

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

MILWAUKEE INNER-CITY
CONGREGATIONS ALLIED FOR
HOPE (MICAHA) and BLACK
HEALTH COALITION OF
WISCONSIN,

Plaintiffs,

Case No: 12-cv-556

vs.

MARK GOTTLIEB, in his official
capacity as Secretary of the Wisconsin
Department of Transportation; WISCONSIN
DEPARTMENT OF TRANSPORTATION;
VICTOR MENDEZ, in his official capacity as
Administrator of the Federal Highway
Administration; GEORGE POIRIER, in his
official capacity as Division Administrator of
the Wisconsin Division Office of the FHWA;
FEDERAL HIGHWAY ADMINISTRATION;
RAY LAHOOD, in his official capacity as
Secretary of the U.S. Department of
Transportation; and U.S. DEPARTMENT OF
TRANSPORTATION,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action challenges the final action of Defendants U.S. Department of Transportation (USDOT) and Federal Highway Administration (FHWA) approving a project of the Wisconsin Department of Transportation (WisDOT) to reconstruct and add capacity to the “Zoo Interchange” in Milwaukee. The project, if it proceeds, will reconstruct, widen and add lanes and present and future capacity on the Interchange in western Milwaukee County, using federal and state funds at

an estimated cost of \$1.7 billion, while failing and refusing to incorporate any public transportation element. The project will also have the likely effect of exacerbating regional racial segregation, and it will have adverse environmental effects on air quality and water resources. The refusal to address these issues occurred despite Defendants' knowledge of, among other issues, segregated land use patterns and the need for transit to address environmental concerns and to comply with civil rights requirements. If the project proceeds, it will have major and significant impacts on the most racially segregated region in the United States. FHWA's final action approving the expressway project is unlawful because the action was based on a Final Environmental Impact Statement (FEIS) that Defendants prepared and approved without full and adequate consideration of a wide range of project impacts, including social, racial, economic, land use, environmental, employment, indirect and cumulative impacts.

2. Plaintiffs seek a declaration that Defendants have violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA), and that the state Defendants have violated the Wisconsin Environmental Policy Act (WEPA), by failing to prepare an adequate FEIS; an order vacating and remanding the FEIS, Record of Decision (ROD), and Notice of Final Federal Agency Actions pertaining to the Zoo Interchange project for the purposes of reconsidering and curing the violations; and preliminary and permanent injunctions to prohibit all construction and construction-related activities related to the expressway project until an adequate FEIS has been prepared and relevant impacts adequately considered and resolved.

JURISDICTION AND VENUE

3. This action arises under NEPA, 42 U.S.C. § 4321 *et seq.*; the APA, 5 U.S.C. § 551 *et seq.*, and WEPA, Wis. Stat. § 1.11. This Court has jurisdiction of the federal law claims under 28 U.S.C. §§ 1331, 1361, and supplemental jurisdiction of the state claims under 28 U.S.C. § 1367.
4. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because evaluation and decisions about the project were made in this district, and thus a substantial portion of the events or omissions giving rise to the claim occurred in the district.
5. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a). This Court may issue a declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201-02.

PARTIES

6. Plaintiff Milwaukee Inner-city Congregations Allied for Hope (MICAHA) is a multi-racial, interfaith organization committed to addressing justice issues that have an impact on the community and on the members of MICAHA's three dozen member congregations. Its principal place of business is 1927 N. 4th St., Milwaukee, WI 53212. Among the justice issues that MICAHA has long worked to address is jobs for unemployed and underemployed urban members, and the associated need for public transportation to access jobs that do exist. It has used and diverted resources, through its Jobs and Economic Development Committee and Transportation Work Group, to organize, advocate and educate for improved public transportation. It has also submitted oral and written testimony on these issues, including comments on the Zoo Interchange proposal itself.

7. Most MICAHA congregations are in Milwaukee, and most of MICAHA's members live in Milwaukee. MICAHA's office is in an overwhelmingly minority neighborhood, many MICAHA congregations are located in predominantly minority neighborhoods, and many members are African-American and Latino. Many MICAHA members are also transit-dependent and unemployed or underemployed, and would use transit to access employment and other activities and services, were it to be made available. The interests of MICAHA members fall within the zone of interests protected by the laws sought to be enforced in this action.
8. The Black Health Coalition of Wisconsin (BHCW) is a non-profit organization whose purpose is to improve the health status of African-Americans and to ensure equitable and comprehensive health for all people. Its principal place of business is 3020 W. Vliet St., Milwaukee WI 53208. BHCW ascribes to World Health Organization policies and principles holding that you cannot have healthy people in a sick community. Among the issues BHCW has long sought to address are environmental justice; access to health care, including physical access to locations where health care is provided, and the associated need for public transportation to ensure access to that care; air quality issues, including those relating to the high rates of asthma among African-Americans; and health issues related to unemployment, poverty, community isolation, and discrimination. It has used and diverted resources to further these goals, including participating in meetings relating to seeking environmental justice and transit equity for its members, clients and community, and has submitted oral and written testimony on these issues, including multiple comments on the Zoo Interchange proposal itself.

9. BHCW's office is located in an overwhelmingly minority neighborhood in Milwaukee. Many of BHCW's members and clients are persons of color who are transit-dependent, including many persons who require transit to access health care, and who would use more transit to do so were it to be made available. Many also suffer from health effects related to isolation, unemployment, poverty and discrimination. The interests of BHCW members and clients fall within the zone of interests protected by the laws sought to be enforced in this action.
10. Defendant Mark Gottlieb is the Secretary of the Wisconsin Department of Transportation. His principal place of business is the Hill Farms State Office Building, 4802 Sheboygan Avenue, Madison, WI 53705. He is sued in his official capacity only.
11. Defendant Wisconsin Department of Transportation ("WisDOT") is the agency within the State of Wisconsin primarily responsible for highway planning, funding and construction. Its primary administrative office is the Hill Farms State Office Building, 4802 Sheboygan Avenue, Madison, WI 53705.
12. References to the "state Defendants" are to Defendants Gottlieb and WisDOT.
13. Defendant Victor M. Mendez is the Administrator of the Federal Highway Administration (FHWA), an agency of the U.S. Department of Transportation. He is sued in his official capacity only.
14. George Poirier is the Division Administrator of the FHWA Wisconsin Division Office, which is located at 525 Junction Road, Suite 8000, Madison, Wisconsin 53717. He is sued in his official capacity only.
15. Defendant FHWA is the agency within USDOT primarily responsible for highway planning and funding. FHWA, through its Wisconsin Division, was responsible

with WisDOT for preparing, reviewing and approving the EIS in accordance with NEPA.

16. Defendants Mendez, Poirer and FHWA are referred to collectively as “FHWA.”
17. Defendant Ray LaHood is Secretary of the U.S. Department of Transportation (USDOT). He is sued in his official capacity only.
18. Defendant USDOT is the executive department of the federal government responsible for approval of highway projects.
19. Defendants USDOT and LaHood are referred to collectively as “USDOT.”
20. References to the “federal Defendants” are to the FHWA and USDOT Defendants.

FACTUAL BACKGROUND

Facts Relating to Segregation and Isolation of Minority Communities

21. The Zoo Interchange is located in western Milwaukee County. It is near Waukesha County, and in particular proposals to increase capacity in the east-west segments of the Interchange will facilitate access to Waukesha County.
22. The Zoo Interchange is also located in the vicinity of major medical facilities collectively known as the Milwaukee Regional Medical Center. The Center includes, *inter alia*, Children's Hospital of Wisconsin, Froedert Hospital, the Medical College of Wisconsin, and the Milwaukee County Behavioral Health Division.
23. The purpose of the Zoo Interchange project is not only to address (or impair) the circumstances of those living or working adjacent to the Interchange, but to resolve regional transportation needs. Public transportation is also required to address regional transportation needs.

24. The metropolitan statistical area (MSA), as defined by the federal government, includes Milwaukee, Waukesha, Ozaukee and Washington counties, all of which are adjacent to Milwaukee County.
25. In 1990, 2000, and 2010, the Milwaukee MSA was, overall, the most racially segregated region in the United States for African-Americans. The segregation is due in no small part to the fact that while in 2010 Milwaukee County has an African-American population of about 26% and a total minority population of about 46%, the suburban counties' populations - including Waukesha County - are each only about 1% African-American and more than 90% white non-Hispanic. There is also significant segregation of Latinos in the MSA. Defendants are aware of these disparities.
26. For purposes of the Southeastern Wisconsin Regional Planning Commission (SEWRPC), the "region" also includes Kenosha, Racine and Walworth counties, all of which are also significantly less diverse than Milwaukee County.
27. There are significant racial disparities in transit dependence in the MSA and region. For example, "[o]nly about 68 percent of Milwaukee County Black/African American households indicate they have an automobile available for travel, and only an estimated 60 percent of Black/African American adults have a driver's license. Only about 80 percent of Milwaukee County Hispanic households indicate they have an automobile available for travel, and only an estimated 50 percent of Hispanic adults have a driver's license." SEWRPC, "A Regional Transportation System Plan for Southeastern Wisconsin: 2035" ("2035 Plan") (July 2006) at 576. Non-Hispanic white persons in the MSA and region are significantly more likely to have drivers' licenses and vehicles. Defendants are aware of these disparities.

28. Persons of color in the MSA and region have significantly higher unemployment and joblessness rates than non-Hispanic white persons.
29. Although there are many jobs, and significant job growth in suburbs outside Milwaukee, including in Waukesha County, there is little transit service from Milwaukee County to Waukesha County or other suburbs. Further, virtually all the minimal transit service that exists is structured for Waukesha County residents to commute to jobs in a few portions of Milwaukee, especially downtown, rather than for Milwaukee residents to access jobs in Waukesha County. In recent years, there also has been a reduction in the already limited amount of Waukesha-Milwaukee transit service.
30. Many persons, including a disproportionate number of persons of color, depend upon transit to access non-employment services and facilities, including medical care and schools.
31. In the year 2000, to settle a race discrimination complaint based on, *inter alia*, its alleged disparate treatment of funding for and development of highway and transit projects in the Milwaukee area, Defendant WisDOT agreed that “[t]he Wisconsin Department of Transportation shall continue to use its best efforts to expand and improve transit service within the Milwaukee Metropolitan Area to enable transit dependent residents of Milwaukee to better access areas of job growth.” (Settlement Agreement in *Wallace v. Thompson*, No. 99-020 and *Campaign for a Sustainable Milwaukee et al. v. Thompson*, No. 99-029 (US DOT - OCR, Nov. 17, 2000)). The settlement was made under the auspices of Defendant USDOT.
32. Upon information and belief, the state Defendants failed to follow, and the federal Defendants failed to enforce, that provision of the settlement agreement.

33. Instead, subsequent to the settlement agreement, budget cuts and restrictions forced the decline of transit service within the Milwaukee metropolitan area. From 2000 to early 2012, the Milwaukee County Transit System (MCTS) eliminated 21 regular bus routes, 4 freeway flyer routes and numerous route segments, and reduced the frequency and span of service on many bus routes. While the state reduced its percentage share of operating assistance for the transit system during these years, WisDOT's funding for and construction of major highway projects, including projects in southeastern Wisconsin, increased exponentially.
34. SEWRPC's Regional Transportation System Plan made clear that transit preservation, improvement and expansion is necessary for economic development, to reduce highway congestion, and in particular to connect low-income and minority residents of Milwaukee's inner city with jobs elsewhere in the region, and to ensure access to schools, medical care, and other necessary services for persons who lack vehicles or are unable to drive. "[T]he transit service recommendations of the plan would be particularly directed to serving minority and low-income populations" and "would in particular connect minority and low-income populations with jobs. Also, the public transit recommendations of the regional transportation plan are directed towards improving transit service in central Milwaukee County and those areas with minority and low-income populations." SEWRPC, *2035 Plan* at 576.
35. SEWRPC also recommended that, beginning in 2005, there be annual increases in transit service and vehicle miles served by transit. *See, e.g., id.* at 372, 407. As discussed above, that has not occurred and instead there have been decreases in transit service.

36. Title VI of the Civil Rights Act and its implementing regulations prohibit recipients of federal funds, including state agencies such as WisDOT, from taking actions that have the intent or effect of discriminating on the grounds of race, color, or national origin. 42 U.S.C. § 2000d; 49 C.F.R. § 21.5. These regulations apply to the EIS process. Federal civil rights regulations, 23 C.F.R. § 200.9(a)(11), also require state highway agencies, such as WisDOT, to “annually submit an updated Title VI implementing plan to the Regional Federal Highway Administrator for approval or disapproval.” From 2005 to late 2011 WisDOT did not have, and thus did not submit, any Title VI implementing plan. The FHWA Defendants were aware of the lack of the plan and permitted the state Defendants to ignore this requirement. The Title VI plans that WisDOT submitted before and after these dates, and which the FHWA Defendants approved, also contained no meaningful criteria or processes setting forth how WisDOT would “implement” Title VI.
37. The Milwaukee-Racine region, which includes Milwaukee, Ozaukee, Racine, Washington, Waukesha, and Kenosha counties, has long been out of compliance with federal air quality standards. It has been and is now a nonattainment area for PM 2.5, and has been a “moderate” area for ozone. It was not an attainment area for ozone when the FEIS and ROD were prepared and issued, and while US EPA has recently issued an attainment designation for ozone, as of August 1, 2012, there were 14 ozone-related air quality advisories for 2012 for Milwaukee County, compared to 2 for all of 2011. (*See* Wisconsin Air Quality Notice History – <http://dnr.wi.gov/topic/AirQuality/AQNSHistoryList.asp?county=>) Transit is an integral and stated method for Wisconsin to comply with Clean Air Act requirements, one which, as discussed above, is not being provided Persons of color

in the region, especially African-Americans, have higher rates of air-quality-related respiratory disease, such as asthma, than white persons.

38. SEWRPC confirms that “[p]ublic transit also contributes to efficiency in the transportation system, including reduced air pollution and energy consumption.” *2035 Plan* at 366.

39. The Zoo Interchange proposal would significantly increase the amount of impermeable pavement surface, thereby also increasing the amount of runoff into adjacent and downstream communities and bodies of water, including Underwood Creek, which is in the general vicinity of the Zoo Interchange. In addition, pending regional water supply proposals would result in the discharge of increased volumes of water from the city of Waukesha into Underwood Creek and the Menomonee River into which it flows, which are already subject to flooding and have been the subject of significant and expensive flood management efforts.

Facts Relating to Environmental Impact Statement Process

40. The Zoo Interchange project is a southeastern Wisconsin “freeway megaproject,” for which the state Defendants “may” provide funding under Wis. Stat. § 84.0145(3)(b).

41. NEPA requires agencies to “utilize a systematic, interdisciplinary approach which will insure the integrated use of natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.” 42 U.S.C. § 4332(A). Because Defendants determined that the Zoo Interchange project is a major federal action significantly affecting the quality of the human environment, they undertook the preparation of an EIS.

42. FWHA and WisDOT prepared a Draft EIS (DEIS) for the project, which was

signed on May 19 and 20, 2009.

43. FHWA and WisDOT prepared a Supplemental DEIS (SDEIS), which was signed on Feb. 3 and 4, 2011.
44. On or about March 20, 2011, Defendant Gottlieb publicly stated that no transit options would be included as part of the Zoo Interchange project. Defendant Gottlieb stated that transit development options fell to local governments and regional transit authorities (RTAs).
45. On June 26, 2011, Wisconsin enacted its 2011-13 budget bill, 2011 Wis. Act 32. Act 32 eliminated RTAs, including the Southeastern Wisconsin Regional Transit Authority; reduced transit operating assistance to local transit operators by 10%, which cut the Milwaukee County Transit System's budget by about \$7 million; and eliminated a \$100 million capital bonding program for transit in southeastern Wisconsin.
46. FHWA and WisDOT prepared the FEIS, which was signed on Sept. 29 and Oct. 3, 2011.
47. Although the proposal recommended in the FEIS was labeled a "Reduced Impacts Alternative," it included about the same 8-lane capacity expansion as the Modernization Alternatives that were not adopted. The Alternative includes four lanes on each approach leg, adds lanes on ramps, and contains three lanes north-south through the Zoo Interchange. Although the Alternative purports to have only 2 eastbound and 2 westbound lanes through the core of the Zoo Interchange, it includes minimum 18-foot-wide shoulders on the east-west segments to facilitate future conversion to additional lanes.

48. When the SEWRPC originally planned for the Zoo Interchange reconstruction in 2003, it was estimated (in 2000 dollars) to cost \$126 million to replace in-kind, \$398 million to update the interchange to current design standards, and \$412 million to update the design and add lanes. The estimated project cost in the FEIS was \$1.7 billion.
49. Defendants failed to evaluate indirect and cumulative effects of the project specifically as those impacts effect minority communities.
50. The FEIS did not include or evaluate any transit preservation, improvement or expansion component. The FEIS also did not address, evaluate or respond to the state's actions in eliminating RTAs, eliminating a transit capital bonding program, reducing operating assistance for transit, and otherwise impairing the preservation, operation and expansion of transit.
51. In declining to incorporate public transit as part of the project, Defendants stated that SEWRPC had found that the Zoo Interchange capacity expansion was necessary whether or not transit was expanded. Although Defendants adopted, without meaningful separate analysis, SEWRPC's conclusions regarding the need for the Zoo Interchange project, they refused to accept or comply with SEWRPC's transit recommendations. Thus Defendants did not meaningfully evaluate, or incorporate at all, transit capacity preservation and expansion alternatives that are also necessary for regional transportation system development, and did not evaluate or address SEWRPC's determinations that highway and transit development need to proceed at the same rate for reasons including environmental justice and civil rights compliance. Nor did Defendants evaluate or require the evaluation of, indirect and cumulative impacts – including adverse civil rights, environmental

justice, and air quality impacts – of *failing* to provide the recommended transit preservation and capacity increases.

52. Defendants also asserted that there were funding barriers to transit expansion, but did not meaningfully evaluate such alternatives as rebuilding the Zoo Interchange in the existing footprint or rebuilding it only with safety improvements and using any cost savings for transit development. Nor did Defendants evaluate alternatives including, but not limited to, using federal Surface Transportation Program flexible highway funding for transit purposes instead. Nor did Defendants evaluate or require the evaluation of, indirect and cumulative impacts – including civil rights and environmental justice impacts and mitigation – of these alternatives.
53. During the EIS process, organizations, including Plaintiffs, provided Defendants with data about segregation and disparate transit dependence in the region, and the need for transit preservation, improvement and expansion to address those deficits.
54. During the EIS process, organizations, including Plaintiffs, requested reconsideration and alteration of the project to address concerns including the refusal to incorporate transit and the disproportionate adverse effects of that failure; the potential land use and associated social effects, including segregation effects, of facilitating automobile access to non-diverse suburban communities; adverse air quality effects; and potential flooding and water quality effects, including potential flooding in disproportionately minority Milwaukee neighborhoods and potential effects related to the combined effects of increased impermeable pavement and increased return water flow from the city of Waukesha. Defendants declined to alter the project to mitigate these concerns.
55. During the EIS process, organizations, including Plaintiffs, objected to Defendants'

failure to evaluate the Zoo Interchange proposal in light of Title VI requirements and regulations. The state Defendants did not, and could not have, evaluated the Zoo Interchange proposal with reference to a Title VI implementing plan because at the time it prepared the DEIS, SDEIS and FEIS, no Title VI implementing plan existed, and the federal Defendants were aware of that fact. In approving the project, the federal Defendants nevertheless accepted the state Defendants' certification and assurance of Title VI compliance.

56. On February 10, 2012, FHWA issued its ROD on the project.

57. On March 9, 2012, FHWA's "Notice of Final Federal Agency Actions on Proposed Highway in Wisconsin" (Notice) was published in the *Federal Register*. The notice announced final FHWA action granting approval of the Zoo Interchange project, and referred to the FEIS, the ROD, and other documents in the administrative record for a description of the agency's actions on the project. The notice also asserted compliance with other legal requirements, including civil rights and environmental justice laws and executive orders.

STATUTORY AND REGULATORY FRAMEWORK

58. The Federal Aid Highway Act (FAHA), 23 U.S.C. § 109(h), mandates that any "possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and . . . (1) air, noise, and water pollution; (2) destruction or disruption of man-made and natural resources, . . . community cohesion and the

availability of public facilities and services; (3) adverse employment effects, and . . . (5) disruption of desirable community and regional growth.”

59. FAHA also mandates that highway projects be consistent with plans for implementation or maintenance of air quality standards. 23 U.S.C. § 109(j).
60. FAHA also requires that the statewide transportation planning process “emphasize the *preservation* of the existing transportation system.” 23 U.S.C. § 135(d)(1)(h) (emphasis added).
61. NEPA requires federal government agencies (or a state agency with the guidance and participation of the responsible federal official) to prepare an EIS on all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332.
62. NEPA requires federal agencies to “utilize a systematic, interdisciplinary approach which will insure the integrated use of natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.” 42 U.S.C. § 4332(A); 40 C.F.R. § 1502.6. Regulations promulgated by the Council on Environmental Quality (CEQ) to govern the criteria and procedures to be applied by federal agencies when they review proposed projects under NEPA require agencies to “insure the professional integrity, including scientific integrity, of the discussion and analyses in environmental impact statements.” 40 C.F.R. § 1502.24. Accordingly, agencies may not selectively ignore consequences or use discredited science.
63. An EIS must evaluate the effects of the proposed project. “Effects and impacts as used in these regulations are synonymous. Effects includes ecological . . . , aesthetic, historic, cultural, economic, social, or health [effects], whether direct, indirect, or

cumulative.” 40 C.F.R. § 1508.8.

64. An EIS must take a “hard look” at indirect effects and their significance. 40 C.F.R. §§ 1508.8(b), 1502.16(b). Indirect effects as those that are “caused by the action and are later in time or farther removed in distance [than direct effects], but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Indirect effects “include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” *Id.* In evaluating issues such as 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 Citizens Group v. USDOT*, 656 F.Supp.2d 868, 887 (ED WI 2009).
65. An EIS must evaluate “[p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local . . . land use plans, policies and controls for the area concerned.” 40 C.F.R. § 1502.16(c). “Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.” 40 C.F.R. § 1506.2(d).
66. An EIS must evaluate “[u]rban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.” 40 C.F.R. § 1502.16(g).
67. An EIS must take a hard look at cumulative impacts. 40 C.F.R. § 1508.25. A “cumulative impact” is:

the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from

individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. The goal is to highlight negative impacts or effects that might occur if the minor effects of multiple actions accumulate over time. An agency cannot simply state that development will occur with or without the project, but instead must actually analyze the possible growth-inducing effects of a proposed highway project. *See, e.g., Highway J Citizens Group*, 656 F.Supp.2d at 888-9.

68. An EIS must meaningfully evaluate alternatives to a proposed action. 42 U.S.C. § 4332(C)(iii). An EIS must “rigorously explore and objectively evaluate all reasonable alternatives” and . . . [d]evote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparable merits.”

40 C.F.R. § 1502.14(a). This analysis will be irreparably skewed by a failure to adequately consider either reasonable alternatives or the consequences of the proposed action. The EIS must include the alternative of no action, must include reasonable alternatives not within the lead agency’s jurisdiction, and must include appropriate mitigation measures not already included in the proposed action or alternatives. 40 C.F.R. §§ 1502.14(c), (d), (f).

69. Agencies also must assess new information made available after the completion of an EIS. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). If new information indicates that circumstances differ significantly from those contemplated when the original EIS was prepared, NEPA requires that the agency prepare a supplemental EIS. *Id.* at 372.

70. The APA, 5 U.S.C. § 551 *et seq.*, requires that federal agency actions and decisions follow all statutorily prescribed procedures and comply with all applicable laws. The APA also requires that a reviewing court hold unlawful and set aside any

agency action if it fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706.

71. The APA authorizes federal courts to enjoin agency activity if it fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

72. WEPA, Wis. Stat. § 1.11, is the state law analog of NEPA, and imposes substantially identical requirements on state agencies.

FIRST CAUSE OF ACTION: VIOLATION OF NEPA (Inadequate Analysis of Effects)

73. Plaintiffs assert this First Cause of Action against the federal Defendants.

74. Plaintiffs reallege and incorporate paragraphs 1 through 73 above.

75. The FEIS violates NEPA by failing to identify, disclose, and study adequately the effects and impacts of the Zoo Interchange project on the natural and human environments in the region, including but not limited to:

- a. The social, economic, employment, urban and racial effects, including indirect and cumulative effects, of failing to preserve, improve and expand transit, and of the disparate treatment of highway and transit development in the region, especially in light of the known racial disparities and the documented need for transit to develop at the same rate as highways to achieve civil rights compliance;
- b. The land use, and associated social, cultural and racial effects, including but not limited to impacts related to facilitation of suburban and exurban growth patterns (“sprawl”) and those effects insofar as they facilitate or perpetuate racially segregated residential land use patterns, the relocation of jobs and

businesses from older, developed urban areas with significant minority populations to less developed, predominantly white, parts of the region, and/or the exclusion of transit-dependent workers from parts of the region where greater job growth is occurring;

- c. Impacts of induced demand, whereby the expansion of the highway itself, alone and/or combined with the failure to provide recommended transit, increases traffic by influencing motorists to use the expanded highway capacity and developers to build in the vicinity of that increased traffic and in locations made more accessible by the expanded capacity, and any associated social, economic, land use, and racial impacts thereof;
- d. Air quality impacts, with attendant increases in adverse health effects and risks, resulting from increased volumes of traffic and/or from inadequate provision of transit alternatives, and the extent to which any such effects are disproportionately borne by minority communities;
- e. Community, neighborhood, economic development, employment, and local economic effects, especially on underemployed and unemployed, isolated and transit-dependent minority communities in Milwaukee;
- f. Impacts of expenditure of limited public funds on this project in lieu of other transportation projects, including transit projects, that are needed in the same region, and the impacts of expending public funds to expand a highway project at the same time that funding is needed for the preservation – not just the expansion – of the transit system; and
- g. Impacts on water volume and quality, and associated impacts such as flooding impacts on downstream communities, from the increased runoff

likely to occur by the significantly expanded impermeable pavement surface alone and/or combined with proposed water-related projects in the region.

76. For the foregoing reasons, the FEIS fails to fulfill the purposes of NEPA; Defendants violated NEPA by failing to prepare an adequate FEIS; and the approval of the Zoo Interchange project based on that flawed FEIS is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

SECOND CAUSE OF ACTION: VIOLATION OF NEPA
(Inadequate Analysis of Alternatives)

77. Plaintiffs assert this Second Cause of Action against the federal Defendants.

78. Plaintiffs reallege and incorporate paragraphs 1 through 73 above.

79. The FEIS violated NEPA by failing to consider adequately all reasonable alternatives, including but not limited to:

- a. Incorporation of transit into the project;
- b. Prioritizing preservation of existing transportation systems over capacity expansion;
- c. Reducing the project size and scope through methods including but not limited to reconstructing the Zoo Interchange without adding lanes and without building extra-wide shoulders for the purpose of adding future lanes;
- d. Using cost savings from reducing project size and/or using other funding sources, including federal flexible funding sources, to preserve, improve and expand transit; and
- e. Various combinations of the above alternatives.

80. By using an incomplete analysis of the environmental impacts of the project and by underestimating the potential benefits of alternatives, Defendants seriously and

unjustifiably skewed the analysis of alternatives. Defendants weighed alternatives to the proposed project against an unrealistically optimistic assessment of project benefits and shortcomings.

81. For the foregoing reasons, the FEIS fails to fulfill the purposes of NEPA; Defendants violated NEPA by failing to prepare an adequate FEIS; and the approval of the Zoo Interchange project based on that flawed FEIS is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

THIRD CAUSE OF ACTION: VIOLATION OF NEPA
(Noncompliance with Title VI Requirements)

82. Plaintiffs assert this Third Cause of Action against the federal Defendants.
83. Plaintiffs reallege and incorporate paragraphs 1 through 73 above.
84. Title VI of the Civil Rights Act and its accompanying regulations prohibit the state Defendants from taking actions with the intent or effect of discriminating on the basis of race, color or national origin. The federal Defendants have the obligation to ensure compliance with Title VI and its regulations. *See, e.g.*, 23 C.F.R. § 200.7; 49 C.F.R. Part 21.
85. Defendants are obligated to comply with Title VI in the EIS process.
86. Defendants violated civil rights compliance requirements and certifications by, inter alia:
- a. Failing to require the EIS to evaluate, address and mitigate issues relating to the transit dependence and segregation of minorities, especially African-Americans and Latinos, in light of the known racial disparities in transit dependence;
 - b. Failing to require the EIS to evaluate indirect and cumulative effects specifically on minority persons and communities;

- c. Failing to make meaningful, if any, efforts to ensure compliance with the state Defendants' prior agreement to use its best efforts to provide transit, in settlement of a race discrimination complaint under the auspices of the USDOT Defendants; and
- d. Failing to require the state Defendants to comply with Title VI, including by developing and following a specific Title VI implementation plan, for years, including years during which the project was developed and alternatives evaluated.

87. Defendants' failure to meaningfully address or mitigate issues relating to Title VI, and the federal Defendants failure to require that the state Defendants comply with Title VI, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

FOURTH CAUSE OF ACTION: VIOLATION OF NEPA
(Failure to Supplement EIS)

- 88. Plaintiffs assert this Fourth Cause of Action against the federal Defendants.
- 89. Plaintiffs reallege and incorporate paragraphs 1 through 73 above.
- 90. NEPA requires the preparation of a supplemental EIS when new information provides a significantly changed understanding of the environmental impacts of a project.
- 91. Subsequent to signing the FEIS, the likelihood of diversion of Lake Michigan water to the city of Waukesha increased. The EIS failed to evaluate the water quality, flooding and other effects of the proposed return diversion of that water through Underwood Creek, which is in the vicinity of the Zoo Interchange, when combined with the proposed significantly expanded impermeable pavement area of the Interchange itself.

92. For the foregoing reasons, the failure to prepare a supplemental EIS and the approval of the project in the absence of the supplemental EIS is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

FIFTH CAUSE OF ACTION: VIOLATION OF WEPA

93. Plaintiffs assert this Fifth Cause of Action against the state Defendants.

94. Plaintiffs reallege and incorporate paragraphs 1 through 93 above.

95. WEPA, Wis. Stat. § 1.11, imposes on Wisconsin state agencies substantively identical requirements with respect to preparation of an EIS as does NEPA on federal agencies.

96. For the reasons described above, the FEIS fails to fulfill the purposes of WEPA; the state Defendants violated WEPA by failing to prepare an adequate FEIS; and the decision of the state Defendants to proceed with the Zoo Interchange project based on that flawed FEIS is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

WHEREFORE, Plaintiffs demand judgment as follows:

1. A declaration that the federal Defendants have failed to comply with NEPA, and the state Defendants with WEPA, by failing to prepare an adequate FEIS;
2. A declaration that the federal Defendants' approval of the Zoo Interchange project, as well as the state Defendants' decision to proceed with the project, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
3. An order vacating the FEIS, ROD, and Notice pertaining to the project and remanding the FEIS, ROD, and Notice to Defendants for the purposes of curing their violations of NEPA, APA and WEPA;

4. An order vacating any project agreement authorizing the use of federal funds for the project pursuant to 23 U.S.C. § 106(a);
5. Preliminary and permanent injunctions barring Defendants from taking any action that in any manner supports or funds the design, property acquisition, construction, or development of the highway project until the violations of NEPA, the APA, and WEPA, have been cured;
6. An award to Plaintiffs of reasonable attorney fees, costs, expenses, and disbursements associated with this litigation; and
7. For such other or further relief as authorized by law and as this Court may deem just and proper.

Respectfully submitted this 6th day of August, 2012.

/s/ Karyn Rotker

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