g.,* DEIS Comments, Ex. B at 528, 534.

[87] This has included reconstruction of the Marquette Interchange, the Mitchell Interchange, I-94 south to the Illinois border, the Zoo Interchange, and I-43 to the northern suburbs. The SEIS also acknowledges that adding lanes to I-94 west of the Zoo Interchange is contemplated in the future. Table 3-38.

consists largely of adding buses during construction, not actually implementing the kind of transit expansion investments and land use and affordable housing development that they seem to concede could mitigate discrimination, SEIS at 3-219. Nor do they appear willing to decline to approve an alternative unless and until the system and processes necessary to avoid racial discrimination are included. This confirms the unquestionably discriminatory effects – and the absolute failure to achieve the "desired outcome" of ensuring a "fair distribution" of the benefits and burdens of transportation system investments, *see* EJ/NEPA, and making sure that mitigation actually occurs.[88]

Further, as discussed *supra* Sec. I, there is a long history of discrimination against and disparate impacts on people of color in the region – including going back to the original freeway construction. Much of it is in fact rooted in "prior discriminatory practice" that excluded these persons from opportunity and subjected them to greater harm than white persons. Therefore, the refusal and failure of the agencies to take "affirmative action" "to remove or overcome the effects of the prior discriminatory practice or usage" violated federal regulations. 49 C.F.R. § 21.5(b)(7).

B. The Conformity Analysis that is used to claim that there will be no adverse air quality effects is itself predicated on a discriminatory plan.

Milwaukee is a maintenance and non-attainment area for several pollutants. *Infra* Sec. V.A. As such, the region is required to complete a Conformity Analysis to show compliance with the Clean Air Act. Id. The Conformity Analysis here, however, is itself predicated on the "Fiscally Constrained Transportation System" - *a plan which was already determined to have a discriminatory effect*.[89] Thus the SEIS is relying upon a known discriminatory plan in order to claim that there are no adverse air quality effects of the project. That fact - especially in conjunction with the racially disparate pollution exposure and health burdens discussed *supra* Sec. I.E - means that any effort to rely on such a Conformity Analysis inevitably has a discriminatory effect.[90]

C. The SEIS is aware of but does not avoid, minimize or mitigate documented racially disparate asthma issues.

The SEIS admits that persons of color, especially Black persons, have higher rates of asthma in Wisconsin, and more emergency room visits and hospitalization for asthma. *Id*. at 3-

[88] Ex. 5, Title VI Order, Ch. II, Sec. 7.c.

[89] The Conformity Analysis does not include any Title VI or environmental justice assessment. The discriminatory effect was identified, *inter alia*, in Vision 2050, Vol. III, at 34.

[90] Notably, past conformity analyses were predicated on improved transit. It appears to have only been at some point after 2013, when the agencies were chastised by a federal court for relying on use of transit as a "pipe dream," *MICAH,* 944 F. Supp. 2d at 671, that - rather than actually provide the transit that is necessary - expanding transit was removed as an element of that analysis.

94; *see also supra* Sec. I.E. It also admits that air pollution can exacerbate asthma. *Id*. And yet it explicitly argues that "[a]ir quality impacts are not anticipated to have adverse effects on . . . environmental justice populations." *Id*. at 3-82. This is completely unreasonable, because what is also the case is that, first, a majority of persons living close to the highway are people of color and, second, that persons of color have less access to the health care that the SEIS indicates is needed to address asthma, *id*. at 3-94, and thus are likely to have a greater *magnitude* of harm. To then claim there are no adverse effects - and to take no steps to mitigate those effects - is to ignore Title VI and environmental justice requirements.

D. The Agencies Ignore, Misconstrue or Minimize Data that shows Other forms of Disparate Impact

There is no question that the primary study area population is majority persons of color, or that that percentage of persons of color in that area is much higher than the Black and Latinx population in the secondary study area. But rather than grapple with – and follow Title VI and environmental justice requirements for – addressing those issues, the SEIS ignores demographic data, or twists data and invents comparisons to support its argument that there is no disparate impact.[91]

First, on many metrics the SEIS does not meaningfully collect or analyze demographic data at all. For example, the SEIS completely fails to collect or discuss racial and ethnic data on Waukesha County at all (and thus completely fails to analyze associated benefits as well as burdens related to such issues as transportation system access and land use). In fact, a word search of the SEIS Environmental Justice "analysis and plan" does not even turn up "Waukesha County," much less contain an analysis of Waukesha data for the purpose of determining, and identifying racial inequities in, the relative benefits and burdens of the project. As just one example: if the SEIS had analyzed racial data for the entire secondary study area, it would have been clear that Black *and* Latinx persons are disproportionately dependent upon transit, not just Black persons as the SEIS tries to claim. *Supra* Sec. I.D. Omitting Waukesha data also means that the SEIS ignores well known racialized land use and residence demographics, *id*. at 3-203, 204, and the racial effect of induced development. *See supra* Secs. I.A, B; *infra* Sec. V.F. As another example, the SEIS, Sec. 3.8.1.9, discusses potential health effects, without mentioning any racial disparities on anything other than asthma, not even significant racial disparities in health care access. *See, supra* Sec. I.E. Similarly, the SEIS discusses work commuting without employment or unemployment data by race. *Supra* Sec. I.F.

Second, the SEIS repeatedly tries to pretend there are no significant racial effects by comparing corridor demographics to *City of Milwaukee* demographics because, it claims, "[t]he

[91] In addition, or perhaps because of this, the SEIS App. D, Environmental Justice Analysis and Plan, is little more than a collection of data – not a meaningful analysis and certainly not a "plan." We also note that the examples cited in this section are just that - examples - not a comprehensive list of every section in which the SEIS fails to properly collect or analyze racial data; these omissions are pervasive throughout the SEIS.

City of Milwaukee serves as a good comparison to the I-94 East-West Corridor study area because the entire project corridor is within the City of Milwaukee and has a similar level of urban land use." SEIS at 3-62; *see e.g.* SEIS Sec. 3.9.2.1. This is not a valid or reasonable comparison, and – by using as a basis for comparison only the municipality with the highest overall percentage of minority residents in the State and by orders of magnitude the highest percentage of Black residents - instead appears intended to slant data so it can be used to claim a lack of disparate impact. It ignores the facts that the primary study area contains three municipalities besides the City of Milwaukee, the secondary study area contains two entire counties, and neither is limited to the "City of Milwaukee."[92] Moreover, even though the secondary study area includes all of Milwaukee County and all of Waukesha County, even though Waukesha County residents are intended beneficiaries of the project, even though the project will induce and facilitate development in Waukesha County,[93] and even though many parts of Waukesha County are closer to the study area than many parts of the City of Milwaukee,[94] data on or comparisons with the racial demographics of Waukesha County are conspicuous by their absence. Similarly, even though the SEIS discusses indirect effects relevant to Milwaukee *and* Waukesha Counties, including as another example, indirect land use effects in the secondary study area relating to additional travel lanes, Sec. 3.28.4.1, the only racial demographics included are for the primary study area. Sec. 3.28.2.1. The refusal to include and analyze that data results in, at a minimum, significantly understating the disproportionate number and percentage of white persons who will directly and indirectly benefit from the project.

Third, the SEIS comes up with other unwarranted comparisons, also apparently to obscure the adverse effects on people of color. For example, it separates out the minority percentages in northeast, southeast, and west portions of the corridor with no explanation as to why those comparisons are valid or how many actual persons of color there are. *See, e.g.*, SEIS at 3-103 ("the northeast portion of the study area is 40 to 100 percent minority and 20 to 80 percent low-income populations. The west portion of the study area is 0 to 40 percent minority and 0 to 40 percent low-income populations. The southeast portion of the study area is mostly industrial commercial with no population. Property acquisition, displacement, changes in access, visual impacts, noise, and construction impacts would be experienced by both minority and/or low-income populations and non-minority and/or non-low-income populations.") The fact that there are "portions of the study area" with ranges of more or fewer minority population *percentages* does not, of course, show whether more individual persons of color than white persons would be affected - and obscures the facts that the majority of persons living in the

[92] The SEIS collects some demographic data on Milwaukee County, but ignores it in these kinds of analyses.

[93] *See, e.g.,* SEIS at 3-203, 3-204, and *infra* Sec. V.F.

[94] For example, the distance from 141 S. 70th St. (an address adjacent to I-94 and 70th St., the project border) to Brookfield Square, in predominantly white Brookfield in Waukesha County, is about half as far as, and reachable in about 1/3 the time as, the distance to and travel time by the most apparently direct route to Northridge Mall, in the largely Black northwestern portion of the City of Milwaukee. *See* Ex. 46, Maps Comparing Distance and Travel Time from Near Corridor to Two Locations. Thus there is no sound basis why persons living near Northridge would be included as comparators and persons living near Brookfield Square would not be.

primary study area, as well as within the immediate project area (*i.e.*, within 1000 feet of the project) are in fact people of color.

Fourth, the SEIS claims that persons of color will benefit from the highway itself without any evidence in the record to support that argument. For example, Sec. 3.9.2.4 states that persons of color in the corridor use the highway at the same rate as white persons. But the study used to support that claim contains no demographic information whatsoever, among other significant flaws. *Supra* Sec. I.D. The "DWD" study referenced in support of the claim that reverse commuting to Waukesha is even more common than commuting from Waukesha to Milwaukee, SEIS at Sec. 3.9.2.4, is not on the SEIS list of references and was not located on the DWD website, nor is there any indication that study included racial demographics of these reverse commuters. *See also*, DEIS Comments at n. 27. It is completely unreasonable to rely on these unsupported assertions to support any claim that people of color will benefit at all or *to the same extent* as white persons – especially when other evidence calls that into serious question.

Fifth, the SEIS completely fails to address the fact that disproportionate impacts exist if the *magnitude* of the adverse effect is appreciably greater on persons of color than on white persons. For example, the environmental justice screens themselves, *supra* Sec. I.E – which the agencies apparently did not even bother to collect, much less consider – show far greater burdens related to pollution and adverse health effects in Black and Latinx neighborhoods. Even assuming arguendo that a similar percentage of white residents had the same pollution exposure, the adverse *effects* are almost certainly disproportionately greater on persons of color. The higher poverty rates and fewer assets available to Black and Latinx communities, *supra* Sec. I.F, will also increase the magnitude of any harm to them.

Thus, the agencies should be required to conduct a new, complete, Title VI and Environmental Justice analysis – one that gathers all necessary data and uses appropriate comparisons. If, as appears certain, that analysis shows disparate impacts, then the agencies must ensure those impacts are avoided, minimized or mitigated.

E. The Agencies failed to avoid, minimize and mitigate the adverse effects.

As discussed above, there can be no serious question that there are disparate impacts related to transportation system access and to asthma. An adequate, or any, analysis of data would also confirm such effects with respect to air quality, pollution exposure, other health issues, and residential segregation.

There are multiple factors that are to be considered in "determining the impact" of the proposed project. These include:

(1) To what extent does the applicant demonstrate that the proposed project expands opportunity;

(2) If persons or businesses are to be displaced, relocated, or adversely affected, will the displacement be equitably shared by the affected communities;
(3) The historical background of the project over time, including its design, construction, and/or modification;
(4) Any related preexisting disadvantages impacting the affected community, and any action taken by the applicant or others to alleviate these disadvantages;
(5) An analysis of the comparative negative impacts of alternative approaches; and
(6) To what extent does the applicant demonstrate that the proposed project has accounted for community input.[95]

Considering these factors makes clear the non-compliance with civil rights requirements.

First, the failure to develop and study a transit-inclusive reasonable alternative, the disparate vehicle access and transit dependence for people of color, the fact that it is transit for white commuters that will directly benefit from the project, the lack of any evidence to support a claim that people of color use the highway to the same extent as others, racially disparate unemployment rates, and segregated suburban sprawl, means that the project will not equally expand opportunity to persons of color. The reverse almost certainly would be true, if the agencies had – as they should have done – considered a transit-inclusive reasonable alternative like Fix at Six.

Second, while displacement and relocation may not be occurring to a significant extent, persons of color are and will bear a disproportionate burden of other adverse effects, and the magnitude of those effects will be greater on communities of color. *Supra* Sec. I.

Third, the historical background of freeway construction in the region together with decades-long white suburban resistance to transit expansion, as well as the regional history of segregation that will be exacerbated by induced sprawl growth in Waukesha, confirms the racially disparate effect on persons of color. *Supra* Secs. I.B,C.

Fourth, there are a host of preexisting disadvantages impacting the affected community. *Supra* Sec. I. The agencies want to build a freeway to serve the region for decades, but there are no long-term measures being considered for implementation to mitigate those disadvantages, and instead the agencies rest on a claim that there is nothing they can do. *See, e.g.,* SEIS at 3-219. And even though the agencies are aware of disparate air quality impacts and should be aware of other issues, such as disparate health impacts, they provide no mitigation at all to affected communities.

Fifth, because the agencies refused to evaluate a transit-inclusive reasonable alternative like Fix at Six, they did not analyze the comparative negative impacts of alternative approaches, particularly on affected communities. *See generally, infra* Sec. V.

[95] Ex. 5, Title VI Order, Ch II, Sec. 2.c.

Sixth, *the agencies completely refused to consider the alternative that environmental justice communities specifically requested as a "reasonable alternative."* As early as 2014 the main themes the agencies heard in public engagement for this project involved the need to decrease reconstruction costs, maintain I-94 access,[96] *and increase transit.* SEIS Sec. 3.9.3.1. The outreach the agencies conducted starting in 2020 similarly made clear that organizations of persons of color and low-income communities wanted more transit. SEIS Sec. 3.9.3.3. The agencies' response, however, was to claim that a "standalone" transit alternative would not meet the project purpose and need - while not even considering an alternative that *included* transit but was not limited to transit, which is precisely what the Fix at Six proposal did. *Id.*

Where, as here, a discriminatory effect exists, Title VI requires the agencies to "ensure that mitigation measures are taken and documented to eliminate or minimize the disparate impact. Where a disparate impact cannot be eliminated, [agencies] shall ensure that the activity will only be undertaken if a substantial legitimate justification for the action exists and is documented and that the activity is the least discriminatory alternative."[97] Environmental justice requirements are similar; DOT programs shall be administered to seek to avoid discrimination, including by "[p]roposing measures to avoid, minimize and/or mitigate disproportionately high and adverse environmental and public health effects and interrelated social and economic effects, and providing offsetting benefits and opportunities to enhance communities, neighborhoods, and individuals affected by DOT programs, policies, and activities."[98]

Given that each of the factors the agencies should have considered weighs in support of a conclusion of disparate impact, and certainly those factors combined do so, it falls on the agency to ensure that the project "will only be undertaken if a substantial legitimate justification for the action exists and is documented *and* that the activity is the least discriminatory alternative."[99] With respect to substantial legitimate justification, there is no dispute that some freeway repairs and safety improvements are necessary and thus legitimate – but, as discussed *infra* Secs. III, IV, there *are* significant doubts that this project, with the size, scope and number of lanes planned, is substantially justified. And because the agencies refused to consider a transit-inclusive alternative which also does not bring traffic and pollution closer to community members, there is no basis to find that their proposed alternative is the "least discriminatory."[100] At the same time, a reasonable alternative like Fix at Six would minimize and mitigate those negative effects and clearly be less discriminatory.

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[96] A proposal like Fix at Six would maintain freeway access, and also would decrease overall costs.

[97] Ex. 5, Title VI Order, Ch. II, Sec. 2.c.

[98] EJ Order, Sec. 8.c.2.

[99] Ex. 5, Title VI Order at Ch. II, Sec. 2.c.(emphasis added).

[100] The SEIS does admit that the lack of and decline in transit access will have a racially discriminatory effect – but it still refuses to even consider actions to meaningfully mitigate those effects.

Finally, even if adverse effects cannot be avoided, they must be minimized or mitigated. In fact, agencies "shall ensure that mitigation measures are taken and documented to eliminate or minimize the disparate impact." Ex. 5, Title VI Order, Ch. II, Sec. 2.c. Temporary mitigation for *construction* impacts, like the SEIS proposes at 3-219, does nothing to mitigate the extensive and long-standing harms being imposed on persons of color.[101] And while the SEIS at 3-219 lists other measures that if implemented could mitigate the harm - including implementation of regional transit plans, allowing local funding for transit, and ensuring that local governments comply with SERWPC's land use and housing recommendations - there is no effort whatsoever to ensure that mitigation actually occurs.

Instead of throwing up their hands and disclaiming responsibility for mitigation, the agencies should be required to include actual implementation methods for the kinds of transit improvements they know are necessary *as a condition required to approve the project.*[102] To the contrary, the agencies simply disclaim all responsibility for ensuring that mitigation occurs and that they provide the "offsetting benefits and opportunities" they know are needed "to enhance communities, neighborhoods, and individuals."

III. The Purpose and Need Statement In the SEIS Is Not Reasonable and is Designed to Lead Inexorably to Expansion of the Highway by Eliminating Consideration of Other Reasonable Alternatives

Agencies can exercise discretion in defining a Project's purpose and need, but courts can review a statement of purpose and need under a reasonableness test. *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059 (9th Cir. 1998). An agency's statement of purpose and need

[101] As the short term transit construction mitigation used in connection with the Zoo Interchange project - and the refusal of Waukesha County (or the state) to support its continuation - shows, that is only a limited, temporary fix, not meaningful mitigation.

[102] Of course affected community members must be involved in determining appropriate offsetting benefits and mitigation. This may also suggest consulting with transit providers to ascertain what kinds of investments would benefit the system, and use project funding and/or flexible Surface Transportation Program funding to provide, for example, capital costs for more BRT lines, funding to allow signalization at intersections, and other investments the system requires. Providing mitigation and offsetting benefits could also include actions to make neighborhoods better and more sustainable - from actually converting the Stadium Freeway north to the kind of road that would support and help develop the largely minority neighborhood near Washington Park. *See, e.g.,* Ex. 47, Mark L. Stout, "Final Technical Memorandum: Washington Park West," Mark L. Stout Consulting (Jan. 26 2023). Dr. Stout served for more than 25 years with the New Jersey Department of Transportation, including as Assistant Commissioner for Planning and Development. EX. 48 Stout, M. (2023) *Curriculum Vitae*. Mark L. Stout Consulting. It could include increasing green space and vegetation - including near the road - to improve aesthetics and air quality. *See, e.g*., Ex. 49, Richard Baldauf, "Recommendations for Constructing Roadside Vegetation Barriers to Improve Near-Road Air Quality," U.S.EPA Office of Research and Development (July 2016) at 1, and generally ("Roadside vegetation has been shown to reduce a population's exposure to air pollution . . .Noise barriers combined with mature vegetation have also been found to result in lower ultrafine particle concentrations along a highway transect compared to an open field or a noise barrier alone . . .Trees can also act as barriers between sources and populations. . .") These are just a few examples of potentially meaningful mitigation.

should be sufficiently broad that it does not prevent the consideration of reasonable alternatives. *See*, for example, *Davis v Mineta*, 302 F.3d 1104 (10th Cir. 2002) (highway project); *Center for Biological Diversity v. National Highway Traffic Safety Admin*., 538 F.3d 1172 (9th Cir. 2008) (energy conservation goal required consideration of more stringent corporate average fuel economy standards); *Simmons v. U.S. Army Corps Of Engineers*, 120 F.3d, 120 F.3d (7th Cir. 1997)(rejecting "single-source" definition of alternatives for water supply); *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986).

Reasonableness also must be considered in light of governmental policies. Here, both the federal and state governments have clear policy mandates to achieve equity and environmental justice, reduce emissions and combat climate change[103] something that the Purpose and Need statement entirely ignores.

Instead, the Purpose and Need statement in the I-94 widening SEIS is written to lead inexorably toward freeway widening. The "purpose" statement is:

> The purpose of the I-94 East-West Corridor project is to address the deteriorated condition of I-94, obsolete roadway and bridge design, existing and future traffic demand, and high crash rates.

"Needs" are cataloged in five categories: regional land use and transportation planning, system linkage and route importance, high crash rates, existing freeway conditions and deficiencies, and existing and future traffic volumes. Although all these factors are discussed in the SEIS document, it is traffic volume that is quite clearly decisive.[104] And traffic volume means – very specifically – predicted traffic congestion on the freeway in morning and afternoon rush hours in 2050. The project's congestion reduction goal is to provide Level of Service (LOS) at a grade of D or better through 2050. "Guidance in WisDOT's Facilities Development Manual identifies LOS D as the minimum for national highway system (NHS) routes in urban areas." *See* SEIS Appendix B, at p. 66 to 70 of 450 page PDF. This is an unreasonable way of conceptualizing future travel patterns and planning for better mobility and accessibility in the East-West Corridor, especially since SEWRPC has found:

> Travel time delay and congestion costs for auto commuters in the Milwaukee area are below the averages for both the midwest and the other metropolitan areas. The increase in travel time delay for auto commuters in the Milwaukee area over the past 35 years is also below average compared to midwest and other metro areas.

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[103] *See, e.g.,* Ex. 1, Governor's Task Force on Climate Change Report; Ex. 2, Transit Equity Day Proclamation; Ex. 3, Executive Order 13990.

[104] Ex. 50, Mark Stout, "Final Technical Memorandum: Purpose and Need" (Jan. 20, 2023), Marc L. Stout Consulting, at 1("Purpose and Need Memo"); Ex 51, George Fallat P.E., "Induced Demand for Proposed Improvements to the I-94 Corridor between 70th Street and 16th Street Milwaukee County Wisconsin" (Jan. 13, 2023) at 1 ("Induced Demand Memo").

SEWRPC, A Comparison of the Milwaukee Metropolitan Area to Its Peers (2020), at iv.

We previously concurred with other DEIS and FEIS commenters, such as 1000 Friends of Wisconsin and WisPIRG, that a highway *and* transit-focused alternative could in fact meet the purpose and need. The SEIS could and should have considered an alternative that repaired or reconstructed the highway and made some necessary safety improvements, while also dramatically increasing transit (and, if needed, seeking other ways to reduce VMT and ADT[105]). This is particularly important, since the Purpose and Need section of the SEIS makes it clear that the "most notable functional deficiencies are the closely spaced service interchanges and the combination of left- and right-hand entrance and exit ramps, which are contrary to driver expectations and result in major safety and operational problems, such as traffic weaving and congestion." SEIS at 1-5. In other words, it is the closely spaced interchanges and ramp problems - not simply too many vehicles – that the SEIS blames as the "most notable functional deficiencies" causing congestion.[106]

The refusal to develop a transit-inclusive alternative is even more unreasonable because SEWRPC's *recommended* Vision 2050 Plan - on which the agencies rely to justify their proposed alternative - makes abundantly clear that transit can help meet and mitigate many of the articulated needs, including congestion reduction and traffic demand. At the same time, transit would provide benefits to persons of color, persons with disabilities, elderly persons, employers, job seekers, and others. It includes various routes and various modes in, near and affecting the project corridor. *See, e.g., id.,* Vol. III, Ch. 1 at 32-33.

> [T]he significant improvement and expansion of public transit is essential for Southeastern Wisconsin's future for many reasons, including:
>
> - *Public transit expands traffic carrying capacity in the Region's heavily traveled corridors and densely developed activity centers, helping to mitigate congestion in crowded corridors. Rapid transit (either bus rapid transit or light rail) provides a*

[105]Efforts to reduce travel demand are entirely reasonable — and in fact recognized as appropriate in federal regulations. *See,* 23 C.F.R. § 450.320(b) ("consideration should be given to strategies that reduce single occupant vehicle (SOV) travel.")

[106] At the same time, the SEIS does not even mention a number of potential ways to reduce traffic volumes and congestion on I-94 East-West: designating the I-894 Bypass as I-94, and redesignating what is now I-94 between the Zoo Interchange, Downtown and the Mitchell Airport Interchange with another number, perhaps I-395, to shift some "through traffic" from I-94 East-West – as Fix at Six had suggested. Ex. 53, at p. 26; or as suggested by a member of the public at the December 2022 public hearings, bar large trucks, other than for local trips, from using that portion of what is now I-94, either during rush hours or generally.

reliable alternative to driving on congested roadways, with consistent travel times and minimal wait times.

- Fixed-guideway transit investment can guide development by focusing jobs and housing around its stations, leading to more compact, walkable neighborhoods that encourage active transportation and improve public health.[107]
- The regionwide transit system recommended under VISION 2050 (including shared-ride taxi service in rural parts of the Region) would assist residents across Southeastern Wisconsin in aging in place, without needing to move from their home as their ability to drive declines....
- For the 1 in 10 households in the Region without access to a car, households that are more likely to be minority or low income than the overall proportion of the Region's population, transit is vital to providing access to jobs, healthcare, education, and other daily needs. Improving and expanding public transit would significantly improve this access for people of color, low-income residents, and people with disabilities. Conversely, a continuing decline in transit due to a lack of funding, as the financial analysis later in this chapter expects, would likely result in a disparate impact on these population groups.
- . . . [T]he lack of fast, frequent transit service in much of the Region limits access to a large number of the Region's jobs for households without access to a car due to excessive travel time. Approximately 1,422,000 of the Region's residents (or 70 percent of the Region's year 2050 population) would be able to use transit to reach 10,000 jobs or more in less than 30 minutes under VISION 2050, compared to 499,000 residents (or 21 percent) under the Trend.
- . . . [A]robust transit system can provide employers with access to a larger labor force, increasing the number of available candidates for job openings
- . . .Although transit alone does not make a metro area successful, it is one of the amenities expected of an economically competitive city.

[107] This also would help improve compliance with the land use recommendations of the regional plan focused on infill and transit-oriented development, and limiting low density development outside urban service areas. Vision 2050, Vol. III, at 15-20.

- Replacing a car with transit use would save an average Southeastern Wisconsin household about $4,500 per year, money that can be saved or spent on other goods. . .
- In dense areas, parking garages can be a significant part of the cost of a development. . . Providing fast and frequent transit service has been shown to decrease the demand for parking, allowing communities to reduce or eliminate parking requirements, developers to build fewer spaces, and commercial and residential tenants to pay less.
- Fast, frequent transit service also reduces the need for multi-car garages to be built for single-family homes in dense urban areas, allowing for more green space and larger yards without increasing lot size.
- An expansive transit system can provide economic resiliency. Should the Region experience greater economic success than currently predicted, the increase in congestion caused by a growing workforce could have significant negative impacts without a reliable alternative to driving. Similarly, should fossil fuel prices rise dramatically before alternative methods of powering cars and trucks are more mainstream, the negative impacts on the Region's residents and its economy would be significant without a robust transit system to provide an alternative to driving.

Id. at 34-35 (emphasis added). In contrast to the SEIS, and similar to SEWRPC's recommended plan research, the Fix at Six alternative would improve racial equity by:

- Using transit investment to leverage economic development in the neighborhoods;
- Providing improved access to jobs via transit, especially for the disproportionate number of persons of color who rely on transit; and
- Providing transportation choices for people without access to cars, who also are disproportionately likely to be people of color.

Syracuse, New York, also provides an example of a far more reasonable way of thinking about the transportation future - one which comports with federal and state goals - and of developing an appropriate Purpose and Need statement for a prospective project focusing on an Interstate highway in an urban area. The I-81 freeway is carried between the Syracuse University area and downtown Syracuse on an approximately mile long set of elevated structures (the

"viaduct").[108] Dr. Stout has summarized New York State DOT's Purpose and Need statement for the project as follows:

> Like many structures built in the 1960s, the viaduct has reached the end of its useful life. The options: build a new viaduct or replace the viaduct with at-grade streets and reroute I-81 along the current I-481 bypass route. Here, the state developed Purpose and Need language for the I-81 project strikingly different from the framing used here. There are two goal statements. The first statement addresses safety and mobility, but in a broader and more appropriate and equitable manner: "Improve safety and create an efficient regional and local transportation system within and through greater Syracuse." The second goal statement establishes a context for developing a project concept, which, again, is far more equitable: "Provide transportation solutions that enhance the livability, visual quality, sustainability, and economic vitality of greater Syracuse." There are five "objective" statements, which also set a broad context. Two are directly oriented to the roadway itself, dealing with structural deficiencies and with geometric and operational deficiencies. But the other three address access, connectivity, and transit - key concepts for developing a modern, sustainable transportation system. The Syracuse Purpose and Need statement has led not to a freeway widening solution but to a "Community Grid Alternative."[109]

WisDOT could and should have used a Purpose and Need statement like that developed for Syracuse to address an integrated transit system that achieves benefits for the surrounding community. Doing so would have pointed toward an integrated highway and transit alternative like the Fix at Six alternative, rather than towards widening and transit exclusion. As the Fix at Six report, and other information in the record, makes clear, there are two very important needs that the SEIS Purpose and Need statement completely ignores: racial equity and climate change.

The SEIS also ignores climate change – an issue that today should be front and center for all major transportation projects. The proposed I-94 expansion in fact is, as the Fix at Six report describes it: "a disaster for the effort to fight climate change, promoting increased vehicle miles traveled, propping up an automobile-reliant economy and society, encouraging sprawl development, and consuming a billion dollars of resources that could otherwise be used to support high-quality transit serving liveable neighborhoods." Id. at 3

Thus, the Purpose and Need statement is unreasonable because it is inadequate, and therefore unreasonable. A reasonable, adequate statement would have enabled WisDOT to recognize, and required it to plainly disclose, what has been hidden in the depths of its

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[108] See Ex. 52, Viaduct Project, "Final Design Report Final Environmental Impact Statement and Final Section 4(f) Evaluation," New York Dept. of Transp. (April 2022).

[109] Ex. 50 Mark Stout, "Final Technical Memorandum: Purpose and Need" (Jan. 20, 2023) ("Purpose and Need Memo"), Marc L. Stout Consulting, at 2.

consultants' technical reports -- that only a transit and highway project could achieve the agency's goals.

IV. WisDOT Wrongly Failed to Develop a Transit-Inclusive Reasonable Alternative

Federal law states that "…all agencies of the Federal Government shall — (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332 (E). Under 23 C.F.R. § 771.105(c), it is the government's policy that "[a]lternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goals."

As these comments and the history of this project demonstrate, there are significant conflicts concerning reasonable alternative uses of available resources, significant social, economic and environmental impacts of the action, and a significant failure to follow environmental protection goals, including those related to climate change and environmental justice.[110] Yet the agencies entirely failed to evaluate an alternative that does not expand capacity, that rebuilds and makes focused improvements to the existing roadway, and that increases transit, would meet the purpose and need of the project. Improving transit – and thus considering a transit-inclusive alternative - is also required to ensure that communities of color receive a fair share of the benefits of transportation system investments. *See supra* Secs. I.D, II.

A. Contrary to the SEIS, None of WisDOT's Alternatives Can Achieve Congestion Goals without Funding and Implementation of Major Improvements to Public Transit

Nothing in the SEIS, its appendices, or its supporting documentation demonstrates that WisDOT's current preferred alternative, an 8-lane expansion with a diverging diamond stadium interchange and a half interchange at Hawley Road, could satisfy the LOS D congestion criteria *without actual funding and implementation of SEWRPC's VISION 2050 recommendations for expanded transit.* Nor does the current preferred alternative commit to any such funding.

In fact, *WisDOT's detailed analysis of future conditions under all of their currently considered alternatives shows that none of them are able to achieve LOS D throughout the*

[110] In 2015, when this Project was undergoing an earlier environmental review process, we and other commenters on the Draft EIS [including 1000 Friends of Wisconsin ("1000 Friends") and WisPIRG] noted that an alternative that does not add lanes to expand capacity, but that rebuilds and makes focused improvements to the existing highway without significantly expanding its footprint, and that increases transit, would meet the purpose and need of the project. Those comments and exhibits regarding the DEIS, as well as our own prior comments, remain relevant, and we incorporate them by reference.

planning period. (Appendix B-4, pp. 108-122 of 450). And, while the Purpose and Need section of the SEIS continues to refer to achieving LOS D as the Project's target goal for reducing congestion, Appendix B indicates that WisDOT is now measuring LOS at the 250th highest peak hour, meaning that *there will be more congestion than their analyses show* during 249 more highly congested peak hours annually. (Appendix B-1, p.5 of 450; Appendix B-2, p. 9 of 450).[111]

A Final EIS and Record of Decision for this project were previously issued in 2016. Review of that FEIS by the casual reader would have suggested that the $1 billion cost of the preferred alternative, the 8 lane at grade expansion (8LAG) of I-94 would enable drivers, even rush hour drivers, to routinely travel through the corridor at free flowing speeds, relatively free from congestion; and that automobile accidents, property damages, and injuries in the corridor would be dramatically reduced. However, careful examination of the 2016 FEIS, including the thousands of pages of technical supplementary material contained separately on a CD, revealed that WisDOT's then preferred alternative, as proposed, was not likely to be able to satisfy the project's stated purpose and need criteria, including the stated goal of achieving and maintaining a Level of Service D (LOS D), a measurement of congestion. Nor would it achieve anything resembling free flowing rush hour traffic as a general rule[112,113] As a result, reasonable alternatives that were improperly dismissed by WisDOT from full consideration because they could not achieve LOS D should also have been given serious consideration.

The 2016 FEIS supplementary materials CD contained a July 30, 2014, technical memorandum, "Assessment of Additional Measures to Maximize the 8-Lane At-Grade Alternative's (8LAG) Ability to Meet Purpose and Need" (CH2MHill. On the first page, it assessed the ability of the 8LAG alternative to meet the LOS D Purpose and Need goal as follows:

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[111] The body of the SEIS fails to inform readers that there will be 249 weekday peak hours per year that will be *more congested* than what is described. There are roughly 250 workdays per year, and the body of the SEIS should not have misled readers to expect that *any* of the alternatives would result in routinely congestion-free commuting experiences. It should have made clear to the non-technical reader that at least 249 times the Preferred Alternative would annually fail to achieve the LOS D congestion goal. And that does not count incidents such as accidents, vehicles stalling or running out of fuel, or special events like baseball games or concerts at American Family Stadium, that will also result in traffic slow-downs.

[112] It is noteworthy that it was the hard-to-find technical report that revealed that the Level of Service of all alternatives was being evaluated then on the basis of the 200th peak hour, meaning that there would be 199 rush hour peaks per year with *worse* congestion than the rated LOS applied to each alternative. And this is not counting for accidents, incidents, and events like games at the Stadium. There are roughly 250 workdays per year, and the body of the FEIS should not have misled readers to expect that *any* of the alternatives would result in routinely congestion-free commuting experiences. The body of the FEIS should have made clear to the non-technical reader that at least 199 times per year the Preferred Alternative would fail to achieve the LOS D congestion goal.

[113] For the SEIS, the agencies have evaluated the performance of their alternatives using an easier grading system. They are evaluating congestion – determining the Level of Service grade – using the 250th highest peak hour, ignoring 249 more congested occasions, again without accounting for accidents, baseball games, and the like.

> Design-year traffic operations on I-94 under the 8LAG alternative would meet level of service D in most locations, but would drop to level of service E along a short segment adjacent to the cemeteries.

Under the heading "Capacity," the memorandum stated:

> The 8LAG would operate at LOS E in the design year peak hour. . . LOS E is described in the AASHTO's GDHS as "unstable flow, operating at capacity. Flow becomes irregular and speed varies rapidly because there are virtually no usable gaps to maneuver in the traffic stream and speeds rarely reach the posted limit. Vehicle spacing is about 6 car lengths, but speeds are still at or above 50 mph. Any disruption to traffic flow, such as merging ramp traffic or lane changes, will create a shock wave affecting traffic upstream. Any incident will create serious delays. Drivers' level of comfort becomes poor."

Id. at 5-6. Under the heading "Traffic Operations," the memorandum stated:

> The 8LAG will operate at a LOS E in the design year through the cemetery section only if all SEWRPC-identified TDM and TSM measures[114] are implemented, if a doubling of transit service is realized, and only if the Hawley Road interchange is closed. In other words, *traffic performance will be far worse for the 8LAG alternative is [sic] any or multiple of these other conditions are not met by the design year*. . . (emphasis added)
>
> It should be noted that even though an acceptable level of service can possibly be achieved on the freeway mainline by diverting no less than 4,400 vehicles per day, the freeway corridor as a whole will be substantially less reliable in terms of overall operations and predictable travel times due to the increased effect that random influences (weather, incidents, etc.) will have on the 8LAG.
>
> Most, if not all, of the diverted traffic would likely reroute to I-894, Greenfield Avenue, Blue Mound Road, Wisconsin Avenue, National Avenue and other parallel east-west arterials. This would increase congestion and have significant impacts to adjacent residents and businesses along these routes.
>
> Under the 8LAG, it is possible that enough additional capacity could be provided on these arterials by eliminating on street parking . . .

Id. at 6.

[114] TDM and TSM are "Transportation Demand Management" and "Transportation Systems Management," SEIS at xiii.

The technical memorandum then went on to describe and discuss the elements and assumptions included in SEWRPC's Regional Transportation Plan, all of which were assumed to be fully implemented for the 8LAG alternative to achieve the capacity and operational results described above.

> It is important to reemphasize that SEWRPC considers capacity expansion as a last resort, only if there is congestion that cannot be addressed by transit TSM, TDM, and other noncapacity expansion strategies and elements. While most of the TSM measures have already been implemented, the transit and TDM measures have not, and will be difficult to implement by the design year based on current trends of transit service and funding availability and allocations. . . Actual transit service has dropped 20 percent since the 2006 plan was adopted, further widening the gap between current transit usage and the levels envisioned in the plan to address demand. This suggests that the doubling of 2005 transit levels may not occur, which would result in more traffic on I-94 than forecast.
>
> Based on current transit usage in the I-94 corridor between the Zoo and Marquette Interchanges, peak hour transit use would have to triple in order to divert enough vehicles off I-94 for the 8LAG to reach LOS D in the design year peak hour. Note that this is not merely tripling transit ***service*** but tripling transit ***use***. It would be difficult to triple transit use among I-94 commuters when there is no travel time savings compared to using a car; there is no incentive for people to switch to transit. . .
>
> Travel Demand Management (TDM) measures could have some impact on freeway volumes, individually or together they could possibly help raise LOS on this segment of I-94 to LOS D. But to be effective they must be implemented on a regional basis. TDM measures such as HOV lanes must be executed system wide, otherwise congestion will still be an issue adjacent to the project, and the efficiency to move transit vehicles, vanpools and carpools will not be realized.

Id. at 7-9. Finally, there is the conclusion:

> History shows little success in implementing transit and other TDM/TSM measures listed above. The I-94 East/West study has incorporated such measures and assumptions into the design year traffic analysis, but if these elements are not implemented, additional volume and the resulting congestion can be expected on the freeway, not only by the design year but well in advance of that period. Many of these measures need to be implemented regionwide, yet there is no regionwide consensus, or mechanism in place, to execute them. Diverting traffic to parallel east-west arterials such as Greenfield and National Avenues has been included in this analysis. These strategies, including removing parking and introducing additional arterial traffic into neighborhoods and past business districts, are

> controversial in nature. Beyond the traffic and congestion implications, it can be expected that arterial crashes and crash rates would rise on these arterials.

Id. at 13.

Yet the 2016 FEIS itself gave no indication to the public or to public officials that the ability of the preferred alternative to provide LOS D service depended upon fully implementing all of SEWRPC's transit expansion recommendations and "diverting no less than 4,400 vehicles per day." Nor did the FEIS indicate that its consultants seriously questioned whether the optimistic assumptions regarding the expansion of transit use and other TDM measures could be achieved, particularly in the absence of a decision by WisDOT to actually incorporate the assumed expansion of transit and TDM measures into the project. *Since transit expansion and TDM implementation were necessary for the expansion project to succeed, and not merely needed to mitigate impacts during the project's construction, it was incumbent on the agency to include implementing those elements as part of the project and to include the cost of those elements in its evaluation and comparison of the cost of alternatives.*

Instead, the FEIS told the public that the preferred alternative, with a half Hawley Road interchange, would operate at LOS D, by allowing 100 to 150 eastbound vehicles to exit at Hawley Road during the design year peak hours, "enough to reduce traffic density to just below the level of service E threshold. Id. at 2-23. The FEIS explained that the numeric level of service on the eastbound segment in the afternoon peak hour would be 4.88, which "is only slightly better than level of service E." *Id.* at 2-23 n. 16. Thus the preferred alternative got a LOS grade of D minus minus - barely better than a high E (5.0) – *but even that could occur only if transit use just about tripled, and all of the other TDM elements were fully implemented*, and 100 to 150 eastbound peak hour vehicles exited at Hawley -- without any commitment by WisDOT to assure that any of those assumptions would be met.

The current SEIS does indicate that substantial transit improvements are unlikely without changes in state funding priorities or lifting restrictions on local taxing authorities - without which there will be discriminatory effects.[115] But nothing in the SEIS counters the fact that its Preferred Alternative, and each of the expansion alternatives, *cannot* succeed without full implementation of all of the transit expansion recommendations that SEWRPC has made. In short, the SEIS and its supporting documentation, including documentation from the DEIS and FEIS, demonstrates that *in order to achieve the Project's congestion reduction goals, funding and implementation of a transit expansion and highway improvement project is necessary*, and

[115]SEIS at 3-101, 102. "Not addressing this funding shortage limits access to jobs, education, and other opportunities for households without, or with limited access to, an automobile, perpetuating the Region's racial and economic segregation and the long-standing disparities that are at least partially attributed to that segregation." Vision 2050, Vol. III, App. N at 246-7. The SEIS does not, however, acknowledge or address the fact that moving forward without transit will also increase racial discrimination, nor does it in any way avoid, minimize or mitigate that effect. *See, e.g., supra* Secs. I.D, II.A. Saying, as it does repeatedly, see, e.g, SEIS at 3-97 to 3-102, that other entities are responsible for transit funding is not *mitigation*.

the failure to include transit is therefore unreasonable and does not meet the project's purpose and need.[116]

B. The Failure to Develop a Transit-Inclusive Alternative Ignores Agency Policy.

In the 2015 DEIS and 2016 FEIS, "WisDOT and FHWA considered the transit element of the regional transportation plan and did not develop or evaluate a transit alternative beyond that recommended in the regional plan." DEIS Sec. 2.4.2, FEIS Sec. 2.5.3. They also asserted that SEWRPC determined that transit alternatives alone would not meet the need and purpose of the project. DEIS at 2-25, 2-46, 2-47, 3-57. FEIS Se. 2.5.3. The SEIS discusses at length the failure of the State to fund and implement SEWRPC's VISION 2050 recommendations for transit, but does not consider any alternative that included highway improvements *together with* implementation of the full transit recommendations along with full Traffic Demand Management.

In 2021, Dr. Stout prepared a detailed report, "The Sustainable Mobility Alternative to Widening I-94 in Milwaukee" (June 22, 2021) ("Fix at Six"),[117] which described the kind of alternative that could and should have been considered.[118] This report was submitted to the agencies. While development and fair evaluation of such an alternative would likely show a more equitable distribution of the effects of the transportation system and would avoid or minimize adverse effects, rather than taking such an alternative seriously and considering it in good faith, WisDOT has in the past dismissed calls for improved transit, labeling it as a "problem" or "risk" to address, not as an alternative to meaningfully consider. DEIS Comments, Ex. I. Certainly no such analysis was conducted for the SEIS.

Refusing to consider a transit alternative can be – and here is - the result of an inappropriately biased process. "[O]verburdened mass transportation systems" are one of the issues that "affect the urban 'environment'....'" *Trinity Episcopal School Corp. v. Romney,* 523 F.2d 88, 93 (2d Cir. 1975) (internal citations omitted). *See also First National Bank of Chicago v. Richardson*, 484 F.2d 1369, 1377-8 (7th Cir. 1973) (internal citations omitted):

> Of necessity, NEPA must be construed to include protection of the quality of life for city residents, particularly in view of the profound influences of population growth, high-density urbanization, [and] industrial expansion .... [In the inner city] many of our most severe environmental problems interact with social and economic

[116] WisDOT's failure to accurately account for induced traffic demand which would result from adding lanes to this corridor means that each of its 8-lane alternatives would result in even more congestion and even lower levels of service than it has projected in the SEIS. This is discussed more fully *infra* Sec. IV.G.

[117] Ex. 53.

[118] This 2021 report updated one that was prepared by Dr. Stout and had been submitted in connection with the 2015 DEIS.

conditions which the Nation is also seeking to improve....

The failure to consider a transit alternative is also indefensible in light of long-standing FHWA policy:

> The following range of alternatives should be considered when determining reasonable alternatives:
>
> > Mass Transit: This alternative includes those reasonable and feasible transit options (bus systems, rail, etc.) even though they may not be within the existing FHWA funding authority. *It should be considered on all proposed major highway projects in urbanized areas over 200,000 population*. . . [T]he relationship of the project to other Federal actions which may serve or adversely affect the ethnic or minority population should be identified."

"Guidance for Preparing and Processing Environmental and Section 4(F) Documents*," FHWA Technical Advisory T 6640.8A* (Oct. 30, 1987) ("*Advisory T 6640.8A*") at Sec. V.E.3 (emphasis added). The requirement to consider transit to meet some or all the project need is true even if mass transit in the area is not a "sure thing." *Davis v. Mineta,* 302 F.3d 1104, 1121-2 (10th Cir. 2002). *See also*, *Utahns for Better Transp. v. U.S. Dept. of Transp.,* 305 F.3d 1152, 1170-71 (10th Cir. 2002) (agency should have considered reasonable alternatives including implementing transit improvements before highway improvements, and integrating highway and transit improvements). To fully consider such alternatives requires a careful evaluation of costs and benefits, and consideration of whether resources targeted for a road project might instead "be effectively directed toward expansion of mass transit and other traffic management strategies" in ways that avoid adverse impacts. *Davis,* 302 F.3d at 1122. Moreover, WisDOT could, if it chose to, recommend that some federal Surface Transportation Program dollars which might be used for highway construction instead be used, as allowed by federal law, to support transit capital improvements*, see, e.g*., 23 U.S.C. § 133(b)(1)(c).

Further, as a federal court made clear to these agencies in 2009, in the highway context the agencies must evaluate less harmful alternatives to address transportation capacity needs.

> [D]efendants cannot use the need for additional capacity on Highway 164 as a reason for refusing to study alternative means of providing that capacity. The very point of the reasonable alternatives exercise is to determine whether less destructive alternatives might achieve the purpose of the project. Here, defendants seem to have simply assumed that Highway 164 must be expanded to four lanes because local transportation plans document the need for additional capacity. Again, however, defendants must examine whether it is possible to provide this capacity through an alternative that is less environmentally destructive than expanding the highway to four lanes.

Highway J Citizens Group v. USDOT, 656 F.Supp.2d 868, 892 (E.D. Wis. 2009), *citing Simmons v. Army Corps,* 120 F.3d 664, 668-70 (7th Cir. 1997).[119]

C. *Racial Equity Requires Major Transit Improvements to be Included Within the Project*

As discussed *supra* Sec. II, Title VI and environmental justice require the agencies to consider alternatives that will have fewer disproportionate adverse effects on communities of color, and doing so also comports with the agencies' own policies, including policies focused on urban residents.

Moreover, improving transit – and thus considering a highway and transit expansion alternative - is also required to ensure that communities of color receive a fair share of the benefits of transportation system investments. In the absence of transit expansion, the disproportionately minority residents in the primary study area will bear more of the burdens of construction, pollution, etc. while receiving proportionately fewer benefits. The 2014 DEIS admitted that "[p]eople who do not have access to an automobile will not often use I-94, except potentially through local or inter-city bus travel. This population will not benefit from the proposed action as much as those who use I-94 regularly." DEIS at 3-56. The 2016 FEIS similarly said: "The proposed improvements would affect bicyclists, pedestrians, and transit users less than drivers who use I-94 and the local roadway system regularly, and these users would not experience the benefits of the Modernization Alternatives retained for detailed study to the extent that drivers would experience benefits." FEIS at 3-58.

The SEIS also admits that "[r]esidents who do not own a vehicle and do not routinely use the bus system would not necessarily benefit from an improved I-94 from a travel standpoint, but may benefit from increased economic opportunities within communities." *Id*. at p. 3-103 Discussing "residents" who do not own vehicles ignores the *race* of those residents and the associated racial disproportion. Further, there is no evidence in the record - only speculation - that persons of color (or persons who do not own vehicles) would in fact benefit from purported increased economic opportunities if those even occur. There *is* evidence in the record that the

[119] The SEIS also raises the argument that "[e]fficient ingress and egress is an important aspect of the fan experience at American Family Field." Sec. 3.7.1.7. As discussed extensively in DEIS Comments at 17-18, the agencies could have, but failed to, investigate alternatives to SOV usage for these and similar events - and they fail to do so here. Further, only about 12 baseball games per year are played at times that would involve rush hour and it is completely unreasonable to spend many millions of dollars or more for that handful of days. *Id*. The SEIS also mentions the importance to fans of tailgating (and thus of vehicle access to the field), *id.*, although the plan is *also* clear that a majority of the additional land the project would take may come from American Family Field property – which itself would reduce tailgating opportunities. *Id.*, Sec. 3.2.2.2. It is also troubling that the SEIS seems more concerned about accommodating the transportation desires of baseball fans and those attending other special events than of persons of color in the community.

proposed project will disproportionately benefit white persons,[120] *supra* Secs. I, II, and that the proposed alternative will induce even more development in Waukesha County, much of which will not be accessible to persons without vehicles.[121] SEIS at 3-204. Thus, minority communities will not receive a "[f]air distribution of the beneficial . . . effects of the proposed action. . . ."[122] EJ/NEPA. And although the SEIS also claims the predominantly minority population in the study area will not be harmed by the expansion proposal, that, as discussed throughout these comments, is incorrect.

Moreover, WisDOT long ago committed to improving transit precisely as a matter of racial equity – something that has occurred largely in the breach. DEIS Comments Ex. D. Its Connect 2050 plan explicitly recognizes the need to "[p]romote and *implement* Transportation Demand Management (TDM) strategies to improve efficiency, *equity,* and access by developing a connected multimodal transportation system and reducing single occupancy vehicle travel.[123,124] The Preferred Alternative, however, will exacerbate inequity, not improve it. The agencies are choosing to have this occur even though "[u]sing opportunities to enhance and increase sustainability in communities and neighborhoods is desirable." EJ/NEPA. Moreover, had WisDOT – as it should have done – considered a highway and transit increase alternative, it would also have had to evaluate the relative effects of *that* alternative, including the relative positive and negative effects for persons of color. 40 C.F.R. §§ 1502.14(a), (b). There is little doubt that such an analysis would have shown that such a transit-inclusive alternative would have had more positive effects and more mitigating effects, and fewer adverse effects, on persons of color – who, again, comprise a majority of the population of the study area - than the present proposals.

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[120] The SEIS at 3-89, also refers to $120 million in DBE contract spending on the Zoo Interchange project as an example of economic benefits to minority communities from highway construction. That amounted to only 8% of the projected cost of that project, and quite possibly a far smaller percentage of the actual expenditures since it included contracts with women-owned businesses and with businesses from outside of the Milwaukee region. Moreover, to imply that only this project can provide DBE benefits is misleading; the agencies certainly could provide similar DBE contracting opportunities for a project like Fix at Six.

[121] As discussed elsewhere, the race of these Waukesha residents who benefit from induced development is not discussed.

[122] Neither will persons with disabilities, who also are more likely to need public transit access. *See, e.g.,* DEIS Comments Ex. B at 528, 534.

[123] We note that while paying lip service to equity, WisDOT's 2050 plan did not even acknowledge the existence of racial disparities, much less address them meaningfully. This is in sharp contrast to WisDOT's 2030 Plan, DEIS Comments, Ex. E, which explicitly acknowledged the connection between racial equity and improved transit. WisDOT's apparently intentional decision to leave the explicitly racial equity issue – which has not changed or improved – out of its 2050 Plan, and even out of its most recent Title VI Implementation Plan (Ex. 4, WisDOT Title VI Plan), in contrast to its 2012 Plan (DEIS Comments, Ex J) – reinforces our concern that the agencies are not seriously committed to actually working to achieve racial equity.

[124]Ex 54, "Connect 2050: Wisconsin's Statewide Long Range Transportation Plan," WisDOT (May 2022) at 16 (emphasis added).

D. *The SEIS Improperly Failed to Consider a Highway and Transit Alternative (Like Fix at Six) On the Ground that it Would not Completely Solve the Highway's Design, Safety, and Congestion Conditions, Even Though the Preferred Alternative Would Also Fail to Completely Solve Those Conditions.*

A federal court long ago made clear that an EIS "must consider such alternatives to the proposed action as may *partially* or completely meet the proposal's goal and it must evaluate their comparative merits." *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975) (emphasis added). In another case, a court rejected an EIS for a proposed highway reconstruction and widening project due to its failure to afford adequate consideration to an alternative that would partially meet the stated purpose and need. The DOT justified its failure to consider the suggested bypass alternative on the ground that the project had two goals, repairing and upgrading the road, and the bypass would only accomplish the second purpose. The court found the EIS' discussion of alternatives inadequate, concluding that NEPA does not permit the agency to eliminate from discussion or consideration a whole range of alternatives merely because they would achieve only some of the purposes of a multi-purpose project. *Town of Matthews v. U.S. Dept. of Transp.*, 527 F. Supp 1055, 1057 (W.D.N.C. 1981). *See also Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972)(stating that "(it is not) appropriate . . . to disregard alternatives merely because they do not offer a complete solution to the problem.). These principles are all the more applicable here, since the SEIS clearly reveals that the 6-Lane and 8-Lane alternatives it has considered also fail to offer a complete solution to the problem, and to the stated purpose and need.

In 2016, the agencies rejected from consideration a 6-lane reconstruction of the highway that included spot improvements to address safety and design deficiencies from consideration during the environmental review of the project that concluded with the 2016 FEIS. SEIS, at S-3 and 2-13. That spot improvements alternative roughly corresponded to the highway improvements proposed by Fix at Six, but the latter alternative would implement them in conjunction with substantial transit investments and traffic demand management. The rejection was based on the assertion that SEWRPC had concluded that it would not satisfy the Project's congestion reduction goals.[125]

The SEIS itself now shows that the 6 and 8 lane alternatives also will only partially meet the purpose and need of continuity/route function, congestion reduction and goals - yet they have been deemed worthy of consideration while a transit-inclusive alternative has not.

[125]The agencies' current goal is to achieve at least Level of Service D, a measure of congestion, through 2050. SEIS at 1-29, 30, and 1-34, fn 13.

i. The SEIS alternatives will not fully satisfy the continuity/route function purpose, nor the current design criteria purpose.

The SEIS concludes that 6 and 8-lane alternatives would partially satisfy the continuity/route function of the purpose and need and that they would satisfy the purpose and need of replacing deteriorated pavement and bridges. Id. at 2-22. The SEIS reviewed the ability of 6 and 8-lane alternatives to upgrade the highway to current nationally accepted design criteria, and found that they "would partially, but sufficiently, meet the design deficiencies aspect of the project purpose and need." *Id.* at 2-14 to 2-16. Specifically, as a result of the narrow width of the highway corridor between the cemeteries west of the Stadium Interchange, the 6 and 8-lane alternatives would fail to meet the minimum freeway lane width 12 feet design standard and the freeway shoulder width 12 feet design standard in that area. The 6 and 8-lane alternatives would also have inadequate sight distance in the cemetery area; some Stadium Interchange shoulder ramp widths would not be sufficient; and some highway exit and entrance ramps east of the Interchange would have inadequate stopping distance. *Id.*

ii. The SEIS alternatives will not fully satisfy congestion reduction goals.

With respect to congestion reduction – the basis on which the agencies had rejected an option like Fix at Six - none of the considered alternatives was able to satisfy the project's stated congestion goal of LOS D. The SEIS describes the 8-Lane alternative as only "Partially" satisfying the goal of achieving operational efficiency to level of service D (overall) and providing for more predictable travel time, while describing the 6-lane alternatives as not satisfying that goal. *Id.* at 2-18 to 2-21, Table 2-3, and Exhibits 2-19 through 2-22. Thus WisDOT's traffic projections, and the SEIS's modeling of projected congestion (LOS), demonstrate that NONE of the alternatives that were considered were projected to be able to maintain LOS D, the agencies' purported goal for this project. *Supra* Sec. IV.A. The SEIS, in Appendix B (at pages 108-119 of the 450-page PDF) provides the "I-94 East-West Traffic Analysis-Future Conditions." Examination of those charts demonstrates that *the Preferred Alternative, and all of the other alternatives that were considered in the SEIS did not maintain LOS D – every alternative was projected to experience more congestion, dropping down to LOS E and/or LOS F***.** And importantly, the SEIS' underestimate of induced demand resulting from construction of additional highway lanes, *infra* Sec. IV.G, means that it has seriously underestimated the actual amount of congestion that will result, and overestimated the 8-Lane alternatives' actual ability to even *partially* achieve the LOS D goal.

Moreover, the agencies are now evaluating the 8-Lane Preferred alternative on its ability to achieve and maintain Level of Service D, as measured by the 250th highest peak hour, a considerably more lenient standard than the 200th highest peak hour that was used in evaluating the ability of alternatives to reduce congestion when the 2016 FEIS was being developed. In addition, the volume of future traffic that is now being projected for this highway is lower than was projected for the 2016 FEIS, (SEIS at S-4). Yet the agencies unreasonably continue to refuse

to address the ability of an integrated highway and transit alternative, such as the Fix at Six proposal, to address congestion using the same, 250th highest peak hour and lower traffic volume projections that the agencies are now using in the SEIS for their 6-lane alternatives.[126] As a result, the agencies lack a reasonable basis to have rejected this alternative from consideration.

iii. The considered alternatives will not fully satisfy safety goals.

With respect to safety, the SEIS reviewed the ability of 6 and 8-lane alternatives to address safety issues -- the number of crashes experienced on this section of the I-94 corridor. Id. at 2-16 to 2-18. *If protecting drivers and passengers from injuries or death in traffic accidents is a primary goal of spending $1.25 billion on this 3.5 mile stretch of highway, a 6-lane alternative certainly appears preferable to an 8-lane alternative.*

WisDOT's own safety analysis predicts that a 6-Lane Alternative with Hybrid Interchange and Half Interchange at Hawley would be much safer, and would result in 1 fewer fatal crash, 6 fewer incapacitating injury crashes, 22 fewer non-incapacitating injury crashes, 61 fewer possible injury crashes, and 196 no injury crashes, or 286 total fewer crashes during those 10 years, compared to the Preferred Alternative. At the same time, *the 8-Lane Preferred Alternative with Diverging Diamond Interchange is not predicted to reduce the number of fatal crashes on this corridor compared to No Build,* and is expected to lead to an increase of 7 incapacitating injury crashes, 19 non-incapacitating injury crashes, 24 possible injury crashes, and 28 no injury crashes during its first 10 years of operation. *See* "Full Corridor Crash Summary" in WisDOT Safety Certification Document Amendment (SEIS, Supporting Documentation, at p. 1855 of the 2521-page PDF, and at Table 9 of the Economic Analysis Report at p. 1894 of the PDF).

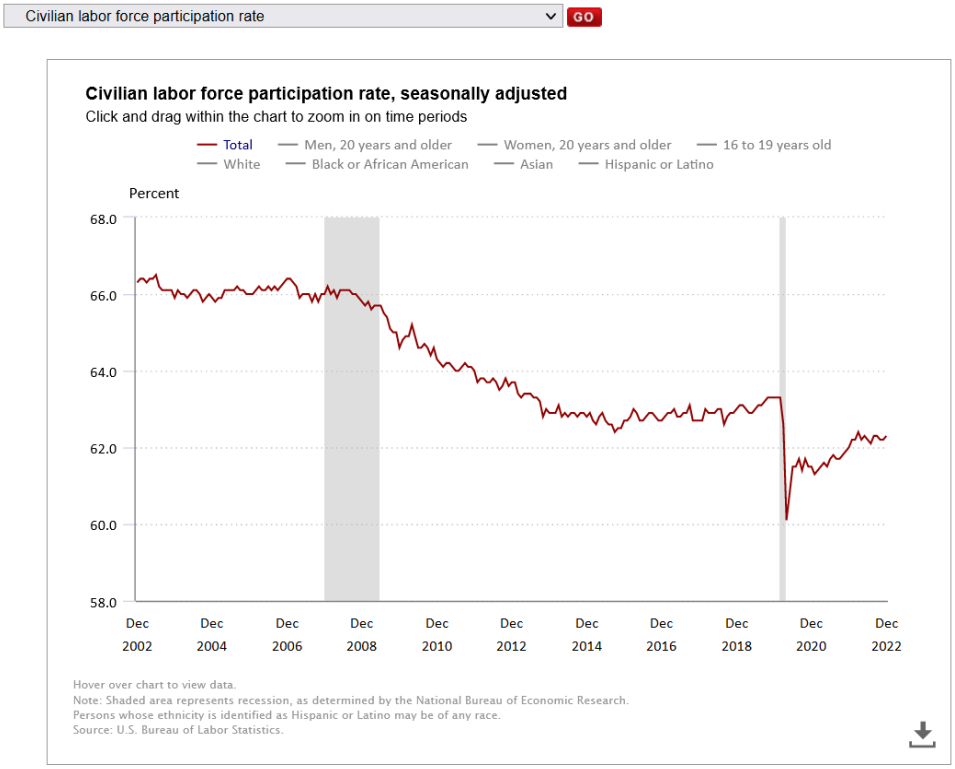
The various 6-lane alternatives were predicted to reduce the number of crashes on the mainline highway by 19-21%, compared with a No Build option; the prediction for the 8-lane alternatives was a similar reduction of 18-21%. When the entire Project was considered, the SEIS predicted that 6-lane alternatives would have between 5% less and 3% more crashes than No Build, and 8-lane alternatives would have between 4% less and 2% more crashes than No Build.

Thus, even though the alternatives the agencies considered, including the Preferred Alternative, did not fully meet continuity/route function/design criteria, congestion reduction, or safety goals, these alternatives were all deemed worthy of full consideration, and considered to sufficiently meet the Project's Purpose and Need. Again, there is no reasoned basis for the agencies to continue to refuse to consider a transit-inclusive alternative like Fix at Six as a reasonable alternative.

[126] Those changes would improve the ability of a transit and spot improvement alternative, like Fix at Six, to satisfy the congestion/LOS goal, since they are less stringent criteria than those that were applied to the spot improvements alternative that was rejected at the DEIS stage.

E. Travel behavior has changed, especially due to the Covid-19 pandemic, and the agencies cannot reasonably rely on past behaviors to justify capacity expansion.

We have submitted comments, reports and other documentation on multiple occasions to the agencies regarding this project that WisDOT's projections of future traffic volumes have time and time again been overestimated.[127] As has been suggested for years – and now confirmed by the 2020 census - Milwaukee's population has continued to decline,[128] and growth in and near the project area has been minimal. "[T]here will be a significant increase in the proportion of the Region's population aged 75 and older in the near future," whose ability to drive will decline. Vision 2050, Vol. III, at 34. The proportion of young people who prefer to drive less often, and desire to live and work in neighborhoods where it is not necessary to own a car or use it daily in order to function continues to increase.[129] The proportion of working-age people who are in the labor force is below 2002 levels, as data from "Workforce participation statistics," U.S. Bureau of Labor Statistics, show.[130]



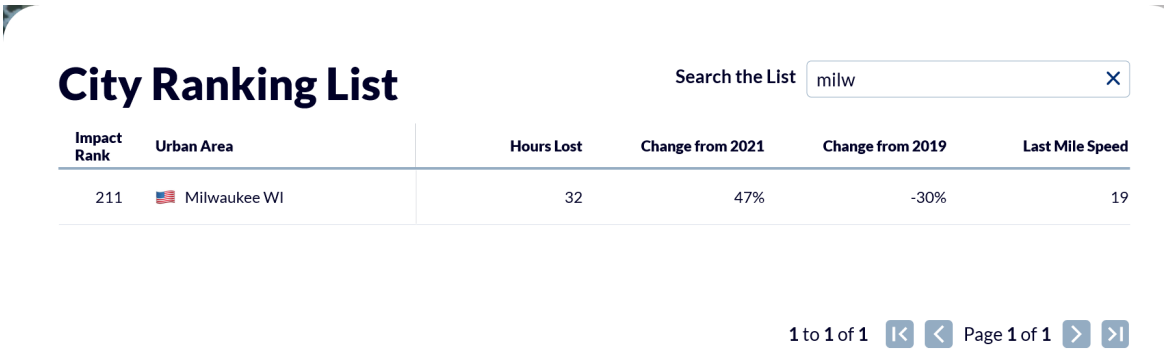
[127] *See, e.g.,* DEIS Comments at 12-15; Ex 55, Letter to Pete Buttigieg, Secretary of Transportation (March 16, 2021).

[128] Ex. 56, Arthur Thomas, "Milwaukee's population dropped nearly 3% since 2010," *BizTimes* (Aug. 12, 2021).

[129] *See, e.g*, Ex. 57, "Millennials on the Move," WISPIRG Foundation (Feb. 2019).

[130] Generated at: https://www.bls.gov/charts/employment-situation/civilian-labor-force-participation-rate.htm

The SEIS confirms that we were correct to be skeptical of the agencies' projections of inexorable growth in traffic volumes. "Since the 2016 Final EIS, updated traffic forecasts (certain Stadium Interchange movements are expected to have lower traffic volumes than the 2040 forecasts used for the 2016 Final EIS) and public comment caused WisDOT to relook at the Stadium Interchange design."[131] The SEIS also includes a relook at 6 lane alternatives.[132] This is also consistent with the previous pattern of low growth and even declines in traffic volumes. Moreover, the Inrix 2022 Traffic Scorecard Report released earlier this month shows that in Milwaukee time lost to congestion in 2022 was *30% below* 2019 levels.[133] Thus, it is unreasonable to rely on predictions that assume a continual increase in traffic congestion which has not occurred.



City Ranking List

Search the List: milw

Impact Rank	Urban Area	Hours Lost	Change from 2021	Change from 2019	Last Mile Speed
211	Milwaukee WI	32	47%	-30%	19

1 to 1 of 1 Page 1 of 1

This is not surprising. The trends discussed above were followed by the COVID-19 pandemic, and the long-term impacts of the pandemic on living, working, shopping, recreating and traveling behaviors – indeed, upon the whole range of activities and relationships that form people's lives – absolutely change expectations regarding travel behavior. In order to justify spending $1.25 billion on expanding capacity on this 3.5 mile long corridor, the agencies are predicting future traffic volumes for 23 years from now based largely on *past* decades of experience with the relationships between population, employment, land use, and similar factors– experiences that have radically changed and are likely to be long-standing or permanent.[134] This is completely unreasonable.

In fact, one of the purposes of the SEIS was to "identify any changes in project area conditions, including changes in traffic patterns resulting from the Covid-19 pandemic, laws and

[131] SEIS, at S-4.

[132] *Id*., at S-3 to S-5.

[133] Ex 58, 2022 Inrix Global Traffic Scorecard Report (Jan. 2023); Milwaukee data at 28 obtained from: https://inrix.com/scorecard/#city-ranking-list.

[134] *See, e.g*., Ex. 59, Riley Vetterkind, "Gov. Tony Evers' administration imagines future with less office space, more remote work," *Wisconsin State Journal* (May 26, 2021); Ex 60, Mike Freeman, "Hybrid work looks increasingly popular for workers and employers," *governing.com* (Jan. 14, 2022); Ex. 61, Jose Maria Barrero et al, "Why working from home will stick," Working Paper 2020-174, Becker Friedman Institute (April 2021); Ex. 62, Sarah Kessler, "Getting rid of remote work will take more than a downturn," *New York Times* (Jan. 7, 2023).

regulations; and to allow for more public input, that would modify the assessment of impacts, environmental compliance, and commitments as presented in the January 2016 Final EIS." SEIS, Public Coordination Plan, App. H at 4. In discussing future traffic, the SEIS acknowledges that major shifts in travel behaviors such as "transportation innovations, economic upheavals, and/or pandemics are difficult to anticipate and therefore increase the level of uncertainty in traffic forecasts." SEIS at 3-32. Similarly, the SEIS notes that "Most data sources used for this supplemental analysis do not yet reflect the potential impacts of the ongoing COVID-19 pandemic; therefore, the long-term demographic and economic impacts of the pandemic are not yet known or are just now being studied." SEIS at 3-192, APP.G at 14.

Yet the SEIS says almost nothing else about the disruption caused by the pandemic, or that transformative changes had taken place over the last three years. The upheaval in living, working, shopping, recreating, and traveling, or any effects that all this might have in the long term on expanding I-94 through the heart of Milwaukee is barely mentioned. Nor is there anything in the SEIS, its Appendices, or Supporting Documentation that reflects any significant effort to assess the nature and size of current and likely future travel behaviors that would change the expected traffic demand on this corridor.

The magnitude of this effect is uncertain – but also unlikely to be the same as before the pandemic. Dr. Stout addresses the fact, noted in the SEIS at Appendix B-2, that some 2021 I-94 traffic counts show a rebound to pre-Covid numbers and thus the agencies are moving forward as if there has been no change. This still ignores the fact that previous behaviors – including travel behaviors – no longer are present, and projects based upon previous patterns are unreliable.[135] Notably, SEWRPC also believes remote work will continue. See*, e.g.*, SEIS, APP. B-3, pp. 4-5 (pp. 77-78 of unpaged PDF) (SEWRPC November 24, 2021, memo, "Forecast Variability Sensitivity Analysis,") ("The COVID-19 pandemic has allowed a portion of workforce to work remotely from home. With increase in the number of vaccinated populations, workers are beginning to return to their workplaces, although the pandemic is far from over as newer and virulent variants continue to form. *It is believed that remote work will continue to exist post pandemic in one form or another for those industries and job types that allow for it*, though likely at a reduced level from the highs seen during the pandemic.") (emphasis added). SEWRPC estimated that about 25% of the Region's total workforce are potentially eligible to work from home. *Id.* at 7 (p. 80 of the unpaged PDF.)[136]

SEWRPC also reviewed other behaviors, such as shopping from home, estimating that one package delivery trip could replace 5 individual vehicle shopping trips. *Id*. at 7. However, the SEWRPC memo did not provide any assessment of how much working from home or online shopping was likely to occur at any time in the future, nor did it predict by how much traffic

[135] Ex. 63, Mark Stout, "Final Technical Report: Pandemic effects on traffic projection," (Jan. 23, 2023) ("Pandemic Report") at 1, 2.

[136] *See also, e.g.,* Ex 64, Emily Badger, "A Little More Remote Work Could Change Rush Hour a Lot," *New York Times* (June 11, 2021); Ex 62, "Getting Rid of Remote Work"; Ex. 60, "Hybrid Work Looks Increasingly Popular."

volumes would likely be changed as a result of these or any other likely changes in the transportation system or travel behavior. Instead, the agencies used a number of *assumed* ranges for the size of these changes to gauge the sensitivity of the SEIS' traffic forecasts to these factors. " I-94 East-West Traffic Analysis -- Future Conditions, App. B-4, p. 3 (page 92 of unnumbered PDF).

Dr. Stout reviews how the impact of the pandemic on travel patterns has been seen in other parts of the country:

> In Chicago, local planners have found that although overall traffic counts have rebounded, the "when" and "how" of travel is very different from pre-pandemic times. About 20% of workers in the region now work fulltime or part-time from home – four times the number doing so in 2019 – and this share is likely to continue. Online shopping has increased, meaning fewer trips to shopping locations and more trips by delivery trucks. As a result of these social changes, car trips are now often on different days, different times, and closer to home than before. Fewer trips are now made in the traditional rush hour, making travel and congestion unpredictable.[4]
>
> In Baltimore, average commute times dropped significantly during the height of the pandemic. Although traffic is reported to be "picking up," shifts in work habits have resulted in changes in commuting patterns.[5]
> In Boston, a news report noted that "roadway congestion continues to inflict grating headaches on drivers but the patterns themselves have changed." The report quoted the top state highway administrator on this topic:
>
> > People are choosing to travel differently…Yes, there's still a lot of people that you're going to see during those traditional peak times in the morning and the afternoon, those traditional commuting hours on pretty much every road are usually going to be the busiest of the day. But what we're seeing here and what this demonstrates is that people are spreading out their trips, so even though the full volumes are getting close and sometimes exceeding (pre-pandemic), those peaks, although congested, are not as bad as they were in prior years.[137]

Dr. Stout also reviewed Milwaukee business news over the past few months, and found that "future patterns of office employment and travel patterns in Milwaukee are very much shrouded in uncertainty:"

> Post Office data showed a significant migration of businesses out of downtown Milwaukee.

[137] Ex. 63, Pandemic Report, at 2-3.

> Some area CEOs are trying to get workers back into the office, but as one CEO put it: "If it is not mandatory, you can bet most workers are not coming in the office…People got comfortable working at home and really like the flexibility it offers and the elimination of the commute. It is like a ghost town in our office on the days where they are not required to be there."
>
> Harley-Davidson has no plans to reopen its corporate headquarter offices and will convert some of its employee parking lots to a "community park."
>
> American Family Insurance Co. said it will sell the downtown Milwaukee building where it had planned to establish a corporate office.
>
> Coworking space is growing in Milwaukee, as employers pursue flexible office arrangements.[138]

The SEIS is correct in admitting the high level of uncertainty in traffic projections that are based on travel patterns and relationships that existed before the pandemic. However, there is more reason for this uncertainty than anecdotal data from other cities and continuing evidence that workplace and commuting patterns in Milwaukee are and will continue to be changing. Dr. Stout has also reviewed more rigorous scholarly studies about the future of commuting. These findings include:

- A study at the University of Washington finds that due to "huge uncertainties…conventional prediction methods are no longer adequate" and argues for development and application of new scenario planning methodologies.

- A similar study from the University of Vermont applies a scenario planning approach to California data, concluding that trips and traffic are likely to increase in all post-pandemic scenarios, but with "varying degrees of intensity" and different patterns of mode use and trip purpose.

- A Canadian survey-based study of travel in the Toronto area predicts "significant telework-induced future changes in travel behavior" and raises the question of "how the geography of work and commuting will change based on shifts in teleworking." They predict that the biggest changes will affect the downtown core, with modeling results that "portend a poor outlook for downtown urban agglomeration economies…but also imply more nuanced potential network impacts than simply inducing sprawl."

[138] *Id.* at 3.

- A study from Northwestern University says the evidence suggests that "some degree of telework will likely stick long beyond the pandemic" with "higher remote work amongst those without a vehicle, those working in the information sector and those aged above 65 years."

- A survey study in Scotland predicts continued teleworking "potentially weakening the role of commuting for future residential choices." These choices appear to break along demographic lines with, for instance, "high-income urban dwellers…willing to switch to non-urban areas, whereas non-urban dwellers with middle income wish to relocate to urban destinations."

- A Swiss panel study examines the question of "how new hybrid working arrangements drive modal splits" and finds "a strong modal shift from car and train, to more regional, slow-moving modes."

Id. at 4.[139] Dr. Stout concludes that in "view of this abundance of evidence of uncertainty about the future, predicting rush hour traffic on a segment of the East-West Freeway in 2050 seems an exercise in futility if not foolhardiness."[140]

Nor does the SEIS discuss alternative methods, much less best practices, to *reduce* VMT, even if traffic volumes were to return to pre-pandemic levels. Increasing transit is clearly one method. Research shows that even relatively small declines in single occupancy vehicle travel - due to even modest shifts to transit – can significantly reduce traffic congestion.[141] In fact, FHWA confirms that transit can be an appropriate alternative to reduce congestion. So do many researchers. *See generally*, DEIS comments at 15-16. And so does SEWRPC. "Public transit expands traffic carrying capacity in the Region's heavily traveled corridors and densely developed activity centers, helping to mitigate congestion in crowded corridors. Rapid transit (either bus rapid transit or light rail) provides a reliable alternative to driving on congested roadways, with consistent travel times and minimal wait times." Vision 2050, Vol. III, Ch. 1 at 34. Declining to expand capacity unless and until suburban communities – especially in the west suburbs – implement SEWRPC's housing study recommendations and provide more affordable housing closer to job centers, to "reduce public costs, such as costs associated with the impacts on transportation infrastructure through the reduction of vehicle miles traveled (VMT) and congestion…." could also reduce VMT.[142]

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[139] *See also*, Ex 61, "Why Working From Home Will Stick."

[140] Ex. 63, Pandemic Report at 5.

[141] *See, e.g.*, DEIS Comments, Ex. DD; Ex. 64, "A little more remote work could change rush hour a lot."

[142] *See* DEIS Comments, Ex. EE at 55; Ex 65, "Evaluation Methods and Techniques: Advanced Transportation and Congestion Management Technologies Deployment Program," FHWA (Dec. 2019) at 26 (recommending "optimizing" multi-modal performance and using, among other measures of success, "VMT avoided through transit or other modes.").

F. The agencies fail to appropriately consider or address the causes of safety issues and whether or how the Preferred Alternative would solve them.

In arguing that its preferred alternative is needed to increase safety, the SEIS at 3-18 to 3-23 discusses vehicle crashes largely without disaggregating cause (including driver (mis)behavior), time of day, nature of the crash, weather, or what aspects of the project (if any) might resolve – or exacerbate - the purported problems.[143] For example, moving ramps from the left to right hand side could be aspects that increase safety, but that does not automatically mean that all other aspects of the Preferred Alternative – like adding lanes – do so. We concur with, and incorporate by reference the comments of, groups that submitted comments on the DEIS, including 1000 Friends, who analyzed this issue in considerable detail, that this analysis is inadequate. *See* also DEIS Comments at 18-19. Further, as noted *supra,* Sec. IV.D.iii, the agencies themselves know that the 8 lane option – their Preferred Alternative - is likely to increase accident rates, *particularly with respect to crashes resulting in fatalities or serious injuries*, compared to leaving the highway at 6 lanes.

In selecting its Preferred Alternative – especially to support adding lanes - the SEIS at 2-16 to 2-18, also argues that congestion causes crashes. However, it does not address the fact that expanding the road in order to increase speed by reducing congestion may *worsen* safety by causing more serious accidents, since those are frequently related to excess speed. Notably, WisDOT's Highway Safety Plan does not even contain the word "congestion." It does state that "speeding is the most cited driver behavior," that the number of crashes where speeding is reported as a contributing factor probably understates the number of crashes in which it actually was a factor, and that in 2020 alone there were nearly 200 deaths, more than 1000 injuries, and almost 16,000 crashes related to speed.[144] As recently as July 2022, WisDOT reminded the public that "when speed increases, dangers on the road increase."[145] For the Preferred Alternative to potentially reduce congestion-related fender benders only to increase speed-related serious accidents raises questions about whether and how the project will in fact meet safety goals.

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[143] Another likely cause of higher than average crash rates that is never mentioned in the SEIS (and cannot be addressed by *any* reconstruction alternatives) is the generally east-west configuration of this stretch of I-94. The result is that east-bound morning rush hour drivers frequently find the rising sun shining in their eyes, and during their west-bound afternoon or early evening return trip are often faced with the setting sun in their eyes. *See, e.g.*, Ex 66, Brady Meyer, "Sun glare determined as factor in string of fatal crashes," *Fox11 News* (Sept. 28, 2022).

[144] Ex. 67, State of Wisconsin Federal Fiscal Year 2022 Highway Safety Plan, WisDOT ("2022 Safety Plan") at 4-1. *See also, e.g.*, Ex 68, Wisconsin Strategic Highway Safety Plan 2017-2020, WisDOT ("Strategic Plan") at 14 ("Speeding leads to more crashes, and those crashes tend to be more severe because of the higher speed.") In addition, historically, speed limit reductions – not *increased* speed - were a key factor in reducing fatality rates. *Id*. at 9.

[145] Ex 69, "July Law of the Month: Slow down to keep Wisconsin's roads safe," WisDOT [Press Release] (July 7, 2022).

Nor does the SEIS address whether and how elements of its Preferred Alternative would improve safety by remedying other common causes of serious accidents, including impaired and distracted driving and weather conditions. The 2022 Safety Plan identifies "Wisconsin counties . . . by descending degree of apparent crash problem (alcohol, speed, and occupant protection [seatbelt use])." *Id.* at App. 1, p. 1. In 2020, was a factor in more than 28% of all traffic related deaths.[146] "Although alcohol-involved crashes are a relatively modest portion of all crashes (4.2%), they tend to result in more severe outcomes. For example, over the past five years (2012-2016), alcohol-involved crashes accounted for 6.9% of all non-fatal injuries, 15.2% of all serious, or incapacitating, injuries, and 33.9% of all fatalities."[147] Historically, WisDOT found that drunk driving laws and enforcement played a crucial role in reducing fatality rates, *id.* at 9 – something the Preferred Alternative does not address. In 2022, the agency reiterated that "thousands of drivers get behind the wheel while drunk or high every year,"[148] and it is entirely unclear whether impaired driving accidents generally happen during periods of congestion or how relieving congestion would improve safety in such situations.[149]

Distracted driving is another frequent cause of accidents, and again the agencies do not address how elements of the preferred alternative would improve safety when distracted drivers are on the road. "[C]ell phone use, particularly texting, has been identified as an egregious, prevalent, and dangerous form of distracted driving because it severely reduces the visual, mechanical, and mental focus needed behind the wheel.[150]" And again in 2022, WisDOT reminded the public of the dangers of distracted driving, including cell phone and navigation system use.[151]

Of course, in Wisconsin poor weather can and often does lead to accidents, especially when persons are driving too fast for conditions. "Many winter crashes are caused by drivers going too fast in hazardous conditions."[152] For example, less than two years ago freezing temperatures and white-out conditions caused 20 crashes, including a 48 car pileup, on an

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[146] Ex 67, 2022 Safety Plan at 3-1.

[147] Ex 68, Strategic Plan at 21.

[148] [Ex 70, "August Law of the Month: Drive sober every trip behind the wheel," WisDOT [Press Release] (Aug. 2, 2022).

[149] It is reasonable to assume that these substance-abuse related accidents may be more likely to occur during evening and weekend hours. *See, e.g.,* Ex 71, "Wrong way driver arrested after vehicle drove off I-43 and into steel construction beams," *WTMJ-TV* (July 31, 2022) (intoxicated driver drove off interstate at 5:30 a.m.). Certainly, time of day is relevant to determining whether the alternative proposed to reduce congestion will meaningfully affect such accidents - which will not be the case if the accidents do not occur during rush hour. We also note that the agencies' efforts to make it easier to drive home from events at places like American Family Field or State Fair Park – venues in which consumption of alcohol is widespread – rather than steering patrons to other forms of transportation, could exacerbate this problem. *See also*, DEIS Comments at 18-19 and n.37.

[150] Ex 68, Strategic Plan at 17.

[151] Ex 72, "'Every second matters' - Driving distractions on the rise," WisDOT (April 1, 2022).

[152] Ex 73, "Be prepared for winter driving to avoid crashes this season," WisDOT (Dec. 1, 2022).

interstate in a county adjacent to Milwaukee.[153] Last fall, two people were killed and six injured in a crash on rain-slick I-894 in Milwaukee.[154]

Thus, while safety improvement is certainly a valid purpose and need for a project, it is not at all clear whether, or which individual aspects of, the Preferred Alternative will actually increase safety, which may be neutral, and which could actually make safety worse.

G. The SEIS Fails to Appropriately Consider Induced Demand That 8-Lane Alternatives Would Create

The SEIS identifies four critical factors for assessing and selecting a "Preferred Alternative." One key factor in selecting the "Preferred Alternative" is addressing poor future Levels of Service. Specifically, the EIS concludes that by Year 2050 (the project's design year), traffic volumes on the existing highway are expected to rise to approximately 167,000 to 187,500 vehicles per day, which represents a 5 to 6 percent traffic increase over current conditions.[155]

A number of improvement alternatives were developed, analyzed, and subsequently compared and evaluated within the context of best addressing the identified critical factors, including congestion, measured by deficient Levels of Service. The two basic improvement alternatives retained for detailed study in the SEIS consisted of a 6-lane option (3 travel lanes in each direction) and 8 lane option (4 lanes in each direction). The 6 and 8-lane alternatives contain similar improvement options to key interchanges and generally follow the same alignment. Apart from the treatment of the Hawley Road interchange, the key difference between the 6-lane and 8-lane alternatives is the additional travel lane in each direction of I-94 with the latter alternative.

i. <u>SEWRPC's Estimation of Induced Demand</u>

As the Metropolitan Planning Organization for the Milwaukee, Wisconsin region, the Southeastern Wisconsin Regional Planning Commission (SEWRPC) is charged with developing a regional travel demand model for the SEWRPC region. SEWRPC develops forecasts to identify the impact of transportation improvement projects and other travel demand initiatives on future year scenarios. Projects, strategies, initiatives, and travel demand forecasts are contained in its VISION 2050 Regional Transportation and Land Use Plan.

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[153] Ex 74, Mark Stevens, "Worst I've ever seen,' 1 dead in massive pileup on Wisconsin Interstate 41," *CBS58.com* (April 21, 2021).

[154] Ex 75, Kent Wainscott, "Two killed, six hurt in fiery interstate crash," *WISN.com* (Oct. 12, 2022).

[155] Transportation experts Dr. Stout and P.E. Fallat recognized that predicted Level of Service is the key basis in the SEIS for selection of the 8-lane alternative over 6-lane alternatives. Ex. 50, Purpose and Need Memo at 1 ("...it is traffic volume that is decisive. And traffic volume means – very specifically – predicted traffic congestion on the freeway in morning and afternoon rush hours in 2050."); Ex 51, Induced Demand Memo at 3 ("Hence, the key basis for selection of the 8-lane alternative over the 6-lane alternative, improved Levels of Service . . .").

Based on SEWRPC traffic forecasts, in the year 2050, 12,000 to 16,000 more vehicles would use I-94 on a weekday with the 8-lane alternative than with the 6-lane alternatives (SEIS p. 2-21). This additional traffic on I-94 is estimated to come from a combination of motorists currently using the local road system instead of I-94 because of congestion and safety concerns and those currently using other interstates who would now use I-94 because of reduced travel time and overall capacity with an expanded I-94. SEIS at 2-21,2-22. Similarly, the SEIS Supporting Documentation, at p. 2237 of the 2521-page PDF, states: "The 8-Lane Modernization has an 8% increase in traffic compared to the No Build, which reflects the additional traffic lanes that allow for more trips to be completed on the freeway instead of parallel routes."

ii. <u>There is More Induced Demand That SEWRPC Has Not Considered</u>

However, this attraction or diversion of projected traffic from other routes onto a new or expanded highway is only one source of increased travel demand. Another source, not accounted for in SEWRPC's forecasts, is causing people to take *longer or entirely new vehicle trips* that would not have taken place if additional highway infrastructure had not been constructed and made available "for free" to motorists. If not for the added highway infrastructure, they would have walked, biked, taken transit, or simply not taken those particular trips at all. The nature of this "generated traffic" has been explained as follows:

> Traffic engineers often compare traffic to a fluid, assuming that a certain volume must flow through the road system, but it is more appropriate to compare urban traffic to a gas that expands to fill available space (Jacobsen 1997). Traffic congestion tends to maintain equilibrium: traffic volumes increase to the point that congestion delays discourage additional peak-period vehicle trips. Expanding congested roads attracts latent demand, trips from other routes, times and modes, and encourage longer and more frequent travel. This is called generated traffic, referring to additional peak-period vehicle traffic on a particular road. This consists in part of induced travel, which refers to absolute increases in vehicle miles travel (VMT) compared with what would otherwise occur (Hills 1996).
>
> Generated traffic reflects the economic "law of demand," which states that consumption of a good increases as its price declines. Roadway improvements that reduce the user costs of driving (i.e., the price) encourage more vehicle use. In the short-run generated traffic represents a shift along the demand curve; reduced congestion reduces travel time and vehicle operating costs. Over the long run induced travel represents an outward shift in the demand curve as transport systems and land use patterns become more automobile dependent, so people must drive more to maintain a given level of accessibility to goods, services and activities (Lee

1999).[156]

Pages 6 through 11 of the Litman article summarize numerous studies of the effects of this latent demand in cities around the world, including short-term reductions in congestion, followed by increases in the number and length of vehicle trips, particularly during peak periods, that reduces or eliminates the initial congestion improvements over time.

This has certainly been the experience of many U.S. cities in recent decades. "In 2015, $1 billion project to widen a 10-mile stretch of Interstate 405 through Los Angeles was completed. For a period, 'congestion was relieved,' said Tony Tavares, the director of Caltrans, California's Department of Transportation. But that relief did not last. Rush hour traffic soon rebounded, he said." [157]

> 'It's a pretty basic economic principle that if you reduce the price of a good then people will consume more of it,' Susan Handy, a professor of environmental science and policy at the University of California, Davis, said. 'That's essentially what we're doing when we expand freeways.'
>
> The concept of induced traffic has been around since the 1960s, but in a 2009 study, researchers confirmed what transportation experts had observed for years: In a metropolitan area, when road capacity increases by 1 percent, the number of cars on the road after a few years also increases by 1 percent.

Id. at 5["Widening"]. In Houston, after the Katy Freeway in Houston was expanded in 2008, "the project was hailed as a success. But within five years, peak hour travel times on the freeway were longer than before the expansion. Matt Turner, an economics professor at Brown University and co-author of the 2009 study on congestion, said adding lanes is a fine solution if the goal is to get more cars on the road. But most highway expansion projects, including those in progress in Texas, cite reducing traffic as a primary goal. "If you keep adding lanes because you want to reduce traffic congestion, you have to be really determined not to learn from history," Dr. Turner said. *Id*. at 9.[158]

In essence, SEWRPC's projections captured the effect of diverting trips from vehicles from other roads onto the expanded highway. Assuming their forecasts are correct, construction of the 8-lane alternative versus the 6-lane alternative would result in additional vehicle miles traveled

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[156] Ex 76, Litman, "Generated Traffic and Induced Travel: Implications for Transport Planning," Victoria Transport Policy Institute (July 18, 2017) at 2.

[157] Ex. 77, Eden Weingart, "Widening Highways Doesn't Fix Traffic," *New York Times* (Jan. 6, 2023) at 3; See also, Ex 78, Katie Wilson, "How Fighting Congestion Can Create Congestion," *Crosscut*, (Oct. 20, 2021); and Ex 79, "The Congestion Con," *T4America* (2020).

[158] *See also,* Ex 80, Dave Zipper, "The Unstoppable Appeal of Highway Expansion, *Bloomberg CityLab* (Sept. 28, 2011) (discussing Atlanta, GA, Austin, TX, Nevada, and New York City)

(VMT) ranging from approximately 15 Million to 20 Million annual VMT per year (ADT x 3.5 miles x 365).[159] As noted above, the SEIS projections did not consider newly generated trips taken in response to the availability of expanded lanes.

Efforts to better quantify the effects of induced demand have been undertaken by the Institute of Transportation Studies at the University of California, Davis (ITS-Davis) through its National Center for Sustainable Transportation (NCST). NCST has developed an Induced Travel Calculator (Calculator) as a method for estimating the additional vehicle miles traveled (VMT) induced by expanding the capacity of major roadways. While ITS-Davis initiated the project to support Caltrans, the application can now be used to estimate induced demand for other regions of the country.[160] The tool enables users to estimate the VMT induced annually as a result of expanding capacity of interstate highways, other freeways and expressways and other principal arterials. While the tool is limited to certain facility types and conditions, it has the ability to estimate induced VMT for highway capacity expansion, such as that proposed by adding additional through lanes to the I-94 corridor. The Calculator produces a statistical range (95% confidence level, +/-20%) of induced VMT. Data sources and specifications for the equation include Lane Miles Added, Facility Type, State, and Metropolitan Statistical Area (MSA).[161]

Mr. Fallat entered the relevant data into the NCST Calculator, and his memo sets forth the results.

> For the I-94 project, and assuming construction of the 8-lane preferred alternative was advanced, the following data was entered into the Calculator to estimate "Induced Demand". Results are also provided below.
>
> - Lane Miles Added: 7.0 (3.5 miles of added lanes in both (2) travel directions)
> - Facility Type: Interstate Highway
> - State, MSA: Milwaukee, Wisconsin
>
> Results of these inputs show the added through lanes would result in an additional 33 to 49 Million additional VMT per year.[162] *Id.,* p. 3.

[159] Ex. 51, Induced Demand Memo at 2.

[160] Calculator at: https://travelcalculator.ncst.ucdavis.edu/about.html

[161] Ex. 51, Induced Demand Memo at 2.

[162] Source: https://shift.rmi.org/

iii. Erroneous Induced Travel Estimates Invalidate the Analysis of the Preferred Alternative

Mr. Fallat noted that:

> The above estimated ranges are more than double the estimated 15 Million to 20 Million annual VMT increase that was projected based on the SEWRPC model traffic forecasts for Year 2050. Thus, construction of the 8-lane preferred alternative is likely to attract considerably more traffic than the 6-lane alternative. Hence, the key basis for selection of the 8-lane alternative over the 6-lane alternative, improved Levels of Service, may not likely be realized due to additional volume increases not anticipated in the travel demand forecasts that are contained in the SDEIS. Please see the discussion below for more specific information.[163]
>
> Assuming that the induced vehicle miles traveled is at the midpoint of the NCST estimate range, 41 Million VMT, the number of vehicles per day (vpd) would equal approximately 32,000 vpd of induced volume. (41,000,000/3.5miles*365 days/yr).
>
> Assuming that 10% of the daily traffic volume occurs during the peak design hour, the induced volume would be approximately 3,200 vehicles during the peak hour. Ideal freeway capacities are generally estimated to be approximately 1,900 vehicles per hour and are reduced based on several factors including vehicle composition, shoulder width, lane widths, and roadway geometry. Therefore, the additional 3,200 vehicles (1,600 vehicles per direction) in the peak hour due to the effects of induced demand would use a significant portion of additional capacity of adding a lane in each travel direction proposed in the Preferred (8-lane) alternative versus the 6-lane alternative. *Consequently, constructing an 8-lane freeway section would likely provide minimal capacity improvements over the 6-lane alternative due to induced vehicle demand.*[164]

This failure of the traffic projections in the SEIS to appropriately and fully account for and consider the induced travel demand that would be generated by adding travel lanes to this section of I-94 is a fundamental defect which invalidates its analysis of Level of Service (congestion), of air pollution emissions, of noise impacts, and of safety (all categories of crashes). This is yet another reason for the agencies to go back and take a real, hard look at an *integrated transit and focused 6-lane highway improvement alternative* that rebuilds the highway with improved safety designs, but without substantially expanding its footprint.

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[163] The significant increase in traffic volumes on the 8-lane alternative, much larger than what WisDOT has considered, affects more than the congestion/LOS analysis. *It also renders the air quality analysis, safety analysis, and analysis of other impacts invalid, as significantly more traffic will result in more air pollution, more crashes, and more noise and water pollution.*

[164] Ex. 51, Induced Demand Memo at 3.

H. The agencies cannot justify the failure to consider transit in the reasonable alternative by claiming a lack of "jurisdiction" to do so.

In rejecting a transit-focused alternative, the agencies argue that they do not have the power to unilaterally implement the regional transit strategy and that implementation of transit improvements is not within their authority. (citing statutory limitations, the power or authority lies with the Governor, the legislature, or Congress.) *See,* SEIS at 2-28, 3-97 n. 10, 3-100, 3-102, 3-219. Whether or not WisDOT or FHWA has such jurisdiction does not excuse the failure to *consider* (or recommend) *an alternative* that includes increased public transit.

> [T]he agencies cannot simply assume that incorporating some form of transit into the project to avoid or minimize adverse social and economic harm is out of the question. Moreover, the agencies should not assume that adding transit entails eliminating other necessary elements of the project, such as elements that are designed to improve safety.

MICAH, 944 F.Supp.2d at 670. Given the documented harm, there should be no barrier – other than the agencies' intransigence, adherence to decisions formally or informally made in advance of the EIS process, and/or discriminatory attitudes – that preclude the agencies from developing and considering a transit-inclusive alternative or recommending such an alternative in the SEIS. This could include recommending that federal Surface Transportation Program dollars which might be used for highway construction instead are necessary to support transit capital improvements*, see, e.g*., 23 U.S.C. § 133(b)(1)(c), in order to mitigate, *inter alia,* documented disparate racial impacts.

V. The DEIS Fails to Adequately Consider Effects of the Project.

As part of the analysis of the environmental impacts of the project, the agencies must take a "hard look" at the effects of the project – and the comparative effects of all reasonable alternatives. *See, e.g.,* 40 C.F.R. §§1502.14(a),(b); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989). "Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect,[165] or cumulative.[166] Effects may also include those resulting from

[165] "Indirect effects . . . are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.1(g)(2).

[166] "Cumulative effects, which [sic] are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R.

actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial." 40 C.F.R. § 1508.1(g)(4). "Conclusory statements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA." *North Carolina Wildlife Federation v. North Carolina Dept. of Transp*., 677 F.3d 596, 602 (4th Cir. 2012); *see also Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998) (analysis must provide "detailed and quantified" information, not vague generalities or conclusory statements, regarding cumulative impacts).

In addition, those "social" effects include racial effects. "Explicit consideration of potential effects on minority and low-income populations is required in NEPA documents." EJ/NEPA. *See also, Advisory T6640.8A* at Sec. V.G.3.e:

> General social groups especially benefited or harmed by the proposed project. The effects of a project on the elderly, handicapped, nondrivers, transit-dependent, and minority and ethnic groups are of particular concern and should be described to the extent these effects can be reasonably predicted. Where impacts on a minority or ethnic population are likely to be an important issue, the EIS should contain the following information broken down by race, color, and national origin: the population of the study area, the number of displaced residents, the type and number of displaced businesses, and an estimate of the number of displaced employees in each business sector. Changes in ethnic or minority employment opportunities should be discussed and the relationship of the project to other Federal actions which may serve or adversely affect the ethnic or minority population should be identified.
>
> The discussion should address whether any social group is disproportionally impacted and identify possible mitigation measures to avoid or minimize any adverse impacts. . .

In addition, as discussed *supra* Sec. II, where, as here, there is a disparate impact on minority groups, then under Title VI and environmental justice requirements, as well as under

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§1508.1(g)(3).

[T]he point of studying cumulative impacts is not simply to identify such impacts, but to inject their consideration "into the planning process as early as needed *to improve decisions*." . . . Once it has developed a cause-and-effect model, the agency must attempt to fit past actions, present actions, the proposed action, and future actions into the model. But the agency cannot simply lump all actions together and explain that they will have a given cumulative effect. Rather, the agency must "separat[e] [the] effects into those attributable to the proposed action or a reasonable alternative versus those attributable to past and future actions."

Highway J, 656 F.Supp.2d at 888-9 (emphasis in original, internal citations omitted). What that means in the context of the SEIS is that there must be an evaluation of the effects caused by the multiple reconstruction projects of the *entire* freeway – not just those related to this segment. *See MICAH*, 944 F.Supp.2d at 672.

NEPA, the agencies must "Follow the protocol of avoidance first, then minimization, and finally measures to offset or rectify the adverse effects." EJ/NEPA. "If there is a disproportionately high and adverse effect on an EJ population, after taking benefits and mitigation into account, the NEPA document must evaluate whether there is a . . . practicable alternative that would avoid or reduce the disproportionately high and adverse effect(s)." *Id*. Here, the agencies have not considered a practicable, transit-inclusive alternative. Nor have they undertaken the required analyses or sought to avoid, minimize, or meaningfully mitigate the harmful effects of their preferred alternatives.

A. The Agencies Failed to Adequately Consider the Air Quality and Health Effects of the Project.

i. The SEIS fails to properly analyze air pollutants.

Milwaukee County already suffers from unhealthy air quality. It is designated as being in nonattainment for the 2015 ozone National Ambient Air Quality Standards and as in maintenance for the 2006 standards for the smallest particulates, known as PM2.5. SEIS at 3-147. As a result, the Clean Air Act requires that this project "will not worsen air quality or delay attainment of air quality standard," and thus requires a conformity analysis. *Id*.[167]

There is an extensive body of research documenting the negative effects of air pollution - particularly traffic-related air pollutants - and the disproportionate burden of air pollution on communities of color and low-income communities - including a higher COVID-19 mortality rate.[168] The effects of ozone pollution include premature death - even when other pollutants are

[167] Our comments on the DEIS and FEIS addressed earlier deficiencies in conformity determinations in the Region, including an air quality analysis that a federal court described as a "pipe dream" that was unreasonable for agencies to rely upon. Since deficiencies in the previous environmental impact statements regarding air quality for this project have been repeated in the SEIS, we rely upon and reference those earlier comments without repeating them here. For example, while asserting that capacity expansions will increase vehicle speeds and thus reduce emissions, the SEIS *again* fails to disclose that FHWA staff themselves have admitted that some emissions *increase* at freeway speeds. *See, e.g.*, DEIS Comments Ex. KKK.

[168] *See, e.g.* "Traffic Related Air Pollution and the Burden of Childhood Asthma in the Contiguous United States in 2000 and 2010" (data sets available at https://carteehdata.org/library/webapp/trap-asthma-usa) ; Ex 81, Achakalwisut et al., "Global, national, and urban burdens of pediatric asthma incidence attributable to ambient NO_2 pollution: estimates from global datasets*," Lancet Planet Health* (2019); Ex.82 "Finding pollution- and who it impacts most- in Houston," *Environmental Defense Fund* (June 3, 2020); Ex 83, Bell ML et al. "Challenges and recommendations for the study of socioeconomic factors and air pollution health effects," *Environmental Science and Policy* 2005 8:525–33; Ex 84, O'Neill MS et al. "Health, wealth, and air pollution: advancing theory and methods," *Environmental Health Perspectives* 2003;111:1861–70; Ex 85, Brender JD et al., *"Residential proximity to environmental hazards and adverse health outcomes." Am. J. Public Health* 2011;101:S37–52; Ex 86, Chakraborty J. "Automobiles, air toxics, and adverse health risks: environmental inequities in Tampa Bay, Florida," *Annals of the Assoc. of Amer. Geographers* 2009, 99:674–97; Ex. 87, Gunier RB, et al., "Traffic density in California: socioeconomic and ethnic differences among potentially exposed children," *Journal of Exposure Analysis & Environ. Epidemiol.* 2003;13:240–46; Ex. 88, Tegan K. Boehmer, "Residential proximity to major highways - United States, 2010," *CDC Division of Environmental Hazards and Health Effects* (2013); Ex 89,

present - immediate breathing problems like asthma attacks, worsening other respiratory and heart conditions, harm to the central nervous system, and reproductive and developmental harms, like low birth weights and decreased lung function in infants.[169] High ozone pollution also results in increased hospital admissions, particularly for children,[170] and people 65 and older face an increased risk of premature death; even when ozone levels are below the national standard.[171]

The primary pollutants from motor vehicles are unburned hydrocarbons, nitrogen oxides, carbon monoxide and nitrogen dioxide. They also emit particulate matter, including microscopic solids or droplets in their exhausts as well as from brake and tire wear, and cause dust from roads to be re-suspended in the air. Some of these emissions can react to form ozone or secondary particulate matter. *Id.* at 3-146. There is also growing concern over the direct and cumulative effect of mobile air source toxics (MSATs). *Id*. at 3-94. Particulate matter can cause heart attacks, asthma, and difficulty breathing, and MSATs are known to cause serious health and environmental effects. *Id.* at 3-146,147. Asthma can be one of those adverse effects, and statewide asthma statistics show Milwaukee County has the highest rate of asthma-related emergency room visits and the second-highest rate of asthma hospitalization and hospital emergency department visits.[172]

On the basis of the best current science and recognizing the threat of PM2.5 concentrations to public health, on January 6, 2023 US EPA proposed to tighten the annual PM2.5 standard from 12 micrograms per cubic meter to between 9 and 10 micrograms per cubic meter. Environmental Protection Agency, *Proposed Rule for Reconsideration of the National Ambient Air Quality Standards for Particulate Matter,* 88 FR 5558 (Jan. 27, 2023). This proposed change of the NAAQs for this pollutant highlights the danger it poses to public health, and the need to analyze whether and to what extent this project will affect or exacerbate nearby

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Xiao Wu and Rachel C. Nethery, "Exposure to air pollution and COVID-19 mortality in the United States," *Harvard T.H. Chan School of Public Health* (April 2020).

[169] U.S. Environmental Protection Agency. *Integrated Science Assessment of Ozone and Related Photochemical Oxidants (Final Report*). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-10/076F, 2013. This document is more than 1200 pages long. Please advise us if you wish us to email the document to you and we will do so. Alternatively, the full document is available at this link: https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NCEA&dirEntryId=247492&fed_org_id=111.

[170] Ex 90, Strickland MJ, Darrow LA, et al. *Short-term associations between ambient air pollutants and pediatric asthma emergency department visits*. A J Respir Critical Care Med, 2010, 182:307-316; and Ex 91, Lin S, Liu X, Le LH, Hwang SA. *Chronic exposure to ambient ozone and asthma hospital admissions among children*. Environ Health Perspect. 2008; 116: 1725-1730; Mar TF, Koenig JQ. *Relationship between visits to emergency departments for asthma and ozone exposure in greater Seattle, Washington*. Ann Allergy Asthma Immunol. 2009; 103: 474-479;

[171] Ex 92, Qian, D. et al., *Association of Short-Term Exposure to Air Pollution with Mortality in Older Adults.* JAMA. 2017; 318: 2446-2456.

[172] Ex 34, Burden of Asthma Report. As noted *supra* Sec. I.E, Blacks and Latinx persons in Wisconsin are more likely to be exposed to these vehicular pollutants and more likely to be suffering from poor health, including asthma and heart disease.

concentrations of PM2.5, and if so to mitigate such harms to protect persons in the project area.

The SEIS acknowledges that "the project, along with other activities and developments in the study area, may have a cumulative impact on air quality in the region." *id*. at 3-93, although it also argues that the "project is not anticipated to cause adverse impacts to air quality." *Id*. at 3-153.

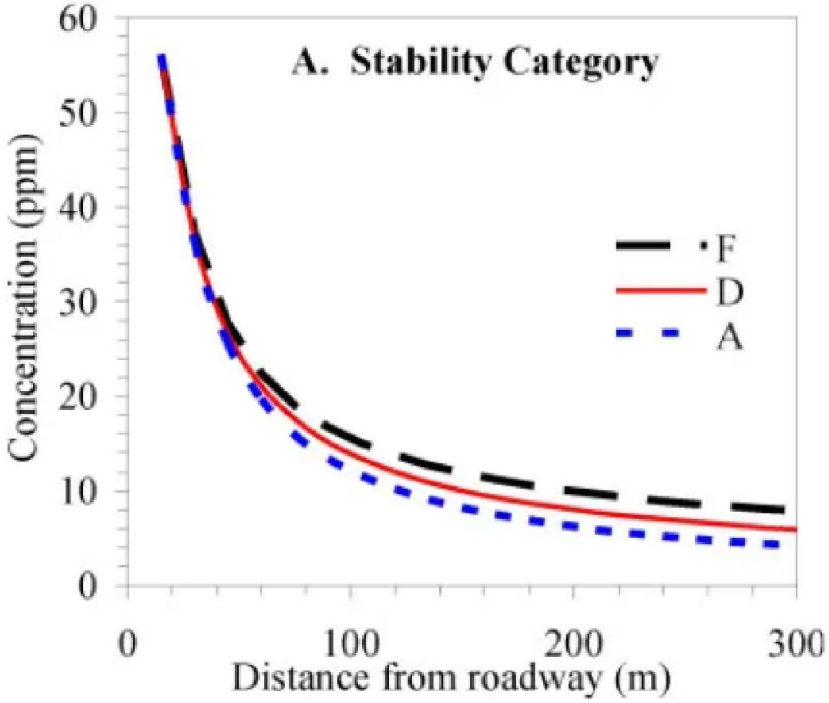
John Zamurs, Ph.D., an internationally recognized expert in transportation related air quality, climate change, sustainability and energy who has completed 11 years as Chair of the American Association of State Highway and Transportation Officials (AASHTO) Committee on the Environment, Air Quality, Energy and Climate Change Subcommittee, concluded that statement in the SEIS "cannot be supported or substantiated. This opinion is due to the fact that the SDEIS is inadequate and/or incomplete in many significant elements."[173] His Memorandum explains:

> **NEPA Analysis** The National Environmental Policy Act (NEPA) requires agencies to take a "hard look" at the potential adverse impacts of Federal actions on the environment and consider mitigation of those impacts. With regard to air quality, the SDEIS should quantitatively assess the potential of the project to cause an exceedance or exacerbate an existing exceedance to the following air pollutants: particulate matter less than or equal to 2.5 microns in diameter (PM2.5), particulate matter less than or equal to 10 microns in diameter (PM10), carbon monoxide (CO), and nitrogen dioxide (NO2). In setting short-term, health-based National Ambient Air Quality Standards for these pollutants, USEPA recognized that the concentration of these pollutants can vary substantially over short periods of time and over short distances. The Figure below illustrates how quickly concentrations can change over short distances. While the SDEIS states that the project would generally be within the existing footprint of the roadway, other sections of the SDEIS are clearer on the impact. For example, page 3-152 states "[T]he proposed improvements to the project corridor would have the effect of moving some traffic closer to nearby homes, schools, and businesses; therefore, there may be localized areas where ambient concentrations of MSATs could be higher under the 8- and 6-lane alternatives than under the No-build alternative." [174]While this statement

[173] Ex 93, John Zamurs, Ph.D., Zamurs and Associates, LLC, "I-94 East-West Corridor, 70th Street To 16th Street, Milwaukee County, Wisconsin. Supplemental Draft Environmental Impact Statement and Section 4(f) Evaluation Final Technical Memorandum: Air Quality," (Jan. 18, 2023), with appended Curriculum Vitae ("Air Quality Memo."), at 7.

[174] Research has demonstrated that the effect of highway pollution is highly localized, and populations who live in close proximity to highways may have significantly higher exposure to not only air toxics, but particulate matter, road dust, and other emissions and metals. *See, e.g.,* Ex 94, Askariya MH et al., "Near Road Traffic-Related Air Pollution: Resuspended PM 2.5 from Highways and Arterials," *Int'l Journal of Environmental Rsch and Public Health* (Apr 21, 2020); Ex 95 Krivoshto I. et al., "The Toxicity of Diesel Exhaust: Implications

speaks to MSATs (mobile source air toxics), it is also true that ambient concentrations of the criteria pollutants listed above will be higher, and therefore have a potential to cause an exceedance of one or more of the NAAQS. This would have an adverse health impact on nearby residents, visitors, and travelers. Examination of Attachment 1 of Attachment F- "Project Location Map and Alternative Figures" also indicates a reduced distance between the roadway and nearby receptors at some locations.



From "Prediction and analysis of near-road concentrations using a reduced-form emission/dispersion model"; Batterman, et al.; Environmental Health; June 2010

Therefore, the project sponsor must perform a quantitative air quality analysis, determine the concentrations of the various air pollutants, compare the derived concentrations to the appropriate NAAQS, and mitigate any potential adverse impacts to concentration levels below the appropriate NAAQS.

It is recognized that the Air Quality Section of Section 3 of the SDEIS discusses the potential for a CO analysis and concluded that an analysis is not necessary

for Primary Care," J. AM. BOARD FAM.MED. 55, 58 (2008). *Also cf.*, Ex. 96, Nicholas Mailloux et al, "Nationwide and Regional PM 2.5-Related Air Quality Health Benefits from the Removal of Energy Related Emissions in the United States," *GeoHealth 6*, c2022GH000603 (2022).

because there will be no signalized intersections operating at Level of Service D or worse. However, examination of the traffic analysis for this project indicates that the induced demand from the expansion of the roadway to the 8-lane alternative (the preferred alternative, Page 2-24, Section 2 of the SDEIS) has not been properly accounted for.[175] Using the Induced Travel Calculator, developed by the University of California at Davis,[176] this examination of the traffic analysis found:

- the added through lane would result in an additional 33 to 49 million additional VMT per year;
- the induced volume would be approximately 3,200 vehicles during the peak hour; and
- constructing an 8-lane freeway section would provide minimal additional capacity over the 6-lane alternative due to induced vehicle demand.

This finding seriously undermines the conclusion in the SDEIS that no signalized intersection will be operating at Level of Service D or worse. Nevertheless, if the conclusion regarding Level of Service in the SDEIS is correct, then a CO analysis may not be necessary. However, an analysis for the other pollutants (PM2.5, PM10, NO2) must be performed to understand what will be happening to localized concentrations of these pollutants.

The SDEIS refers to one ambient air quality monitor as meeting the NAAQS for PM2.5 as a partial reason for not analyzing the project for PM2.5 levels. However, that monitor is 1.3 miles from the project corridor. As shown by the Figure above, ambient concentrations at the monitor have little relevance to the actual concentrations that the local population is exposed to in the immediate project area. These analyses must be performed and documented before any concluding remarks regarding adverse air quality impacts can be made. Until this project is analyzed for these criteria pollutants and the results disclosed, the SDEIS does not meet the requirements under NEPA.

Id. at 1-3.

Moreover, as noted *supra* Sec. IV.A, the modeling of LOS for the SEIS did not provide *any* information regarding the LOS of the highway or of any intersection sites in the project area during the 249 highest annual peak volume periods, since it evaluated congestion on the 250th

[175] *See*, Ex. 51, Induced Demand Memo.

[176] Induced Travel Calculator, https://travelcalculator.ncst.ucdavis.edu/about.html.

highest peak volume hour, leaving those more congested periods unexamined, as well as conditions during accidents, incidents, and special events. [177]

It also is not clear from the SEIS whether the modeling of PM2.5 concentrations for the various alternatives included emissions of resuspended dust. A study in Texas used U.S. Environmental Protection Agency guidelines for quantitative hotspot analysis to predict traffic-related PM2.5 concentrations for a road network in Dallas. Results showed that the inclusion of resuspended dust in the emission and dispersion modeling chain increased prediction of near-road PM2.5 concentrations by up to 74%. The results also suggested elevated PM2.5 concentrations near arterial roads.[178] If, as appears to be the case, emissions from resuspended dust were not considered in the SEIS, the estimates of PM2.5 concentrations near the highway could have been even more dramatically underestimated.

Dr. Zamurs also found the Transportation Conformity analysis required by the Clean Air Act inadequate:

> **Transportation Conformity:** The Air Quality discussion in Section 3 of the SDEIS and the Air quality Appendix (Appendix F) conclude that this project is not a Project Of Air Quality Concern (POAQC) because there is not a significant increase in diesel vehicles. Yet Table 6-2 of Appendix F shows a 11.3 % increase in diesel trucks between the preferred alternative and the No-Build in 2030 and Table 6-3 shows a 13.3% increase in 2050. These are large percentage increases in diesel trucks. While the relevant section of the transportation conformity regulation (40 C.F.R. 93.123(b)(1)(i)) speaks to "a significant number of diesel vehicles", because of the wide range of possible levels of diesel vehicles on a variety of transportation facilities, a percentage change is the most relevant and appropriate parameter to consider.
>
> A common determinant for transportation agencies for triggering an air quality analysis is a 10% change in conditions leading to elevated concentrations of an air pollutant. For example, New York State Department of Transportation provides guidance for project-level air quality guidance in its Chapter 1 Air Quality of The Environmental Manual (TEM) using a 10% criterion. Specifically: a 10 % or more reduction in the source-receptor distance; a 10 % or more increase in traffic volume on affected roadways; and a 10% or more increase in vehicle emissions.
>
> The 13.3% increase in truck traffic associated with the preferred alternative is a substantial increase in the number of diesel vehicles due to the completion of the

[177] EPA's proposed tightening of the PM2.5 standard further undermines the conclusion in the SEIS that the project will not cause adverse impacts to air quality.

[178] Ex 94, Askariyeh, "Resuspended PM2.5."

> project and well exceeds the common 10% criterion. Further, the lack of an adequate consideration of induced demand (see the discussion in the **NEPA Analysis** above), the percentage of truck traffic increase due to the project is likely higher than the 13.3% shown. While the 13.3% increase in truck traffic should have triggered a project-level conformity determination for PM2.5, the higher levels of truck traffic with the inclusion of induced demand traffic should certainly determine the need for the conformity determination. Due to the well-documented health effects of diesel particulate matter, the reasons described here, and for the reasons described above in the **NEPA Analysis** discussion, this project must undergo a microscale PM2.5 analysis and a project-level conformity determination.

Id. at 3-4.[179]

Dr. Zamurs also found the Mobile Source Air Toxics analysis in the SEIS to be inadequate.

> **Mobile Source Air Toxics (MSATs):** The MSAT analysis as described in Section 3.20.2.4 is both incomplete and speculative. It is speculative because it is incomplete. The text from this Section reads "The proposed improvements to the project corridor would have the effect of moving some traffic closer to nearby homes, schools, and businesses; therefore, there may be localized areas where ambient concentrations of MSATs could be higher under the 8- and 6-lane alternatives than under the No-build alternative. The localized increases in MSAT concentrations would likely be most pronounced along the expanded freeway sections under the 8-lane alternative when additional travel lanes would be constructed. In summary, the localized level of MSAT emissions for the project's 8- and 6-lane alternatives could be higher relative to the No-build alternative at certain locations, but this effect could be offset by increases in speeds and reductions in traffic delays (which are associated with lower MSAT emissions). Also, MSATs would be lower in other locations when traffic shifts away from them. On a regional basis, USEPA's vehicle and fuel regulations, coupled with fleet turnover, will cause substantial reductions over time that, in almost all cases, will cause regionwide and corresponding localized MSAT levels to be significantly lower than today."[180] (underline added). Considering the potential health impacts

[179] In addition, as noted *supra* Sec. II.B, the Conformity Analysis only considered the "Fiscally Constrained Transportation System" - the plan which contemplates significant transit reductions AND which SEWRPC and the SEIS found would have a racially discriminatory effect. *Supra* Sec. II.A. Thus, the analysis is entirely based upon a plan that is known to be discriminatory.

[180] We note that even if WisDOT's assumptions were true on a regional basis, the localized impact on adjacent minority and/or low-income populations could be significant and unacceptable, and has not been analyzed.

on the local communities, this speculative language is completely inadequate.

The MSAT analysis shows that most of the MSATs analyzed would increase compared to the No-Build alternative. The chemicals that comprise the MSAT analysis are carcinogens or have adverse respiratory and cardiac effects. (Note: the increases in MSAT emissions would be even higher compared to the No-Build alternative if induced demand had been accounted for.) Thus, the project with its increased emissions of these poisonous substances, may severely affect the health of nearby residents and visitors. To determine the true impact of the project, the project sponsors must complete a full MSAT analysis. They would do this by:

- determine the appropriate screening level from the related hazardous pollutant for which the State of Wisconsin has established air quality standards (Table A, Chapter NR 445, Wis. Adm. Code, State Hazardous Air Pollutant Rule) to compare to the MSAT compounds emission rates analyzed for the SDEIS

- determine appropriate concentration levels for each MSAT for each appropriate time scale

- determine background concentrations for the appropriate MSAT pollutants by including other emissions sources in the project area, such as hazardous waste generators, diesel particulate and air toxics emitters, Superfund sites, etc.

- compare against appropriate Table A air quality standard

- perform a health risk assessment to indicate increased cancer risk and other disease risks

- mitigate, as possible, at locations of unacceptable increased cancer risk and other disease risks

- determine if the outcome is acceptable to build this project.

The analytical approach described above and the preparation of a health risk assessment to assess health impacts of MSATs is not new. The California Department of Transportation has performed health risk assessments for its transportation projects (e.g., Schuyler Heim Bridge Replacement and Truck Expressway) using guidance provide the by the California Air Resources Board (http://www.airquality.org/Residents/CEQA-Land-Use-Planning/Mobile-Sources-Air-Toxics-Protocol). It is not clear why the residents in and around the project area deserve less protection than do the residents of California!

Id. at 4-5.[181]

Thus, the SEIS falls far short of adequately describing and analyzing the air quality impacts of the Preferred alternative and the other alternatives that have been considered. Its conclusions that the proposed expansion of the highway is not likely to adversely affect air quality are simply unsupported and erroneous.

ii. The SEIS fails to address racially disparate air quality and associated health effects.

The SEIS fails to meaningfully evaluate the nature and magnitude of health effects on persons in the study area – who are predominantly persons of color. As the maps created with the environmental justice screening tool show, *supra* Sec. I.E, bringing more traffic through dense neighborhoods imposes even more risks on those communities – including exposure to diesel emissions, P.M. 2.5 and ozone - especially on communities of color. *See also*, DEIS Comments at 39-42; FEIS Comments at 19-20. While the SEIS does admit that there are racial disparities in asthma - including in hospitalization rates - it also claims there is no adverse air quality effect on environmental justice populations. Yet rather than investigate and analyze the effects of asthma, or other health and air quality issues, on persons of color - even by the minimal effort of using the EJ screen mapping tool - the SEIS instead argues that no disproportionate adverse effects exist. *Id.* at Table 3-18, Sec. 3.9.4.5. Part of this argument also depends upon the unsupported conclusion, addressed above, that expansion of the highway will not adversely affect air quality.

Dr. Zamurs also addresses the relationship of the air quality analysis to environmental justice.

> **Environmental Justice** The Environmental Justice discussion (Section 3.9) incorrectly concludes that there are no adverse air quality impacts to environmental justice populations. It is incorrect because the SDEIS failed to analyze and disclose potential impacts, as shown in the **NEPA Analysis**, **Transportation Conformity**, and **Mobile Source Air Toxics** discussions above. The potential for the Preferred 8-Lane Alternative to result in higher traffic volumes than considered in the SDEIS because of induced travel (see above discussion in the **NEPA Analysis**) further brings into question that conclusion. Before any conclusion can be made with respect to impacts on the environmental justice communities, the analyses

[181] The process used by US EPA to establish risk-based standards for carcinogenic pollutants is based on the goal of maximizing the number of people with risks of less than 1 in a million from a source. However, "[t]he results of this statutory two-step process do not guarantee that cancer risks from exposure to air toxics are less than 1 in a million; in some cases, the residual risk determination could result in maximum individual cancer risks that are as high as approximately 100 in a million." SEIS, Mobile Source Air Toxics Analysis, Appendix F-3, p. 87 of PDF. Protecting against even that much higher 100 in a million level of risk, of course, would depend upon following the proper screening and analysis procedures described by Dr. Zamurs.

described above must be performed and disclosed.

Section 3.9 does disclose that most frequently it is the environmental justice communities that are closest to I-94 in the project area. Being closest to the highway, they are subject to the highest concentrations of air pollutants emitted from vehicles as they travel and idle (during congested periods) on the roadway (see the Figure above) with the concomitant negative health effects. In addition, there are additional air quality sources and stressors in environmental justice communities. Industrial and commercial emissions sources such as, power plants, freight yards, rail yards, truck terminals, bus terminals, ports, depots, etc. have historically been sited in environmental justice communities and disproportionately negatively affects these communities. The increased emissions from this project would then add an additional emissions burden to these communities. The Environmental Justice discussion in the SDEIS and Appendix
D must address this aspect. The project sponsor must inventory the project corridor and the nearby affected roadway network to identify these types of industrial and commercial emission sources and then assess the impact of the project's new and additional emissions, and downgraded air quality, on those communities already suffering from excess air pollution.

To get a true potential impact on environmental justice populations, the project sponsors must perform the studies described above. In doing so, they must ensure that the modeling has adequate receptor placement in environmental justice communities to accurately cover these communities and, thus, be able to ascertain whether there is an adverse air quality impact and employ mitigation measures to lessen the impact, if needed.

USEPA recognizes the importance of appropriate and thorough consideration of potential impacts to environmental justice communities from various types of projects. It recently issued guidance on addressing environmental justice in air quality permitting.[182] Although this project does not require an air quality permit, the principles contained in that guidance should be applied to
this project as well. The guidance calls for:

- An evaluation of existing public health data about the affected community;

- An evaluation of the permitting action's potential health and non-health adverse effects (e.g., noise, odor, and traffic);

[182] Ex. 97, "Principles for Addressing Environmental Justice Concerns in Air Permitting," *EPA Office of Air and Radiation* (Dec. 2022).

- An evaluation of the cumulative impact of the permitting action under consideration together with impacts from other regulated and non-regulated sources of pollution in the community;

- An evaluation of the potential effects of the permitting action under consideration on the health of a population and the distribution of those effects within the population; and

- An evaluation of potential methods for minimizing or mitigating adverse effects on the community.

> These principles are similar to the analysis that is called for above. Only by performing a complete air quality analysis, incorporating consideration of all transportation-related NAAQS pollutants, induced demand, health risk assessment, and environmental justice principles will the true impact on environmental justice communities be able to be assessed.

Id. at 5-7; *see also supra* Sec. I.E, *infra* Sec. IV.A.

In addition, it is not only asthma that will burden and harm communities of color, as the SEIS suggests by virtually neglecting other diseases and the intersection of burdens on people of color. *See, e.g.,* DEIS Comments, Ex. M at 13 ("a large proportion of the population living within 150 and 300 meters from Interstate 94 are either a member of a racial minority group or below the poverty level, meeting the Environmental Justice population criteria. The CDC indicates a 'triple jeopardy' effect amongst these populations, who are known to suffer from poor nutrition and inadequate health care coverage and also tend to be at higher risk of exposure to residential air pollution, suggesting disproportionately larger adverse health effects from an increased exposure to air pollution."). Again, these issues are not addressed, avoided, or minimized.

The DEIS admitted that the preferred alternative may contribute to a cumulative air quality impact, *id.* at 3-93, but also argued that the volume increase and closer proximity to homes and businesses would be offset by increased vehicle speeds – *id*. at 3-98 to 3-99 - an assertion of questionable credibility since in the past the agencies' own consultants privately admitted that increasing highway speeds may *increase* emission-related air pollution.[183] Now, the agencies admit:

> [T]he proposed improvements to the project corridor would have the effect of moving some traffic closer to nearby homes, schools, and businesses; therefore, there may be localized areas where ambient concentrations of MSATs could be higher under the 8- and 6-lane alternatives under the No-build alternative.

[183]DEIS Comments, Ex. KKK.

SEIS at 3-152.[184] They again argue that increased speeds will result in lower emissions and also essentially deny that the project will create air quality or health problems because, they say, in the long run the air will get cleaner because of vehicle emissions standards. *Id.* This is not an analysis that compares the consequences of reconstructing the highway with or without added lanes. And the "long run" is not going to avoid the harms that will occur in the coming years to those living near the highway, if not decades, until the claimed improvements in emissions occurs. Finally, whether or not air quality improves, there is evidence indicating that racial disparities in exposure persist,[185] an obvious disproportionate impact on persons of color.

Nor does the SEIS collect data on, much less analyze, racially disparate health issues that already exist and could be exacerbated by the project. *Supra* Sec. I.E. In other words, even if white persons and persons of color had similar exposure to pollutants, persons of color – who may have pre-existing health conditions and/or less access to health care – could still be *disproportionately adversely affected* by this pollution.

Moreover, the failure to meaningfully evaluate (and disaggregate) the impacts of the entire project, increased vehicle traffic (including traffic induced by the expansion), increased freight traffic, increasing traffic speeds (which can increase emissions), construction-related air quality problems, the cumulative air quality effects of all these issues, and/or the cumulative air quality effects of all the highway projects in the region, is unreasonable and deficient. And the failure to avoid, minimize and mitigate these effects – including disproportionate adverse effects on persons of color – is discriminatory as well as unreasonable.

At the same time, the SEIS also completely fails to compare the relative air quality and health effects of its preferred alternative to any alternative that includes reconstructing the existing interstate highway lanes, addressing prioritized safety improvements, greatly increasing public transit service along the corridor, and seeking to reduce VMT and ADT. It does this even though the Clean Air Act itself, 42 U.S.C. § 7408(f)(1)(a), includes numerous "processes, procedures, and methods to reduce or control pollutants in transportation; reduction of mobile source related pollutants; reduction of impact on public health" that relate to increasing transit and decreasing SOV travel – including "programs for improved public transit," "programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use;" "programs for the provision of all forms of high-occupancy, shared-ride services;" and "programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-

[184] Ex. 93, Zamurs, Air Quality Memo at 2 shows that pollutant concentrations are higher the closer they are to the roadway.

[185] *See, e.g.,* Ex 30, Clark, "Changes in transportation related air pollution exposures." ("absolute NO2 exposure disparities by race-ethnicity decreased from 2000 to 2010, but relative NO2 exposure disparities persisted, with higher NO 2 concentrations for nonwhites than whites.")

occupant vehicle travel." *Id.* at §§ 7408(f)(1)(a)(i), (vii), (viii), (xiv). See also DEIS Comments at 42. Thus, it fails to look at methods to *avoid* the identified adverse effects, even though the agencies have previously admitted, in the DEIS at Sec. 3.28.2.1, that minority residents disproportionately bear those effects.[186]

B. The SEIS Fails to adequately or accurately address Climate Change

The first footnote in these comments cites the federal executive order "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" and the Governor's Task Force on Climate Change Report." That is because these policy statements recognize the importance and priority of addressing climate change and environmental justice and commit the state and federal administrations to addressing both issues.

There is more. The FHWA Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America[187] states:

> Although States and other Federal-aid recipients ultimately select projects consistent with 23 U.S.C. 145, and FLMAs consistent with 23 U.S.C. 201, this Policy will inform that decision-making. Once implemented, this Policy will help improve safety and accessibility for all road users*, reduce the environmental impact of highway and bridge projects, including curtailing transportation greenhouse gas emissions that contribute to climate change,* better accommodate new and emerging transportation technologies, reduce relocations and otherwise ensure that transportation agencies do not expand roadways in inequitable ways that disproportionately impact disadvantaged communities, and support the efficient and effective use of Federal funds." (emphasis added).

In Wisconsin, the Governor's Task Force Report noted that transportation sector GHG emissions are the second-largest source of economy-wide emissions, representing 24 percent of total emissions in 2017.[188] Like the FHWA Policy, it concludes:

> WisDOT transportation planning and development should analyze and report the carbon emissions and environmental justice impacts associated with transportation assets. The carbon and climate impact analysis should include an evaluation of a

[186] Another analysis that is critical but absent is between the amount of harmful air pollution emissions per passenger in individual vehicles, and that emitted per transit rider. Moreover, in view of the ongoing program of reconstructing the region's interstate/freeway system, and constructing additional highway lanes on up to 127 miles of the system, an analysis of the cumulative health impacts of the air pollution resulting from all of those expansion lanes, in comparison to the impacts of expanded transit ridership, needs to be done.

[187] Ex 98 (Dec. 16, 2021).

[188] Ex. 1 Governor's Task Force on Climate Change Report at 44.

> project's potential impacts on VMTs, transportation-related carbon emissions, and an assessment of climate resilience.

Id. at p. 48.

State and federal administrations have committed to policies that prioritize addressing climate change because it is not simply a critical future issue, but a problem that is *already* affecting our communities and harming the health of people in Wisconsin. These harms include heat-related illness, worsening chronic illnesses, injuries and deaths from dangerous weather events, infectious diseases spread by mosquitoes and ticks, illnesses from contaminated food and water, and mental health problems. The health of anyone can be harmed by climate change, but some of us face greater risk than others. Children, athletes, pregnant women, the elderly, some communities of color, people with chronic illnesses and allergies, and the poor are more likely to be harmed. Elevated risks for mortality associated with exposures to high ambient temperatures are also reported for Blacks as compared to Whites, a finding that persists once air conditioning use is accounted for. *Id.* at 252.

Accordingly, it is essential that the environmental review for this project adequately and accurately analyzes and addresses the climate change impacts of the Preferred alternative and of reasonable alternatives.[189] Yet rather than using the best available science, [190]and reasonably analyzing and addressing the greenhouse gas emissions of this project, the SEIS failed to consider the actual greenhouse gas emissions that would result from its various alternatives – including those during construction of new pavement, those resulting from maintenance of each of the considered alternatives (all of which would greatly add to roadways), and those from induced traffic generated by the added roadways. In addition, it failed to include any assessment of climate resilience.

Instead, the greenhouse gas emissions analysis in the SEIS is both incomplete and troubling. As Dr. Zamurs explained:

> It is incomplete because it does not include construction and maintenance greenhouse gas emissions. This analysis should include emissions from construction equipment emissions, excess emissions due to detours and lane narrowing during construction, and maintenance emissions of maintaining the expanded roadway (*e.g.*, snow plowing, vegetation management, routine maintenance). Chehovits and Galehouse ("Energy Usage and Greenhouse Gas

[189] We also incorporate by reference comments regarding climate change previously submitted on the DEIS and FEIS by 1000 Friends of Wisconsin, Sierra Club —John Muir Chapter, and WISPIRG Foundation.

[190] Ex. 99, Patz J. et al., "Medical Alert! Climate Change Is Harming Our Health in Wisconsin," *University of Wisconsin-Madison* (2020) at 4-5,8,24; Ex 100, Crimmins, A. et al., Executive Summary, "The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment," *U.S. Global Change Research Program* (2016) at 4.

> Emissions of Pavement Preservation Processes for Asphalt Concrete Pavements", https://www.pavementpreservation.org/icpp/paper/65_2010.pdf); calculated that construction of a new roadway lanes (which would be the case for this project) generates 24.1 lbs of greenhouse gas emissions per square yard. A more robust estimate can be provided by using readily available tools for estimating highway construction and maintenance greenhouse gas emissions. The most commonly used techniques are: Greenhouse Gas Calculator for State Departments of Transportation (GreenDOT) (http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-5(58)_FR.pdf); and Infrastructure Carbon Estimator (ICE) (https://www.fhwa.dot.gov/environment/sustainability/energy/tools/carbon_estimator /). Other tools are available as well. The greenhouse gas emissions associated with construction and maintenance must be included in any estimates of the greenhouse gas emissions due to the project in order for the public and decision makers to fully understand the impact of the project on greenhouse gas emissions and climate change.[191]

Further, the SEIS shows increased emissions for all Build alternatives, and the Preferred Alternative (8-lane Diverging Diamond Interchange Interchange) comes in with the second highest greenhouse gas emissions of all of the alternatives that were considered. SEIS, Table 3-36. And this was without even considering emissions during construction, from maintenance, and from induced demand.

> Accounting for induced demand, the increase in greenhouse gas emission for all the alternatives, including the Preferred alternative would be even higher compared to the No-Build alternative. Although the SDEIS is not clear, the greenhouse gas emissions shown presumably are annualized emissions, meaning that those emissions will be occurring every year. Many transportation projects that improve the efficiency of the roadway and roadway network, have long term greenhouse gas emissions reduction benefits, showing an overall emissions reduction in the long-term after accounting for the short-term emissions from construction and maintenance (i.e., the so-called "payback period"). However, not so for this project. Adding in the yet-to-be-determined greenhouse gas emissions from construction and maintenance with the ongoing operational emissions (as shown in the SDEIS), this project becomes a long-term greenhouse gas emitter and an unnecessary contributor to climate change.
>
> Approval of this project would seemingly violate the stated policies of both the Federal Highway Administration and the State of Wisconsin.[192]

[191] Ex. 93, Zamurs, Air Quality Memo at 7.

[192] Ex. 93, Zamurs, Air Quality Memo at 8.

By increasing greenhouse gas emissions, SEIS at 3.20.2.5, this project clearly fails to comply with the FHWA's Dec. 16, 2021, Policy. And since the SEIS has not fully analyzed and reported the project's potential impact on transportation-related carbon emissions, and has not included an assessment of climate resilience, it fails to comply with the requirements of the Governor's Task Force Report.

Dr. Zamurs concludes with a description of what needs to be done to comply with these policies.

> The Wisconsin Department of Transportation should evaluate the potential impacts of climate change on its transportation infrastructure, in general, and on the transportation facilities associated with this project, in particular. Extreme weather effects due to climate change (such as extreme rainfall rates, excessive temperature events, etc.) should be assessed: 1) for their potential effect on the I-94 corridor under consideration and whether any design, operational or maintenance practices should be amended to account for these effects; and 2) whether this project could exacerbate any expected impacts of climate change. This could be especially impactful to the environmental justice populations that are in the project area, especially those closest to the I-94 roadway.

Id. at 8-9.

Another climate change impact that needed to have been considered is that the project will cause the destruction of up to 20 acres of urban woods, including about 10 acres considered suitable habitat for the threatened (recently endangered) northern long-eared bat, with a maximum area of 3 acres of trees taken in one spot. SEIS at 3-127. The woodlands function as a carbon store, turning carbon dioxide from the air into wood and roots. The added roadway will induce more miles of car travel, increasing greenhouse gas emissions. It will also add to the urban heat island effect resulting from more acres of paving absorbing heat from the sun.[193]

Climate change, both in terms of considering greenhouse gas emissions and the climate impacts from a changing climate, involves serious matters that must be evaluated, analyzed, and addressed in all aspects of transportation, but especially for the construction and operation of a major transportation project such as the I-94 project under consideration here.[194] Unfortunately,

[193] *See*, Ex 101, "DNR Shares Results From Summer 2022 Milwaukee Heat Mapping Campaign," Wisconsin DNR (Jan. 26, 2023).

[194] Another analysis that has not been, but should be, conducted is between the amount of greenhouse gas emissions per passenger in individual vehicles and that emitted per transit rider. Moreover, in view of the ongoing program of reconstructing the region's interstate/freeway system, and constructing additional highway lanes on up to 127

the SEIS fails to do that. And thus, of course, the SEIS also fails to address the associated racial and environmental justice impacts of climate change. "In the United States, people of color are found to be particularly more vulnerable to heatwaves, extreme weather events, environmental degradation, and subsequent labor market dislocations."[195] "The historical discriminatory practices in housing, education, employment, and healthcare [all existing in this region, *supra* Sec. I] all played a role in the manifestation of these inequalities that contribute to greater vulnerability to climate impacts." *Id.*

C. The Preferred Alternative Will Worsen Water Quality and Quantity Problems, and the SEIS Fails to Adequately Describe and Address These Effects

The SEIS fails to accurately describe and to adequately address the impacts on both water quantity and water quality of the stormwater impacts of this project, as well as the cumulative impacts of this project together with and in combination with the other major highway reconstruction and expansion projects that have added, are adding, or will be adding impermeable surfaces within the Milwaukee River watershed, which includes the Menomonee and Kinnickinnic Rivers.[196] This project alone will increase the highway's impervious surface by 25% (6-lane alternatives) or 31% (8-lane alternatives),[197] and the SEIS admits: "The Build alternatives could cumulatively impact water quality and quantity along with other past, present and future actions." SEIS, APP. G at 41. Similarly, it states:

> The 8- and 6-lane alternatives would increase impervious area and therefore increase the amount of stormwater runoff from I-94. However, the alternatives would also provide the *opportunity* for BMPs to treat the runoff and bring I-94 in compliance with Wisconsin's stormwater management regulations that limit the amount of pollution in runoff.

Id., at 3-115. This appears to be an admission that WisDOT's highway is currently not in compliance with the state stormwater management regulations that are required under the Clean Water Act.[198]

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miles of the system, an analysis of the cumulative health impacts of the air pollution resulting from all of those expansion lanes, in comparison to the impacts of expanded transit ridership, should be done.

[195] Ex 102, Patnaik, A. et al., "Racial Disparities and Climate Change," Princeton Univ. (2020).

[196] Since 2003, plans called for adding additional lanes to 127 miles of the regional freeway system. FEIS, App. D-57.

[197] SEIS at 3-115, Table 3-21 and APP. G at p. 41. The SEIS does not appear to identify how many acres of impermeable surface the highway corridor currently contains, nor how many additional acres will be added.

[198] As discussed below, the SEIS makes it clear that WisDOT is only *considering* various stormwater management techniques, and is not making any commitments to do anything that goes beyond its own policies. This project provides an *opportunity* for improving the quality of runoff from the highway, but no reason for anyone to believe that any significant portion of that opportunity will be implemented.

Among the reasons that many of the signers of these comments requested that a new or supplemental environmental impact statement be prepared for this project was to *update* circumstances that had changed, including changes in knowledge regarding climate change or other relevant factors, changes in policies and rules, as well as changes in patterns of human behavior. Sadly, it appears that none of the knowledge regarding changing weather patterns, changes in the priority given to addressing climate change, or changes in local conditions and regulations regarding protection of water resources in the Milwaukee River watershed were given any discernible attention in the SEIS. It appears that the information regarding the Menomonee River fisheries has not been updated since 2013. *Id*. at 3-112. Nor does the SEIS indicate any awareness of the preparation and EPA approval of the December 2021 Nine Key Element Plan for Restoration of the Menomonee River.[199] Since the Plan is not even mentioned, it is hard to imagine how WisDOT intends to keep its proposed high expansion from preventing or complicating the River's restoration or that it has any intention to avoid doing so.

i. <u>The SEIS Fails to Adequately Describe or Mitigate Water Quantity Impacts</u>

In order to protect public health and safety and to improve the area's water resources, MMSD and local communities have invested billions of dollars to expand and upgrade the metropolitan area's sewers and wastewater treatment infrastructure, and hundreds of millions of dollars on flood management and flood prevention infrastructure. MMSD's efforts at the time the FEIS was issued included local stormwater management controls that were necessary in a highly urbanized area like Milwaukee. MMSD's rules established standards for stormwater discharges that were applicable to redevelopment as small as 2 acres. *See*, FEIS, App. E-20. Controlling both the rate and the volume of stormwater discharges was necessary to avoid damage to waterways, reductions in water quality, and combined sewer overflows. FEIS, App. D-78, App. E-20.

Years ago, the Milwaukee Metropolitan Sewerage District (MMSD) made clear that:

> Even without additional runoff, the water resources affected by this project face many challenges. Current problems include severe erosion, bank failure, crumbling historic retaining walls, and incised channels. In addition, high levels of pollutants have caused the Department of Natural Resources to classify Honey Creek and the Menomonee River as impaired. The redesigned highway may add large areas of impervious surface. This new impervious surface will increase runoff volume and peak flow rates. Also, more impervious surface means more pollutants. Increasing volumes, increasing peak rates, and increasing pollutants will make the already degraded receiving waters even worse, unless the WisDOT acts now to fully protect these water resources.

[199] Ex 103, Kaitlyn Taylor & Cheryl Nenn, "The Menomonee River Watershed Updated Implementation Plan," (Dec. 2021).

FEIS, Appendix D-78. MMSD also emphasized then that runoff management needs to go beyond ensuring that the regional flood does not increase by more than 0.01 foot, as that standard alone "neglects the significant harm caused by the less severe storms that are much more frequent." *Id*.

However, as a result of changing precipitation patterns, continuing development, and updated understanding of increasing flood risks, MMSD's stormwater rules have become more stringent since the FEIS and now apply whenever: "(c) Affected area 1. The development or redevelopment involves a net increase of 5,000 square feet or more of impervious surface; or 2. Demolition or construction during redevelopment will disturb an area larger than 2 acres.[200]"

The preferred alternative would add up to 49 acres of impervious surface. Yet WisDOT generally describes the impact of stormwater from individual reconstruction/expansion projects as either of little significance, or, as it does here, by stating that it will comply with Wis. Adm. Code Trans. 401. That requires a 40% reduction in suspended solids.[201] With regard to managing stormwater runoff flows, the SEIS states: "Per WDNR's request, the project's conceptual stormwater management plan should *evaluate* the impact of runoff release rates for 100-year and 2-year storm events." *Id*. at 3-116 (emphasis added). The agencies consistently refuse to be bound by necessary, more rigorous local stormwater requirements that go well beyond WisDOT's Trans 401 standards (which while possibly sufficient to manage stormwater for transportation projects in less developed areas, are inadequate here). Instead, it describes a variety of best management practices which it might *consider*, but states that it will consider and determine for itself what steps, if any, it will take to go beyond its own requirements and policies.[202] There is no commitment that the agency will implement any such steps, only that it will work to "identify" them.[203]

Thus, the SEIS fails to describe the impact on the waterways, on flooding, and on water quality of the project's failure to comply with local stormwater management standards, and provides no information on the cumulative impact of increased stormwater discharges from the

[200] Ex 104, Milwaukee Metropolitan Sewerage District, Rules Ch. 13, Surface and Stormwater, (March 2019).

[201] SEIS at 3-114.

[202] The FEIS stated that "WisDOT will engage in further discussions with WDNR, MMSD, and other partner communities during design to identify additional stormwater management measures that may be cost-effective to implement, consistent with WisDOT's stormwater management policies." FEIS at 3-105. The SEIS states that "WisDOT would engage in further discussions with WDNR, MMSD, and other partner communities during design to identify additional stormwater management measures that may be cost effective to implement, consistent with WisDOT's stormwater management policies." SEIS at 3-115. This includes no commitment to *do anything* to reduce or mitigate the impacts.

[203] Given the lack of commitment to actually implementing anything beyond Trans 401, WisDOT's promise that the quality of the discharges from the highway will be reduced, even if the quantity increases, is without any foundation.

totality of regional freeway expansion/lane addition projects in the watershed.[204] This is inadequate and unreasonable.

ii. The SEIS Fails to Adequately Describe the Water Quality Impacts of the Proposed Expansion

The SEIS briefly describes the water quality impacts of stormwater runoff from highways as follows:

> Water quality impacts can occur due to stormwater runoff from highways. Runoff pollution is rainwater or melting snow that washes off roads, bridges, parking lots, rooftops and other impermeable surfaces. As it flows over the surfaces, the water picks up dirt, rubber and metal deposits from tire wear, antifreeze and engine oil that has dripped onto the pavement, pesticides and fertilizers, and discarded cups, plastic bags, cigarette butts, pet waste and other litter. The contaminants are carried into lakes, rivers, and streams and have the potential to affect water quality, vegetation, and associated aquatic life.

SEIS at 3-113.

a. Road Salt

The SEIS briefly discusses the impact on water quality of chlorides from use of road salt on highways, saying "impacts of road salt can adversely affect roadside vegetation, streams, and groundwater" and noting that "chloride is thought to be more harmful to plants than sodium." SEIS 3-113, 114. There is *no mention* that the fish and other aquatic life in Milwaukee's rivers and streams, including in the Menomonee River that runs through and along the highway corridor, *already suffer from toxic levels of chlorides* during or after every snowy winter. The SEIS acknowledges that the Menomonee River is an "impaired water" under Section 303(d) of the Clean Water Act, but fails to mention that one of the impairments is for excessive chlorides in Honey Creek and the Lower Menomonee River, both of which will receive stormwater discharges from this section of I-94. *Id.* at 3-112. There is no mention, much less any evaluation of the impact on Milwaukee's water resources of adding more road salt from the added impervious roadways – either from this individual project, or cumulatively from the lanes already added in other expansion projects, currently being added, or being proposed to be added here or in future projects. That is a significant deficiency, as the impact on aquatic life of significant discharges of chlorides into our already impaired waterways is already of

[204] See also Milwaukee Riverkeeper's January 27, 2015 Comments on the DEIS.

considerable current concern.[205],[206] The Clean Water Act prohibits dischargers from from adding new or increased discharges of pollutants into waterways that are already impaired by those pollutants, and while the SEIS notes that TMDLs (total maximum daily load limits) have been established for some pollutants, there is nothing in the SEIS to demonstrate that WisDOT has received wasteload allocations, or can receive valid discharge permits to discharge increased amounts of any pollutants, much less suspended solids (sediment) or salt into this watershed. *Id*., at 3-113.

b. Toxics and Particulate Matter

As noted above, the SEIS describes a variety of pollutants deposited on highways by vehicle traffic or otherwise. However, it fails to provide any information about just how harmful some of those substances are, and it gives no consideration to the impact of an increase in the discharge of those pollutants on I-94 if additional travel lanes and ramps (including those on the Interchange) are constructed. And the failure of the SEIS to properly account for induced traffic, supra Sec. IV. G, means that the volume of traffic on the 8-lane alternatives will be even larger than the SEIS predicts – so the increase in the amount of these pollutants will similarly be larger than the SEIS could have considered.

Tire wear is one of the sources of highway pollution mentioned in the SEIS. Recent research has found that 6PPD-quinone, an oxidation product of an additive intended to prevent damage to tire rubber from ozone, is acutely toxic to Coho salmon even at very low concentrations.[207] Emissions Analytics, a British firm:

> has been testing for the rate of tyre [sic] wear emissions in real-world conditions over a number of years, across thousands of miles on many different types of tyre. The current average wear rate for a whole vehicle is 67 mg/km from new tyres, and this is predicted to halve over the tyres' lifetime. Therefore, particulate mass generated from tyre wear is nearly 2,000 times greater than that from the tailpipe of modern ICE vehicles, as previously reported. In addition, our testing suggests

[205] *See* Ex 105, Steven Corsi et al., "River chloride trends in snow-affected urban watersheds: increasing concentrations outpace urban growth rate and are common among all seasons," *Science of the Total Environment 508* (2015), pp. 488-491.

[206] Lincoln Creek, which flows through the city's North Side neighborhoods, and Wilson Creek, which drains urban land including the airport, have had chloride levels that are five times the level that is instantly toxic to fish. The creeks downstream of Interstate 94, like Honey Creek, also have notably high levels." Ex 106, Madeline Heim & Caitlin Looby, "Road Salt is Washing into Wisconsin's Major Waterways, with Alarming Results," *Milwaukee Journal-Sentinel* (Jan. 9, 2023).

[207] Ex 107, Tian Z. et al., "A Ubiquitous Tire-Rubber-Derived Chemical Induces Acute Mortality," *Science* (Dec. 3, 2020).

> for every 500 kg extra vehicle weight – about the mass of a large battery – tyre wear emissions rise by 21%.[208]"

They also found: "By our estimates, around 10% of the total tyre particulate matter is airborne – primarily the ultrafine particles – but a majority is often said to settle on the land." *Id*.

Fishing for Coho salmon is an important part of the Lake Michigan recreational fishing industry, generating significant tourism business, so this information regarding the toxic aquatic threat resulting from tire wear is something that needs to be considered as the agencies decide whether to spend $1.25 billion on this project that would add lanes and ramps to I-94, and would increase the volume of traffic and tire wear.[209]

In addition, if this information about the huge contribution of particles from tire wear to the emission of particulates from vehicles has not been considered in the Air Quality analysis of the SEIS, as it seems likely is the case, that is another serious deficiency in the SEIS.

D. The DEIS Failed to Adequately Consider the Positive Effects of a Plan that Increases Transit, especially for Communities of Color.

Because WisDOT did not consider an alternative to meet part of the project needs and purposes by significantly investing in expanding transit, it also completely failed to consider the effects of such a plan. It is clear that an objective analysis of the effects of a transit-inclusive alternative which greatly increases transit would redound to the social and economic benefit of African-American and Latino residents.[210] "Using opportunities to enhance and increase sustainability in communities and neighborhoods is desirable." EJ/NEPA. Expanding transit could, of course, improve mobility and job access, as well as access to non-work destinations such as schools, medical care and entertainment. *See generally,* Vision 2050 (2020 Update) Vol. III, Ch. 1 at 30-46; *see also*, DEIS Comments at 27-29.

A transit-inclusive plan, such as a BRT or fixed-guideway plan, could also provide additional employment to the disproportionately minority residents of the study corridor. This could include "jobs directly created in construction and related employment, as well as the employment that occurs as the initial expenditures for [light rail] LRT ripple through the regional economy," especially if coordinated with other kinds of economic development. See DEIS Comments at 27-29; FEIS Comments at 10-11. Yet the SEIS failed to evaluate such potential economic and employment benefits of LRT, BRT, or other transit alternatives.[211]

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[208]Ex 108, "How Tyre Emissions Hide in Plain Sight," *Emissions Analytics*, *Newsletter* (Jan. 2023); *see also*, Ex 109, Karen McVeigh, "Tyre Dust: the 'Stealth Pollutant,'" *The Guardian* (July 25, 2022).

[209] Whether 6PPD-quinone is similarly toxic to other fish species, or to species other than fish, also needs to be explored.

[210] It also would benefit persons with disabilities, who are also more likely to be transit dependent.

[211] The SEIS, at 3-195, touts a claim that the project could "provide economic benefits that would be most

In addition, a transit-expanding plan, such as a BRT or fixed-guideway plan, could provide economic development benefits to those disproportionately-minority neighborhoods. Dramatic economic development along improved transit routes has occurred in other cities. *See, e.g.,* DEIS Comments at 28. Presumably such benefits could accrue if LRT or BRT were part of the current project, and the failure to analyze those benefits – and to determine whether providing them helps provide minority communities with a fair share of the benefits of transportation system investments - is unreasonable and improper.

The DEIS' failure to consider the benefits of expanding transit is also a significant omission given that years ago WisDOT determined that transit has positive environmental, social and economic effects.

> Transit is often the only transportation option for many individuals, and it is an alternative option for others. Robust transit service also helps attract and retain businesses and jobs. A 2006 transit benefit-cost analysis indicated that every $1 invested in transit produces a return of more than $3 of socioeconomic benefits in Wisconsin. In addition, transit is a relatively fuel-efficient mode of transportation, and produces significantly fewer greenhouse gas emissions per passenger mile than the private auto or airlines.

DEIS Comments, Ex. E at 8-3 (internal citations omitted). WisDOT's Connect 2050 plan also is explicit about the need to "[f]acilitate mode choice options that support transit use…," as well as to achieve equity. SEWRPC absolutely concurs. *Supra* Sec. III.

Thus, the SEIS should have considered the effects of a transit-inclusive alternative – including methods to *avoid* the racial impact of the current proposal, and then evaluated the relative benefits and burdens of a transit-increasing alternative against those of its preferred alternatives.[212]

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experienced by service and labor workers, which can include low-income and minority populations . . ." It provides no data to support this assertion or to establish the extent to which persons of color in particular would benefit. And that assertion ignores the fact that another part of the SEIS at 3-203, states that "adding additional travel lanes would help facilitate planned development in the primary study area, [but] *the magnitude of this effect is not expected to be substantial.*" (emphasis added). It also completely ignores SEWRPC's recommendations, based on research, that an expanded transit system would benefit employers and employees in general, and low income, minority and disabled persons in particular. Vision 2050, Vol. III, Ch. 1 at 34-35.

[212] Even if avoidance was not possible, the agencies were required to consider how to minimize, mitigate or offset those adverse, disparate effects. The SEIS fails to do so.

E. The SEIS Failed to Address Known Racially Discriminatory Effects of Expanding Highway Capacity while Transit Capacity Declines.

Given the region's segregation and profound and continuing racial disparities, *supra* Sec. I, the SEIS must examine the social – including, explicitly, racial - economic and other effects of facilitating access to employment, health care, and other necessities and amenities for (disproportionately white) drivers while refusing to consider a transit alternative upon which (disproportionately minority) persons depend. WisDOT actually admits that "there could be a disparate cumulative effect to transit dependent populations in combination with past, present, and reasonably foreseeable future actions," SEIS at 3-219, but although those effects implicate transportation system access generally, as well as land use, job access, and more, WisDOT's proposed "mitigation" of those effects is limited to temporary assistance during, and to address, construction issues. *Id.*

The problem – and the racially discriminatory effects – are exacerbated by the fact that while the highway provisions of regional transportation plans have been and are being implemented, the transit plans have not, and transit service has in fact declined and is expected to decline by 35 percent in the future. Vision 2050, Vol. III, Ch. 3 at 169. Yet while the proposed alternatives will not significantly help transit-dependent residents – disproportionately persons of color, *supra* Sec. I.D - there is no effort in the plan to avoid those effects, or, if avoidance is impossible, to minimize them, offset them, or mitigate them as Title VI and environmental justice, as well as NEPA, require. *See, e.g., supra* Sec. II; *MICAH*, 944 F.Supp.2d at 670 (agencies "must examine the potential social and economic impact on the transit-dependent of continuing to expand highway capacity in the region while transit capacity declines. If after conducting this examination the agencies determine that their continuing to expand highway capacity while transit capacity declines will have negative effects, the agencies must consider identifying and assessing an alternative to the project that might avoid, minimize, or mitigate those negative effects."); *see also, e.g.*, 40 C.F.R. § 1502.14(e) ("Include appropriate mitigation measures not already included in the proposed action or alternatives,"); 23 C.F.R. § 771.105(e) (incorporate "[m]easures necessary to mitigate adverse impacts").

The 2015 DEIS and 2016 FEIS predicted that the capacity expansion in the 8-lane Double-Deck Alternative then under consideration was expected to reduce average rush hour suburban SOV commuting time by three to three and a half minutes in 2040. DEIS at 3-142; FEIS at 3-181. The SEIS admits that the project "would improve mobility between these destinations [Milwaukee County and Waukesha County] by reducing peak period travel times for commuters and improving the reliability of freight distribution," id. at 3-203, although it fails to provide any estimate in minutes. Reducing commuting time for (overwhelmingly white and already advantaged) suburban drivers creates a discriminatory social and economic effect, especially in light of Waukesha County's resistance to ensuring the affordable housing and

public transit deemed necessary for racial equity. DEIS Comments, Ex. BBB.[213] Moreover, the SEIS fails to consider the cumulative (and discriminatory) effects of commuting time reductions in this corridor combined with other projects, such as the Zoo and Marquette interchange projects and the proposed expansion of I-94 west of the Zoo interchange – especially at the same time that transit service is declining overall.

As noted *supra* Sec. I.F., the effort to dismiss the extent of the project's racially discriminatory effect – and of the reductions in that effect that a transit alternative would provide – by focusing on the race of work commuters is a red herring. That is because it ignores racially disparate unemployment, as well as the fact that given the inadequate job access by transit in the region *of course* most persons with jobs commute by car. If they do not have cars, they are far less likely to be able to get to work at all.[214]

The failure to evaluate effects – including racial effects – on persons other than work commuters is also improper because only a minority of travel is undertaken for work purposes.

> [H]omebased work trips comprised between 22 and 25 percent of all such trips; home-based shopping trips, between 11 and 15 percent; home-based trips in other categories, between 30 and 34 percent; nonhome-based trips, between 18 and 23 percent; and school trips, between 9 and 13 percent. These percentage distributions remained stable over five decades despite substantial increases in the absolute numbers of trips in all categories. Homebased trips, typically used for work, shopping and other purposes, declined between 11 and 15 percent between 2001 and 2011; however, nonhome- based and school tripmaking (including nonhome-based school) increased between 8 and 15 percent. The decreases in home-based tripmaking are likely attributed to the loss in employment and household income, and increased trip chaining. . ..

Vision 2050, Vol I, Ch. 5 at 263-4. *See also*, DEIS Comments at 32-33, FEIS Comments at 13. "The accessibility of the Region's population without access to a vehicle to jobs, health care, shopping, and education is almost entirely dependent on the extent to which public transit is available and reasonably fast, convenient, and affordable." DEIS Comments, Ex. B (SEWRPC Housing Study) at 515. Yet the SEIS fails to collect data on these non-employment transportation needs and modes used for job *searching,* school,

[213] Nor was Waukesha County – which will benefit from the highway project – willing to financially assist with continuing the JobLines buses from central Milwaukee to suburban employers after settlement funds were exhausted, while Milwaukee County provided 100% of the funding to continue them to the end of fiscal year 2018-2019. Ex. 26, "Disappointing End for JobLines."

[214]The decades-long failure to implement the transit recommendations of the regional plan – including recommended increases - also means that even those who are able to access transit to commute to work are seriously and disproportionately burdened – another adverse effect. *See, e.g.,* DEIS Ex. CCC at 4; Vision 2050(2020 Update) at 77-78, 88,89,119, 120. Of course, the situation will worsen if projected further declines in transit service come to pass.

shopping, health care, and other home-based and non-home-based trips, to analyze racial disparities and racial implications of this plan in that light, or to avoid, minimize, mitigate or offset those effects. Nor is there any assessment of, or effort to avoid, minimize or mitigate, the effects on persons with disabilities.

F. The SEIS Failed to Adequately Consider - or seek to Avoid - the Adverse "Sprawl" and other Land Use Effects of the Project

An agency must also consider the extent to which its actions will exacerbate or induce growth. *See, e.g.*, *Advisory T 6640.8A* at Sec. V.G.1 ("The secondary social, economic, and environmental impacts of any substantial, foreseeable, induced development should be presented for each alternative, including adverse effects on existing communities.") In evaluating land use and growth patterns, an agency "cannot simply assume that development will occur at the same pace whether or not defendants yield to the demand for more roads." *Highway J*, 656 F.Supp.2d at 887. *See also, e.g., MICAH,* 944 F.Supp.2d at 671-3; *Davis v. Mineta,* 302 F.3d at 1122; *City of Davis v. Coleman,* 521 F.2d 661, 676 (9th Cir. 1975); *Senville v. Peters*, 327 F.Supp.2d 335, 348-9 & n. 11 (D.Vt. 2004) (must evaluate effects including "induced growth," "[o]ften referred to as 'sprawl' . . ."). While "a single highway-improvement project might have minimal environmental consequences, combining that project with those that preceded it and others that are anticipated might reveal a more serious overall impact." *Highway J*, 656 F.Supp.2d at 888. Further, the cumulative regional effects of the multiple highway reconstruction plans have not been meaningfully considered. *MICAH*, 944 F.Supp.2d at 672-3.

The SEIS admits that there likely would be greater planned development with an 8-lane alternative than with a 6-lane alternative, and that "[d]evelopment that may be facilitated in Waukesha County by the build alternatives, particularly under the 8-lane alternative, could increase the number of jobs that are not accessible by transit in Waukesha County" and that this development could result in reduced job access for "lower-income transit-dependent populations in the City of Milwaukee." *Id.* at 3-204. At the same time it argues that because there is a "mature" transportation system with many freeway access points and the region is built up, expanding capacity will not lead to "substantial" development.[215] *Id*. *But see, e.g.,* WisDOT FDM at 25-5-5.2.2 (development "could be assisted or discouraged by a proposed transportation project. . . [I]t can be determined whether existing development parcels are adversely or beneficially affected or if new parcels and related development opportunities are created by the project. The latter can include improved access to existing developed areas. . .").

But perhaps the biggest failing of this discussion is the agencies' continuing, stubborn refusal to examine the effect of facilitating suburban sprawl development – and the associated, expanding suburban employment opportunities that accompany it - in the context of the

[215] In doing so, it also fails to address the cumulative effects of this proposed expansion, along with all the other freeway expansion projects - such as the Marquette and Zoo Interchanges and I-43 north of Milwaukee, and the proposed expansion of I-94 west of the Zoo Interchange.

pervasive and deep-rooted segregation in this region. *Supra* Sec. I.B. Yet the discussion of induced development in Waukesha County does not mention race or segregation at all.[216] SEIS at 3-204. The comment on potential loss of job access for transit-dependent persons also ignores the *race* of those persons. *Id.* There certainly is no effort to avoid, minimize or mitigate this kind of harm. *See also supra* Sec. I.D, II.A; DEIS Comments at 27-33; FEIS Comments at 8-16.

In addition to spurring growth in segregated Waukesha suburbs, the Preferred Alternative may harm business development in Milwaukee - a serious concern which is not evaluated. The agencies seek to take the overwhelming majority of the 42 to 49 acres of added highway right of way for an expanded Stadium Interchange.[217] As Dr. Stout stated:

> Milwaukee is blighted by oversized freeway interchanges, and the Wisconsin Department of Transportation (WisDOT) plan for widening the I-94 East-West Freeway calls for expanding an already too-large Stadium Interchange. The sprawling interchange design will eat up valuable acres that could be targeted for urban redevelopment, green space preservation, and clean, modern, public transportation systems.[218]

Dr. Stout's Memorandum on the Stadium Interchange Design also suggests that redesign of the Stadium Interchange could be approached in a manner similar to how the Massachusetts Department of Transportation dealt with redesign of the Allston Interchange on the Massachusetts Turnpike (I-90) about 3 miles west of downtown Boston. The process from the beginning involved a diverse group of stakeholders: "representatives of local government, advocacy and community groups, state agencies and legislators, business and labor, and universities, as well as the State DOT. *Id.* at 2. Such an approach, which should have occurred at the beginning of the I-94 project, would have complied with NEPA's directive to all federal agencies, 42 U.S.C. Section § 4332(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment.[219]"

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[216] Persons with disabilities also disproportionately live in Milwaukee. DEIS Comments, Ex. B at 464, 528, 530 ("Persons with disabilities tend to be concentrated in the Region's central city areas, in much the same areas of the Region with concentrations of minority populations" and these persons are also more likely to live in poverty "because of the connections between poverty, health, and disabilities.") The SEIS, however, fails to address the disparate adverse effects that sprawl development (and the lack of transit) may have on persons with disabilities, including, for example, access to affordable housing, jobs, health care, and other services.

[217] The Preferred Alternative with a diverging diamond interchange is smaller than, and a modest improvement over, larger proposed hybrid interchange proposals. But it is still larger than it needs to be.

[218] Ex. 110, Mark Stout, Stadium Interchange Redesign Memo ("Interchange Memo").

[219] It also presumably would have complied with civil rights policies to involve affected communities in the process. *See, e.g.,* Ex. 5, Title VI Order, Ch. II, Sec. 4.

The SEIS does not specify the acreage to be taken by the project from Stadium District land, but it appears that it could be as much as 20 acres or more. This could interfere with implementation of a Milwaukee County 2022 resolution "encouraging a conceptual development of an entertainment district on the parking lots around American Family Field to generate money to maintain the stadium in years to come."[220] At a minimum the potential effect of the Interchange alternative on this proposed development must be considered, as well as the effect on potentially increasing the acreage of usable land in the Menomonee Valley by scaling down Brewers Boulevard south of I-94. Portions of the Stadium District land could be redeveloped into an active "Beer District," or "Ballpark Village" with hotel, residential, office, retail, and food and beverage uses, as well as a transit station.[221] Milwaukee's "Deer District," and the Green Bay Packers' "Titletown," as well as similar urban developments adjacent to sports venues in Baltimore and St. Louis have been very successful, and Richmond is building another.[222] It is important to note that such a mixed-use urban development adjacent to American Family Stadium could provide revenues to supplement the Stadium District's current reserve funds for future maintenance and improvements. This could potentially reduce or eliminate the need to raise new taxes for that purpose.[223]

The oversized Stadium Interchange proposed as part of the project also limits opportunities for redeveloping land between I-94 and Wisconsin Avenue to the north, where a study is underway to assess opportunities for rethinking and redeveloping Highway 175 north of Wisconsin Avenue. Dr. Stout notes that replacing the Stadium Freeway (Highway 175 north of I-94) provides several opportunities for redeveloping areas to the north, most notably "Washington Park West," and has concluded that such a project would be an excellent candidate for funding by the federal Reconnecting Communities pilot program.[224]

G. The SEIS Failed to Adequately Consider the Economic, Social and Environmental effects- including potential beneficial effects to communities - of declining to Increase Highway Capacity, and Fails to Adequately Consider Negative Community Effects of Increasing Capacity

The SEIS also fails to meaningfully evaluate potential effects, other than effects related to a claimed increase in traffic congestion, of *declining* to add lanes. If the capacity expansion was

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[220] Ex 111, Sean Ryan, "Milwaukee County Board Backs Concept of Developing American Family Field's Parking Lots," *Milwaukee Business Journal* (July 29, 2022).

[221] Ex 112, Tom Daykin, "Possible Development at American Family Field Could Help Finance Stadium Renovations, Brewers Exec Says. But It's a Long Way from Reality," *Milwaukee Journal Sentinel* (June 7, 2022); Ex 113, Dan Shafer, "9 Takeaways on New Stadium Interchange," *Urban Milwaukee* (Dec. 21, 2021)

[222] Ex 114, Mark Stout, "Final Technical Memorandum: Ballpark Village" (Jan. 26, 2023) at 2-4.

[223] Ex 115, Adam Rogan, "Why Don't the Brewers Have a 'Beer District'?" *Milwaukee Magazine* (March 2022).

[224] "Ex. 47, "Washington Park West" at 1-3; *see also,* Ex 116, Dan Shafer, "Reimagining the Stadium Freeway Is a Big Deal," *Recombobulation Area* (May 6, 2022).

not included in the Project, "constricting" suburban growth could be one of those effects. *Highway J*, 656 F.Supp.2d at 887. That is not necessarily an adverse effect. Instead, it could be beneficial for the City of Milwaukee as a whole, and for its minority and low-income city residents, including those who predominate in the study area. These beneficial effects would be in addition to the beneficial socioeconomic effects of improving mobility by increasing transit and transit-related economic development effects. For example, declining to facilitate suburban commuting could lead to infill development more accessible to transit-dependent minority communities and more consistent with SEWRPC's land use plans. This is simply not considered.

In addition, keeping traffic on city streets rather than diverting it to highways can actually *benefit* local businesses and communities. *See, e.g*., DEIS Comments at 44-45. Similarly, because too much parking (and driving) hurts cities, *reducing* driving and parking is likely to have offsetting economic and social benefits. DEIS Comments Ex. AAA; Vision 2050, Vol. III, Ch. 1 at 34-35. These issues are not addressed.

The alternative will also harm other Milwaukee neighborhoods. DEIS comments at 42-44; FEIS Comments at 4, 18, 21. The SEIS tries to argue that changes - including bringing traffic closer to neighborhoods - will not harm communities because they are "middle class" neighborhoods. SEIS at 3-208. This conclusion is stated without reasoned analysis and without any acknowledgement that freeways are known to "lower property values, increase blight, and maintain marginal neighborhoods nearby." DEIS Comments, Ex. ZZ at 3, Ex. RRR.

> The collage of evidence suggests that freeway disamenities, versus commuting benefits, likely played a significant role in the decentralization of U.S. cities. One, the freeway revolts themselves are prima facie evidence of the importance of freeway disamenities, especially in central neighborhoods. Two, large declines in population and income in central neighborhoods near freeways suggest that freeway disamenities exceeded modest accessibility benefits in central cities. Three, low populations today in freeway-adjacent neighborhoods with superior job access point to significant freeway disamenities. Finally, significant declines in travel volumes and increases in travel times between neighborhoods severed by freeways suggest that barrier effects are an important disamenity factor.[225]

Thus, expanding the freeway is more likely to impose significant indirect and cumulative effects on adjacent neighborhoods – not support them.[226] Conversely, *declining* to increase capacity could provide benefits to these communities.

These materials make clear that a meaningful and detailed evaluation and analysis –

[225] Ex. 22, "Freeway Revolts!"at 46.

[226] The experience of Milwaukee's Black business area - Bronzeville - which was near the 1960's I-43 construction and which still has not recovered - is also instructive. DEIS Comments Ex. RRR; Ex 117, Teran Powell, "Construction of Milwaukee's Freeways - An Asset for Some, Detrimental to Others," *WUWM* (March 11, 2019).

including, but not limited to, an analysis of the potentially beneficial effects (including the relative effects on minority communities) – of *not* expanding highway capacity and of constricting suburban growth is required. The failure to address these issues is therefore improper, unreasonable and discriminatory.

H. The SEIS Fails to Adequately Consider and Address Noise Pollution and Visual Impacts of the Proposed Alternatives

i. Noise

Among the adverse impacts of highways and highway projects is noise.

> Studies have shown that some of the most pervasive sources of noise in our environment are those associated with transportation. Residences and businesses often are faced with increased highway traffic noise, both from newly constructed highways and from highways that are already in place.
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> When describing effects of highway noise and the types of noise mitigation, it is important to understand the principles of noise. Noise is defined as unwanted or excessive sound. Sound becomes unwanted when it interferes with normal activities, such as sleep, work, speech, or recreation. People react to noise differently, based on many emotional and physical factors, such as hearing sensitivity, the degree to which someone is accustomed to noise, or a person's ability to sleep with noise. . .
>
> . . . [N]oise levels from highway traffic are affected by three factors: (1) the volume of the traffic, (2) the speed of the traffic, and (3) the number of trucks in the flow of traffic. Generally, the loudness of traffic noise is increased by heavier traffic volumes, higher vehicle speeds, and greater numbers of trucks. Vehicle noise is a combination of the noise produced by the engine, exhaust, and tires.[227]

In addition to interfering with normal living activities, exposure to noise pollution also has adverse health impacts, including higher blood pressure, heart rate, and stress, as well as sleep disturbances and increased symptoms of depression.[228] Constant exposure to traffic noise, in particular, is associated with increased risk of stroke. Stroke risk increases by 14% for every

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[227] SEIS at 3-130; *see,* Ex. 118, "Traffic Noise & Transportation," *AASHTO Ctr. for Enviro. Excellence* (2021).

[228] Ex. 36, Orban E, et al., "Residential road traffic noise and high depressive symptoms."; Ex. 199, H. Ising, B. Kruppa, *Health Effects Caused by Noise: Evidence in the Literature From the Past 25 Years*, NOISE HEALTH 5, 5-13 (2004); *and,* H.M. Miedema, H. Vos, Associations Between Self-reported Sleep Disturbance and Environmental Noise Based on Reanalyses of Pooled Data From 24 Studies, BEHAV. SLEEP MED. 1, 1-20 (2007).

10 decibel increase in noise.[229]

The SEIS admits that "it would have the effect of moving some traffic closer to nearby homes, schools, and businesses." SEIS at 3-152. It is noteworthy that of the 6 field measurements of existing noise levels that were made for the SEIS, 2 found noise levels that were *already* dramatically higher than the Noise Level Criteria for Considering Noise Barriers: at Spring Hill Cemetery, 123 feet from the eastbound I-94 centerline, 69.2 dBA measured versus the 57 dBA criteria for areas of "serenity and quiet", "[230],[231] and at a residence at W. Park Hill Ave and N. 31st Street, 79 feet from the westbound I-94 centerline, 71.4 dBA measured versus the 67 dBA criteria for residential areas.[232] *Compare* SEIS Table 3-22 with Table 3-24. Reducing the distance to the "sound receptors" – that is the people suffering from traffic noise – will simply increase the already high levels and impact of noise pollution on nearby residents and visitors.

The horizontal and vertical alignment of the freeway also would be substantially different in some areas than today. Therefore, in some areas design-year noise levels could change by as much as 4 dBA for the 8-lane alternative, and 3 dBA for the 6-lane alternatives compared to existing noise levels. SEIS at 3-133, 3-134. Also, the key goal of the project, as is made clear by the SEIS, is reducing congestion and increasing the speed of traffic. This, too, will increase the traffic noise levels.

We recognized two locations in particular where increased noise pollution is likely to be a concern. The first is Valley Park, a Milwaukee County Park that lies immediately north and east of the west-bound exit for vehicles leaving I-94 to head north on highway 175. This is a small park, nestled up against a floodwall protecting the Valley Park (or Piggsville) neighborhood from Menomonee River flooding, with trees and seating areas for rest and relaxation, areas for children to play, and room for sports to the north. The project contemplates extended, high-speed off-ramps that will skirt the edge of the Park, without taking any of its acreage. The SEIS contained no visual images of what the off-ramps will look like from the Park, nor data on what their elevations will be, and the extent to which traffic will be closer to park users – and thus how that will affect people enjoying their time in the Park.[233] There were

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[229] Ex. 120, Mette Sorensen et al., *Road Traffic Noise and Stroke: A Prospective Cohort Study*, EUROPEANHEART JOURNAL 737, 740-41 (Jan. 2011).

[230] The 12.2 decibel excess amounts to a huge difference, as a smaller 10 dBA increase on the scale would be a 100% increase.

[231] Valley Park is another location that should have been given consideration and had field noise measurements made as an area for "serenity and quiet," since it serves as a place of respite and relaxation for children, adults and families in the neighborhood.

[232] Given that W. Park Hill Rd. & 31st St is also a predominantly minority neighborhood, the comparative racial impacts of noise pollution must be assessed.

[233] As noted above, the agencies did not conduct field monitoring of existing noise levels at Valley Park, so the existing and expected post-construction levels of noise have not been but need to be determined. Whether or not noise barriers, or some other changes, are needed to protect park users from adverse noise impacts from increased

comments from neighborhood residents at the December public hearings who were concerned about the visual impact of the project, as well as its noise impacts. The SEIS currently has not considered noise barriers in this area. SEIS, Ex. 3-22b. The SEIS fails to provide sufficient information to determine whether the impact on Park users (either as a result of noise, or of unsightly noise barriers) will be significantly adverse.[234]

The second area for obvious concern about increased noise pollution is the stretch of the highway west of the Stadium Interchange where the right of way is constricted by cemeteries to the north and south, as well as segments to the east and west where narrowed shoulders will also bring traffic lanes closer to adjoining properties. Beth Hamedrosh Hagodel, an active Orthodox Jewish cemetery, lies north of I-94. Some of the headstones are just a few feet from the fence marking the boundary between the cemetery and I-94. SEIS at 3-156. Spring Hill Cemetery is south of I-94, across from Beth Hamedrosh Hagodel Cemetery.[235] East of Beth Hamedrosh Hagodel Cemetery and Spring Hill Cemetery, I-94 bisects Wood National Cemetery. Most of the cemetery is south of I-94. *Id.* at 3-157.

For the 8-lane alternative, the fourth lane of traffic in each direction would result in the edge of the nearest travel lanes coming about five to six feet closer to the cemeteries than they are today, although the exact horizontal location and elevation of I-94 in this area has not been finalized. *Id.* at 158. For the 8- and 6-lane alternatives, the VA's National Cemetery Administration is concerned that vibration could cause alignment issues with the headstones, and the agencies say they will prepare a Monitoring Plan to address concerns about construction related vibration impacts to the National Cemetery, but it is not clear what that plan will include. Id. at 158-159.

Existing noise levels were measured as 69.2 dBA in Spring Hill Cemetery at a site located 123 feet from the eastbound I-94 centerline, 12.2 dBA higher than the 57 dBA criteria in Table 3-24 for considering noise barriers for areas of "serenity and quiet." SEIS at 3-131[236] No field measurements of noise levels were made in any of the other cemeteries. The SEIS notes that the "horizontal and vertical alignment of the freeway would be substantially different in some areas than today. Therefore, in some areas design-year noise levels could change by as much as 4 dBA for the 8-lane alternative." *Id*. at 3-133, 134. The SEIS is not clear whether the

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highway traffic cannot be determined from the SEIS. *See also*, Ex, 121, Leland Pan, "Expanded I-94 will damage Piggsville," *Urban Milwaukee* (Jan. 10, 2022).

[234] Depending on the specific relationship between the ramp(s) and the Park, air pollution impacts may also be increased, but were not addressed in the SEIS.

[235] The SEIS claims at 3-156 that Spring Hill is a non-denominational cemetery. The cemetery's own website, however, describes it as "one of the earliest known Jewish cemeteries in the Milwaukee area." Ex 122, "About Spring Hill Cemetery - Mausoleum," (undated).

[236] As noted above, a 10 dBA increase amounts to a doubling of the sound energy, so 12.2 dBA above the criteria for considering a noise barrier is a very high exceedance. There is no information in the SEIS regarding what are presumably much higher noise levels at the headstones within feet of the I-94 right of way in the Beth Hamedrosh Hagodel Cemetery.

predicted noise levels for the Preferred alternative includes its higher predicted traffic volume, higher predicted traffic speed, increased numbers of trucks, as well as the shorter distance between traffic and the cemeteries. Despite already suffering from noise levels much higher than the 57 dBA criteria for considering noise barriers for areas of "serenity and quiet," the SEIS states that "Barriers Did Not Meet Reasonableness Criteria" along the corridor between the cemeteries. Ex. 3-22b, p. 2. And, also, the SEIS did not consider the additional noise that would result from its failure to fully account for induced traffic.

As far as mitigating adverse noise impacts, "only the construction of noise barriers was reviewed.[237] Abatement is recommended only when it is feasible and reasonable to construct a noise barrier." SEIS at 3-135. Tables 3-26 and 3-27 of the SEIS summarize numbers and locations of sites where noise barriers may be eligible for consideration, if desired and if cost-effective. With respect to these cemeteries, the SEIS states: "No mitigation measures are planned for the Beth Hamedrosh Hagodel, Spring Hill, or Anshai Lebowitz cemeteries;[238] however, coordination with all cemeteries near the project will continue throughout the design process and into construction." SEIS at 3-159.

As noted *supra* Sec. IV.G, adding travel lanes will significantly increase traffic volumes above and beyond those projected by the agencies in the SEIS. This will also increase noise levels, and the need for noise barriers, beyond the predictions made by the agencies. In addition, noise barriers are not a panacea. Noise can still go over and around barriers, and certain weather conditions may worsen that noise.[239] And the barriers can create visual pollution. The Florida Dept of Transportation states that disadvantages include acting as a visual barrier, casting large shadows for portions of the day or permanently shading some areas, obstructing breezes and sunlight, and posing safety concerns by limiting visibility.[240] FHWA itself admits that noise barriers can have an "adverse visual impact" and recommends plantings - which are not, but should be, considered here - to mitigate that impact.[241] WisDOT officials' statements at public meetings for this project have made clear that project funds cannot be used to alter their standard noise barrier options for more costly barriers that address aesthetic or other concerns, and local municipal funding would be required for any such changes. And under certain conditions,

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[237] A transit and focused highway reconstruction project without adding lanes and without significantly expanding the project footprint, such as the Fix at Six alternative, that would reduce highway traffic volumes, and would avoid bringing noisy traffic lanes closer to nearby residents and visitors, was not considered.

[238] Notably, all three are Jewish cemeteries and thus serve members of a minority religion. In addition, Beth Hamedrosh Hagodel Cemetery was historically harmed when the construction of I-94 took the southern portion of that cemetery, and Spring Hill Cemetery when the northern portion of that cemetery was lost to I-94. SEIS at 3-156. This occurred even though under Jewish law, "[t]he land of the cemetery is considered holy and a special consecration ceremony takes place upon its inauguration. According to Jewish tradition, Jewish burial grounds are sacred sites and must remain undisturbed in perpetuity." Ex. 123, "Jewish Cemetery," *Wikipedia* (undated).

[239] Ex 124, Meryl Davids Landau, "On Highway Noise Barriers, the Science is Mixed," undark.org (2017).

[240] Ex 125, Florida Dept. of Transportation *Noise Barrier Information Sheet* [Pamphlet] (undated).

[241] Ex 126: "A Guide to Visual Quality in Noise Barrier Design," Federal Highway Administration (undated) at 10.

pollutant concentrations can be worse behind the barrier than when no barrier is present, although mature vegetation – which is not here being considered – can help mitigate those effects.[242] These adverse effects – which could be imposed on communities in the purported service of mitigation - were not evaluated either. They must be.

ii. Visual Impacts

Reconstructing the highway in an 8-lane configuration will transform the visual landscape of this section of the City of Milwaukee. Transforming 42 to 49 acres, SEIS at S-6, from other land uses into highway right of way, in and of itself transforms the visual landscape. As discussed immediately above, the Proposed alternative is likely to result in lining at least portions of the project with noise barriers, which will block sightlines across the highway in many locations, and present residents and visitors in neighborhoods with bare, stark walls, instead of open views across and above the highway. As also noted above, WisDOT has made clear that its policies prohibit project funding from being used to improve the appearance of sound barriers; if anyone wants aesthetic improvements, the local municipality must fund them.[243]

There are some locations where the negative visual impacts of this project are likely to be especially severe, including Valley Park and the cemeteries discussed above. There were comments from Valley Park neighborhood residents at the December public hearings who were concerned about the visual impact of the project, as well as its noise impacts. Park users currently have a fairly wide-open view across the Menomonee River valley to the west, and the SEIS fails to provide sufficient information to determine whether the impact on Park users (as a result of noise, unsightly noise barriers, or both) will be significantly adverse. The views of Park users to the west and to the south could be dramatically harmed if the new ramps for westbound traffic are elevated sufficiently to be noticeably visible, or looming above the existing views, or even overshadowing them. Since it lacks visual images of what the off-ramp will look like from the Park, or visual images of what noise barriers would look like from the Park, the SEIS failed to address this potential problem.

I-94 already detracts from the visual quality of the cemeteries. SEIS at 3-107. However, the cemeteries currently have clear views across the highway to the cemeteries across the roadway from their properties. That is an integral part of the visual landscape of the Wood National Cemetery, which itself extends both south and north of I-94, and was severed when I-94 was first constructed. The views across the highway from the other cemeteries, which similarly

[242] Ex 127, Baldauf R. et al., "Impact of Noise Barriers on Near-Road Air Quality," *Atmospheric Environment* (2008); Ex. 128, Baldauf R., P.E. "Summary of Noise Barrier and Other Roadside Feature Impacts on Near-Road Air Quality," presentation at Transportation Research Board (2016).

[243] In view of the state's control over all county and municipal revenue sources, its limits on local tax levies, and the ever-declining share of sales and income tax revenue which the state returns to Milwaukee and other municipalities as "shared revenue," WisDOT's policy amounts in effect to a prohibition on any improvements.

lost portions of their property when I-94 was built, also show other cemetery areas. *Id.* If noise barriers are needed to address the noise impacts of an 8-lane alternative, those views will be blocked or transformed by stark, harsh barriers.[244] It was not reasonable for the agencies to fail to consider this fact.

I. The SEIS Failed to Adequately Consider Impacts on Section 4(f) Lands

Section 4(f) of the Highway Act, 49 U.S.C. § 303(c), provides special protection for significant publicly owned public parks, recreation areas, and wildlife and waterfowl refuges, as well as for significant historic sites whether publicly or privately owned.[245] FHWA "cannot approve the use of land from significant publicly owned parks, recreation areas, wildlife or waterfowl refuges, or significant public and private historic sites unless it is determined that there is no feasible and prudent alternative to the use of land from such properties, and the action includes all possible planning to minimize harm to the property resulting from such use or the use is de minimis." SEIS at 4-1.

The SEIS review of impacts under Section 4(f) concludes that the Preferred Alternative will not cause more than *de minimis* impacts. *Id*. However, Spring Hill Cemetery, one of the region's first Jewish cemeteries which has been in operation for more than 150 years,[246] and Beth Hamedrosh Hagodel Cemetery, an Orthodox Jewish cemetery, are of great importance to the region's Jewish community. Wood National Cemetery is part of the "Northwestern Branch-National Home for Disabled Volunteer Soldiers National Historic Landmark district" and multiple Medal of Honor recipients are buried there,[247] and it is of course important to veterans and their families.[248]

Valley Park is a publicly owned park of considerable significance to Milwaukee's nearby, predominantly minority, neighborhoods. The SEIS states regarding Section 4(f) impacts:

> The alternatives would not result in a permanent incorporation of property from Valley Park and would not result in the temporary occupancy of park property during construction. The reconfigured westbound I-94 exit ramp to WIS 175/Brewers Boulevard, 44th Street, and General Mitchell Boulevard (hybrid interchange) and the 35th Street entrance ramp to I-94 westbound (diverging diamond interchange) east of the Stadium Interchange would be located close to

[244] The agencies are not even considering using vegetation to reduce the adverse effects of such walls.

[245] See also 23 C.F.R. Part 774.

[246] Ex 122, "About Spring Hill Cemetery - Mausoleum."

[247] Ex. 129, U.S. Dept. of Veterans Affairs, National Cemetery Association *Wood National Cemetery* [Brochure] (undated).

[248] The SEIS says the Preferred alternative will have a "Proposed *de minimis*" impact on the Soldiers' Home NHL. SEIS, Table 4-1, p. 4-6.

> Valley Park. However, there would be no indirect impacts that would substantially impair the recreational features or attributes of Valley Park. Based on the above findings, FHWA has determined that there would be no use of Valley Park as a result of project actions.

SEIS, Table 4-1, p. 4-8. However, as discussed *supra* Sec. IV.H, the project is likely to have, at a minimum, quite significant adverse noise and visual impacts on users of the Park, as well as increases in air pollution. The SEIS does not contain information to support the conclusion that the project would not result in "constructive use" of Valley Park and that the Park would not be impacted more than *de minimis* by the project. As a result, the SEIS is inadequate in its consideration of Section 4(f) impacts.

J. The DEIS Failed to Adequately Consider or Seek to Avoid, Minimize and Ensure Mitigation of the Direct, Indirect and Cumulative Effects, Especially on Persons of Color.

As discussed throughout these comments, there are many pre-existing adverse conditions for, and many adverse effects being imposed, on the disproportionately minority residents and communities in the project corridor: segregation, inadequate transportation system access, more pollution exposure and less health care, potential business loss less money, and more noise and visual impacts. While the SEIS (insufficiently) evaluates these issues individually, it does not acknowledge or address the *combined* effects of these adverse actions on communities of color, and doing so cumulatively with regional freeway expansion project after regional freeway expansion project. To the contrary, it repeatedly denies the existence of these effects. *See, e.g.,* SEIS at 3-103. Whether or not some portions of the alternatives (such as pavement repair and some of the safety improvements) might be necessary, the overall thrust of these alternatives are to impose combined, multiple adverse actions on minority communities for the primary benefit of white commuters. That is not even close to a project that fairly shares the benefits and burdens of the proposed project. It is, therefore, manifestly discriminatory.

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