

January 25, 2008

WRITER'S DIRECT LINE
608.258.4276
dclark@foley.com EMAIL

CLIENT/MATTER NUMBER
999999-9999

Roberto Gutierrez, Project Manager
Wisconsin Department of Transportation,
Southeast Region
141 N.W. Barstow Street
Waukesha, WI 53187

Re: Comments on the Draft Environmental Impact Statement for Project I.D. No. 1030-20-00 on Behalf of the 27th Street Business District Association

Dear Mr. Gutierrez:

On behalf of our client, the 27th Street Business District Association (the "Association"), we submit the following comments on the Draft Environmental Impact Statement ("DEIS") for Interstate I-94, I-43, I-894, and South 110 (Airport Spur) I-94/USH 41 Interchange to Howard Avenue Project (I.D. No. 1030-20-00). These comments supplement the Association's concurrently filed comments.

The I-94 corridor reconstruction project is a major federally funded action significantly affecting the quality of the human environment. As required by the National Environmental Policy Act ("NEPA"), the Wisconsin Department of Transportation ("WisDOT") and the Federal Highway Administration ("FHWA", hereinafter together referred to as "WisDOT") prepared a draft environmental impact statement for the project. We believe that the DEIS does not satisfy the requirements of NEPA and its implementing regulations and that portions of the DEIS are not sufficient to allow for meaningful review and analysis. We recommend that WisDOT prepare a revised or supplemental DEIS and provide an appropriate public comment period.

I. WisDOT Should Fully Evaluate The Social and Economic Impacts Of Its Proposed Changes To The 27th Street/I-894 Interchange

The Association's membership is made up of various businesses located in the 27th Street area. These members are concerned that WisDOT's planned changes to the 27th Street/I-894 interchange will adversely affect their business operations. WisDOT proposes to remove motorist's ability to exit from I-94 northbound to 27th Street and to enter I-94 southbound from 27th Street. WisDOT's proposal will complicate and reduce motor vehicle access to the businesses on 27th Street.

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The FHWA's regulations implementing NEPA require the agency to conduct a full analysis of the social and economic, as well as the environmental, impacts of the proposed project. *See, e.g.*, 23 C.F.R. § 771.105(b). The DEIS does not adequately identify and evaluate the social and economic impacts of the proposed access changes to the 27th Street area. As a consequence, the DEIS does not present agency decision-makers with the information necessary to reach an informed choice on the details of the proposed project or to evaluate competing impacts of reasonable alternatives to the proposed project. The Association believes that these socioeconomic impacts should be identified and analyzed before WisDOT selects a preferred alternative.

II. **WisDOT's Examination Of Alternatives For The 27th Street/I-894 Interchange Were Not Adequately Presented To The Public**

FHWA regulations require that during the EIS process, WisDOT give the public “[e]arly and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts . . .” 23 C.F.R. § 771.111(h)(2)(ii). Moreover, the CEQ regulations require that alternatives be provided “in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public.” 40 C.F.R. § 1502.14.

WisDOT's proposed alternatives for the 27th Street/I-894 interchange have been unclear and difficult for the public to decipher throughout the EIS process. For example, in the map attached to the DEIS, which purportedly shows the alternatives considered for the 27th Street/I-894 interchange, there is no mention of closing ramps to/from I-94—even though this would clearly be a primary issue of concern for the affected public. DEIS Ex. 2.6. Instead, the map shows four alternatives for the 27th Street/I-894 interchange that do not contain any information about I-94 access.

The only discussion of this issue is in the following three paragraphs of the DEIS:

A key feature under consideration for this alternative is access to and from I-94 and the 27th Street interchange with I-894/43, just west of the Mitchell Interchange. . . . WisDOT and FHWA developed two options to address this issue.

- Under the first option, vehicles entering EB I-894/43 at the 27th Street interchange would not be able to access I-94 SB. Under this option, drivers on 27th Street who want to go south on I-94 could access I-94 at the Layton Avenue interchange about seven blocks east of 27th Street or at Howard Avenue or College Avenue. Conversely, drivers on I-94 NB who want to go to 27th Street could exit at Layton, Howard, or College Avenues and proceed west to 27th Street.

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- The second option is to build special ramps at the 27th Street interchange that would carry vehicles entering I-94, either NB or SB, without ever entering I-894/43. Similarly, I-94 NB traffic that exits to 27th Street would have a dedicated exit ramp in the Mitchell Interchange to access 27th Street without entering I-894/43. This option has been eliminated from consideration because of safety concerns, there are other interchanges nearby, and additional right-of-way acquisition would be required, as well as potential relocation of an apartment building. Also, the second option would cost an estimated \$10 million more than the first option.

DEIS at 2-12.

As discussed below, there are more than two reasonable alternatives for configuring access to/from 27th Street and I-94. Second, because the maps attached to the DEIS do not clearly show the options considered, the impacts of the proposed alternatives are not clearly defined and, as a result, the Association believes that WisDOT has failed to meaningfully notify the public or provide adequate and comprehensible comparisons of the alternatives or impacts. The DEIS should be supplemented with additional maps clearly identifying the I-94 access provided by the alternatives WisDOT is evaluating and the public should be allowed to comment. 40 C.F.R. § 1502.9(a).

III. WisDOT's Preferred Alternative At The 27th Street/I-894 Interchange Does Not Align With The Articulated Project Purpose And Objectives

WisDOT must consider alternatives in reference to the general goals of the project. *See Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). According to the DEIS, the 38-mile I-94 reconstruction project's purpose is "to address the study-area freeway system's deteriorated condition and obsolete design of the roadway and bridges, high crash rate, and current and future capacity." DEIS at 1. The proposed project's objectives are to "[i]mprove safety and traffic operations" and "[a]ccommodate future traffic volumes at an acceptable level of service." *Id.*

As proposed, the planned changes for the 27th Street/I-894 interchange do not meet these project objectives. The DEIS-identified preferred alternative does not improve safety and traffic operations or accommodate for future traffic volumes. As the DEIS itself points out:

AASHTO guidance calls for all service interchanges on interstate routes to provide access in all directions (AASHTO, 2005). That is, interchanges on interstate routes should serve all traffic movements (full interchanges). Drivers, especially those unfamiliar with the area expect to be able to re-enter the freeway at the same location they exit.

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DEIS at 1-44. Nowhere in the DEIS does the agency discuss why these AASHTO safety and service guidelines will not be followed for this interchange. Nor does the DEIS discuss how these two options comport with the overall purpose of the project.

IV. **The EIS's Alternatives Analysis Is Insufficient**

NEPA mandates that agencies “study, develop, and describe appropriate alternatives” to major federal projects that require an EIS. 42 U.S.C. § 4332(2)(C)(iii) & (2)(E). The Council on Environmental Quality’s (“CEQ”) regulations implementing NEPA articulate one of the central purposes of the environmental impact statement: “It shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1. According to FHWA’s regulations, the agency’s policy is 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.” 23 C.F.R. § 771.105(b). In fact, the alternatives section of the DEIS is supposed to be “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. WisDOT is to take a “hard look” at other available options, and in this case, we believe that the DEIS does not do this. *See Eagle Found v. Dole*, 813 F.2d 798,803 (7th Cir. 1987).

A. *The DEIS Does Not Adequately Consider Transportation Demand Alternatives Or Variations Thereof*

As the City of Milwaukee pointed out in its December 28, 2007 letter commenting on the DEIS and asking for additional time to provide comments, the “perfunctory treatment of transit alternatives within the DEIS for major freeway expansion projects is not only contrary to NEPA requirements but also contrary to accepted regional transportation planning principles and the project development process.”¹ *See* DEIS at 2-4. The Association agrees that the DEIS should have more thoroughly evaluated transportation demand alternatives and also should have evaluated combinations of the various build alternatives with all or portions of the transportation demand alternatives proposed.

B. *The DEIS Should Evaluate More Alternatives For The 27th Street/I-894 Interchange And Should Include An Evaluation Of The Social, Economic and Environmental Impacts Of All Alternatives Considered*

The consideration of alternatives is based on a “rule of reason” inquiry, which governs “both *which* alternatives the agency must discuss, and the *extent* to which it must discuss

¹ Letter to Robert Gutierrez from Jeffrey Polenske Re: I-94 North-South Freeway Reconstruction (December 28, 2007).

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them.” *Highway J Citizens Group v. Mineta*, 349 F.3d 938,960 (7th Cir. 2003) (emphasis in original). Generally speaking, the higher the impact, the more number of alternatives should be considered and the more those alternatives should be fully vetted. *Id.*

The Association asserts that a rigorous analysis will demonstrate that reducing and eliminating interstate access from/to 27th Street will have a substantial negative economic impact on local businesses. But the DEIS does not determine or discuss in any detail the social, economic or environmental impacts associated with the proposed options at the 27th Street/I-894 interchange. It briefly discusses only two alternatives. The Association believes that additional alternatives need to be fully evaluated for the 27th Street/I-894 interchange. For example, the Association has recommended at least one additional alternative that should be evaluated, i.e. allowing vehicles to exit from both directions of I-94 but eliminating reentry to I-94 southbound directly from 27th Street. In addition, a full social, economic and environmental analysis should be conducted for all options considered, including an assessment of the economic impacts associated with closing access to/from I-94. The DEIS assumes that a full exit will cost \$10 million dollars more than the preferred half-exit option, but this is misleading because this \$10 million dollar cost does not consider the adverse economic impacts associated with eliminating access to the 27th Street businesses from I-94. *See Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996) (“Misleading economic assumptions can defeat the . . . function of an EIS . . .”).

V. **WisDOT’s Conformity Determinations Are Inadequate**

In accordance with 23 C.F.R. § 771.133, the EIS must document compliance with all applicable environmental laws. Pursuant to the Clean Air Act, to obtain federal funding, the proposed project must “conform to the State Implementation Plan (“SIP”).” DEIS at 4-17; *see also* 42 U.S.C. § 7506(c)(1) (“No department, agency, or instrumentality of the Federal Government shall engage in, support in any way, or approve, any activity which does not conform to an implementation plan . . .”). More specifically, the Clean Air Act states that:

Conformity to an implementation plan means—

(A) conformity to an implementation plan’s purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

- (i) cause or contribute to any new violation of any standard in any area;
- (ii) increase the frequency or severity of any existing violation of any standard in any area; or

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(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in an area.

The determination of conformity shall be based on the most recent estimates of emissions and such estimates shall be determined from the most recent population, employment, travel and congestion estimates .

..

42 U.S.C. § 7506(c)(1). The Association believes that the DEIS conformity analysis for PM 2.5 and ozone is lacking and does not satisfy the requirements of the Clean Air Act's conformity provisions. More specifically, the project could delay timely attainment in applicable PM 2.5 and ozone nonattainment areas, as it would increase traffic in those areas. The project could also cause or contribute to new PM 2.5 violations in Milwaukee County, or at a minimum, increase the frequency or severity of existing violations.

A. *WisDOT Should Conduct A More Thorough Conformity Determination For PM 2.5*

As WisDOT notes in the DEIS, Milwaukee County expects to be designated as nonattainment for PM 2.5 in 2009. After this designation occurs, which will presumably be before much of the project's construction will begin, EPA's conformity requirements for transportation projects in Milwaukee County will become much more stringent. *See, e.g.*, 40 C.F.R. § 93.102. As such, the Association believes that WisDOT should perform a conformity determination for PM 2.5 that assumes Milwaukee County is nonattainment for PM 2.5. 40 C.F.R. § 93.109(i). It is impossible for WisDOT to accurately assess the long-term environmental impacts of the proposal without performing this expanded conformity analysis. *See, e.g.*, 23 C.F.R. § 771.105(b).

In any event, at a minimum, WisDOT should have performed a "hot spot" PM 2.5 analysis for the project, as it is required to do so pursuant to 40 C.F.R. § 93.123(b)(1). It does not appear that the project is exempt from this requirement. It is also unclear from the discussion in the DEIS as to whether WisDOT relied on the most recent information in determining conformity and otherwise complied with 40 C.F.R. § 93.110-112 and 42 U.S.C. § 7506(c)(1).

B. *WisDOT Should Conduct A New Conformity Analysis For Ozone*

The DEIS relies on a conformity determination for ozone stemming from the 2005-2007 TIP approval as the basis for determining the proposed project's conformity. DEIS at 4-69. The DEIS states that "[b]ecause the [more recent] 2007-2010 TIP is consistent with, and implements, the 2035 regional transportation plan, the FHWA and FTA conformance applies to the 2007-2010 TIP." *Id.* The Association disagrees with this statement and believes that WisDOT should conduct a new individual project conformity determination for ozone, including a regional emissions analysis. WisDOT has not adequately shown in the DEIS that the project's scope is substantially the same as it was when it was included in the 2035 regional transportation system plan and the 2007-2010 TIP. 40 C.F.R. § 93.115. In fact, since both the plan and TIP were approved,

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WisDOT changed its proposal at the 27th Street/I-894 interchange. In addition, the conformity analysis uses one-hour nonattainment vehicle emission budgets as a surrogate for the eight-hour nonattainment budgets because eight-hour budgets have not yet been established. Conformity Analysis at 24. Even though this approach was approved by the EPA, the Association believes it is improper under the Clean Air Act.

The Association also believes it is inappropriate for WisDOT to rely on a conformity determination for the 2005-2007 TIP for a project of this magnitude—especially when the Wisconsin DNR has asked EPA to redesignate some of the counties impacted by the proposed project as attainment areas. If the proposed project would interfere with the planned attainment redesignation of the area, there would be significant negative economic impacts on the entire area. Thus, to fully analyze the social, economic, and environmental impacts of the proposed project, the EIS should analyze ozone conformity on a project specific basis—especially when the current monitoring data for a number of counties is so near to justifying redesignation as an attainment. *See, e.g.*, 23 C.F.R. § 771.105(b).

For these reasons, WisDOT should either conduct a full project-specific conformity analysis for ozone or, at a minimum, allow full access to I-94 at the 27th Street/I-894 interchange as WisDOT originally proposed, which would at least ensure that the project proposed in the EIS is the same project proposed in the 2005-2007 TIP.

VI. The DEIS's MSAT Analysis Is Incomplete And Insufficient

The DEIS's mobile source air toxics ("MSAT") analysis is insufficient. DEIS at 4-66. WisDOT essentially argues that EPA's new rule on controlling hazardous emissions from mobile sources (66 Fed. Reg. 17229) will lower overall traffic emissions substantially, and thus it will not matter that traffic is increased on this corridor from the proposal. DEIS at B-1. Then, stating that information is not available, the DEIS does not analyze the effects of moving traffic closer to homes, schools and business, which the DEIS acknowledges will create localized hazardous air pollutant increases. *See* DEIS at 4-67 ("The additional travel lanes . . . will have the effect of moving traffic closer to homes, schools and businesses; therefore, there may be localized areas where ambient concentrations of MSAT emissions could be higher. . ."). The agency also has not analyzed how the increased traffic on Layton Avenue will affect local residents' exposure levels to hazardous air pollutants. Instead, the agency has merely copied the text from the FHWA's guidance, using boilerplate language as to why this analysis cannot be completed because information is allegedly unavailable.² In so doing, the agency has not met its burden under 40 C.F.R. § 1502.22. Given the large scope and important nature of this project, the Association believes that it is inappropriate for WisDOT to reject, out of hand, any attempt at conducting this localized MSAT analysis.

² *See* <http://www.fhwa.dot.gov/environment/airtoxic/020306guidapc.htm>.

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VII. The EIS Should Consider The CO2 Emission Impacts Of The Project

The U.S. Supreme Court has recently determined that CO₂ is an “air pollutant” under the Clean Air Act and that CO₂ emission can impact the environment. *Massachusetts v. U.S. EPA*, 127 S.Ct. 1438, at 1460-61. As such, the EIS must consider the project’s CO₂ emissions and associated environmental impacts. 40 C.F.R. § 1502.16.

In addition, 40 C.F.R. § 1502.09(c)(ii) requires WisDOT to prepare supplements to the DEIS if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact.” In late November of 2007, after the DEIS was completed, the Governor of Wisconsin signed the Midwest Greenhouse Gas Accord, which requires that CO₂ regulations to be adopted prior to this project being built. This creates a possible conflict between the proposed action and State policy, which must be addressed in the DEIS. 40 C.F.R. § 1502.16(c). The DEIS should be supplemented to analyze the impacts of the proposed project’s CO₂ emissions and its compliance with State policy.

VIII. The DEIS Does Not Adequately Address Environmental Justice Issues

As stated in the DEIS, the Presidential Executive Order on Environmental Justice 12898 states that the proposed project should not disproportionately effect minority or low-income populations. *See* DEIS at 4-37 (discussing the Presidential Executive Order). It also requires that representatives of such groups be included and informed about the project. The 27th Street/I-894 interchange proposal disproportionately burdens minority and low-income persons, yet this was not addressed in the DEIS. Moreover, these groups were not adequately informed of the proposed changes to the interchange, as the DEIS maps posted on WisDOT’s website do not indicate the full extent of these proposed changes.

IX. Other Miscellaneous Comments

The Association also has the following miscellaneous comments:

- The DEIS does not adequately explain “how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.” 40 C.F.R. § 1502.2(d).
- The energy requirements and conservation potential of various alternatives and mitigation measures were not adequately assessed. *See* 40 C.F.R. § 1502.16(e). At a minimum, rapid transit and other non-highway transportation projects should have been fully considered.
- The noise impacts associated with increased traffic on Layton Avenue should have been considered. *See* DEIS at 3-64.

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- The area of potential effects (“APE”) for the indirect effects analysis is too small. As proposed, the project could certainly induce (or reduce) development outside of the 1-mile radius used for the entire project corridor. DEIS at 4-4. At a minimum, the Association believes a 10-mile radius should have been used to assess indirect effects.
- The 27th Street exits should not be closed during construction, as this will add to the social and economic loss in the area due to the project.
- The DEIS states that there will be no changes to property values from the proposed project. DEIS at 4-32. The Association disagrees with this conclusion. The DEIS also states that travel patterns will not change. *Id.* In fact, the Association believes that property values and travel patterns will both be impacted on 27th Street and Layton Avenue because of the proposed removal of access to/from I-94 and 27th Street.

Conclusion

The Association believes that the DEIS is inadequate to support meaningful analysis, and as such, the agency should prepare and circulate for public comment a revised DEIS. Thank you for taking the time to consider these comments.

Very truly yours,

FOLEY & LARDNER LLP

/s/ Douglas B. Clark

Douglas B. Clark
Brian H. Potts

Cc: David G. Walsh
The 27th Street Business District Association