UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

1000 FRIENDS OF WISCONSIN, INC.

Plaintiff,

Case No: 11-CV-545

vs.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
ANTHONY FOXX, Secretary of the United States Department of Transportation,
FEDERAL HIGHWAY ADMINISTRATION,
VICTOR MENDEZ, Administrator of the Federal Highway Administration,
STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION, and
MARK GOTTLIEB, Secretary of the Wisconsin Department of Transportation.

Defendants.

PLAINTIFF'S BRIEF FOR JUDICIAL REVIEW AND DECLARATORY AND INJIUNCTIVE RELIEF

INTRODUCTION

The Highway 23 Corridor Expansion Project is a project of the Wisconsin Department of Transportation (WisDOT) to expand Wisconsin State Highway 23 (WIS 23) from an existing two-lane roadway to four travel lanes separated by a median on an approximately 19-mile segment between US 151 in Fond du Lac County and County P in Sheboygan County. The intent of the project is to designate WIS 23 as an expressway under Wis. Stat., Sec 84.295, and to construct the proposed 4-lane highway, along with expanded interchanges and a recreational trail, using state and federal funds at an estimated cost of approximately $128 million, plus $38 million in costs for mapping and acquiring property to preserve a corridor for eventual future

conversion of the highway to a freeway. (R. 21338)[1]

This is a Project with significant environmental impacts: It would convert 424 acres of land (including 225 acres of cropland) and 48 acres of wetland to highway right of way; affect 48 acres of upland or woodland habitat; displace 33 residences, 19 farms, and 10 other businesses; sever an additional 5 farms; encroach on floodplains; and affect several threatened and endangered species. (R. 21338) As this is a major federal action within the meaning of the National Environmental Policy Act (NEPA), Defendants[2] were required, among other things, to consider reasonable alternatives to the Project, to evaluate the effects of the Project, including its social, economic, air quality, indirect and cumulative effects, and to provide for public participation in the decision-making process by preparing draft environmental documents describing the project and their decision-making, and allowing public input in response to those drafts.

Plaintiff 1000 Friends of Wisconsin (1000 Friends) contends in this case that Defendants' final action approving the expressway project is unlawful because it was based on an inadequate and improper environmental review process and a Final Environmental Impact Statement (FEIS)[3] that FHWA and Defendant State of Wisconsin Department of Transportation (WisDOT) prepared without fair, objective and adequate consideration of reasonable alternatives to the project; and without fair, objective and adequate consideration of

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[1] Citations in this Brief to documents in the Record ("R._____") refer to the Administrative Record filed by defendants in this action, and refer to the page number stamped in red at the top of each page.

[2] Defendants United States Department of Transportation, Anthony Foxx, Federal Highway Administration, and Victor Mendez are referred to as the "Federal Defendants", and State of Wisconsin Department of Transportation and Mark Gottlieb are referred to as the "State Defendants."

3The Final Environmental Impact Statement for the project, a Limited Scope Supplemental Final Environmental Impact Statement dated March 17, 2014, reincorporated, amended and updated the contents of a previous June 2010 FEIS. The March 17, 2014 EIS includes a Record of Decision approving the expansion project. It is that FEIS, and that ROD, which constitute the final agency decision that Plaintiff challenges in this Amended Complaint. (Vol 1, R. 21309-21916; Vol. 2, R. 21917-22262)

the environmental impacts of the project.

Defendants previously questioned Plaintiff's standing to pursue this action, and Plaintiff filed 4 Declarations demonstrating the basis for 1000 Friends' standing to bring this action. The Declaration of Stephen Hiniker, executive director of 1000 Friends, identified the purpose and mission of 1000 Friends, since its founding in 1996, to advocate for sound land use planning with the goal of protecting Wisconsin's quality of Life, natural resources and cultural heritage from the effects of sprawl and uncontrolled growth. His Declaration confirmed that the other three Declarants are and have been members of 1000 Friends since well before this litigation was commenced in 2011.

Declarant Leonard Sobczak has owned property in Glenbeulah directly abutting Highway 23, that has already been affected by defendants' approval of the highway expansion project, and that will be further affected if the existing 2-lane road is expanded to a 4-lane highway with a median. A portion of his property, on which he had invested substantial funds and time in restoring to native prairie vegetation, has already been taken by eminent domain for this Project. His Declaration details the harm and injuries that he will suffer if the expansion project is not enjoined, including diminishing his enjoyment of his own land and of the wildlife and wildlife habitat along this highway. Declarant Carol Ann Rittenhouse lives within easy driving distance of the affected Highway 23 corridor, and owns multiple properties within the area. Her Declaration states that she drives on the 2-lane stretch of Highway 23 to visit grandchildren in Oshkosh, and greatly enjoys the rural character, scenic beauty, wetlands, and wildlife that she sees on that rural road. It describes the harm to her esthetic interests that she will suffer if the expansion project is constructed. Declarant Jeffrey S. Siemers lives two blocks from Highway 23, about 2 miles west of the existing 2-lane stretch of the highway. His Declaration states that

he drives on the existing 2-lane portion of Highway 23 to get to skiing and hiking areas in the Kettle Moraine area, and describes how his enjoyment of that corridor, including its wetlands, meadows and wildlife habitat, will be diminished if the highway is expanded to a 4-lane highway with a median.

This case is now before this court for a determination under the Administrative Procedure Act, 5 U.S.C. Sec. 551 et seq, as to whether Defendants have complied with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. sec 4321 et seq,, and if not, for a determination of the appropriate relief for such noncompliance.

I. THE APPLICABLE LAW

NEPA, the controlling statute at issue here,"declares a broad national commitment to protecting and promoting environmental quality. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 358 (1989). It contains "action-forcing procedures which will help to insure that the policies [of the Act] are implemented. . . The thrust of [the law] is that environmental concerns be integrated into the very process of agency decision-making." *Andrus v. Sierra Club,* 442 U.S. 347, 350 (1979). NEPA does not mandate particular results, but requires that agencies follow specified procedures to study and describe the environmental consequences of their proposed actions. *Id.*, at 348-51; Vermont Yankee Nuclear Power Corp v. Nat. Res. Defense Council, 435 U.S. 519, 558 (1978).

The key procedural element of NEPA is to require the agency to prepare an "environmental impact statement" (EIS) for "major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. Sec. 4332(2)(C). As this court explained in *MICAH v. Gottlieb*, 944 F.Supp.2d 656, 662 (E.D. Wis. 2013):

> The EIS is "a detailed analysis and study conducted to determine if, or the extent to which, a particular agency action will impact the environment." *Highway J*

> *Citizens Group v. Mineta*, 349 F.3d 938, 953 (7th Cir.2003). Requiring an agency to prepare an EIS serves NEPA's action-forcing purpose in two respects. *Robertson*, 490 U.S. at 349, 109 S.Ct. 1835. First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Id*. Second, it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id*. Thus, in the EIS, the agency must "articulate why [it has] settled upon a particular plan and what environmental harms (or benefits) [its] choice entails." *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir.1997). The EIS must show that agency officials have "[thought] through the consequences of — and alternatives to — their contemplated acts," and must ensure that "citizens get a chance to hear and consider the rationales the officials offer." *Id*.

An EIS must meaningfully evaluate alternatives to a proposed action. 42 U.S.C. Sec. 4332(C)(iii). It 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. Secs. 1502.14(a),(b).

"No decision is more important than delimiting what these 'reasonable alternatives' are. That choice, and the ensuing analysis, forms 'the heart of the environmental impact statement.'" *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997) (internal citations omitted). The EIS must include reasonable alternatives not within the lead agency's jurisdiction, must include the alternative of no action, and must include appropriate mitigation measures not already included in the proposed action or alternatives. 40 C.F.R. §§ 1502.14(c),(d),(f). The evaluation must consider the impacts of reasonable alternatives, not just mention the alternatives themselves. *See, e.g., Flaherty v. Bryson*, 850 F.Supp.2d 38, 72-73 (D.D.C. 2012).

The agency must "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." *40 C.F.R.* Sec. 1502.14(a). In reviewing what constitutes a reasonable alternative, the purpose of the project must be identified, but a project proponent

cannot define the purpose so narrowly as to "define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons*, 120 F.3d at 666.

> "If NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives. In this case, the officials of the [federal agency] . . . executed an end-run around NEPA's core requirement. By focusing on the single-source idea, the [agency] never looked at an entire category of reasonable alternatives and thereby ruined its environmental impact statement."

Id. at 670. The Seventh Circuit noted the importance of an agency examining potentially feasible alternatives. *Id.* at 669. "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Id.* at 670 (internal citations omitted)

Regulations promulgated by the Council on Environmental Quality make clear that the purpose of an EIS is to "serve as the means of assessing the environmental impact of proposed agency actions," and that they shall "not be used to rationalize or justify decisions already made." 40 C.F.R. Secs 1502.2(f), (g) and 1502.5. Regulations governing the criteria and procedures to be used 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, Sec.1502.24. Agencies must make a good faith inquiry into the environmental consequences of proposed actions, and are required to use the best available science to support their conclusions. *See Environmental Defense Fund v. Hardin*, 325 F.Supp. 1401, 1403 (D.D.C. 1971). Accordingly, agencies may not selectively ignore consequences or use discredited science.

As part of NEPA's full disclosure procedures, the agency prepares and circulates a draft EIS (DEIS) for comment, and a final EIS (FEIS) is prepared that responds to comments submitted in response to the DEIS. 40 C.F.R. Sec. 1502.9(b). The final statement must address the comments by one of the following means: modifying the proposed action or alternatives;

developing and evaluating new alternatives; supplementing, improving or modifying its analysis; or making factual corrections, or explaining why the comments do not warrant further response. 40 C.F.R. Sec. 1503.4(a). While an agency is not required to choose an alternative that a commentator might consider best, or to agree with the comments of another agency, a court may be skeptical of an agency's response if it has apparently ignored the conflicting views of other agencies having pertinent expertise. *Fuel Safe Wash. V. F.E.R.C.*, 389 F.3d 1313, 1326 (10th Cir. 2004); *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002).

The law is clear: as part of the analysis of the environmental impacts of the interchange project, agencies must take a "hard look" at the effects of the project. *See, e.g., 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 and impacts 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.

Indirect effects are the reasonably foreseeable impacts that are caused by the proposed action but which appear later in time or further in distance than the direct effects of the action. 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." 40 C.F.R. § 1508.8(b).

Cumulative impacts are defined as:

> 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 purpose of the cumulative impacts requirement is to ensure that an

agency provides a "realistic evaluation of the total impacts" of its activities by analyzing the impacts of individual projects together rather than "in a vacuum." *Grand Canyon Trust v. Federal Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002).

> [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). "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).

An agency must also consider the extent to which its actions will exacerbate or induce growth. It is well established that 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*, *Davis v. Mineta*, 302 F.3d at 1122 and *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (both affirming need to evaluate growth-inducing effects of development); *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' . . .").

Related to the issue of induced growth is induced travel, "additional traffic resulting from motorists' decisions to take advantage of additional highway lanes. Expanding road capacity may cause induced traffic because the increased capacity makes driving less burdensome, and as a result, motorists who otherwise would not have used the roads decide to make additional or longer trips." *Highway J,* 656 F.Supp.2d at n. 10. Major "highways have a profound influence on 'population growth, high-density urbanization, industrial expansion, (and) resource exploitation.' 42 U.S.C. § 4331. . . .[S]uch highways often create demands for travel and expansion by their very existence. . . . In short, 'need' is often a self-fulfilling prophesy in the area of major highway construction." *Swain v. Brinegar,* 517 F.2d 766, 777 (7th Cir. 1975); *cf., Barnes v. USDOT,* 655 F.3d 1124, 1136 (9th Cir. 2011) (failure to address induced demand due to increased runway capacity is *"*a flaw 'so obvious' that petitioners did not need to preserve it by raising it in their comments.")

The standards for judicial review in this action arise under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* As this court stated in MICAH, 944 F.Supp. at 662:

> Judicial review of an agency's compliance with NEPA occurs under the Administrative Procedure Act, which instructs courts to set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); Highway J. Citizens Group, 349 F.3d at 952. In a NEPA case, the court's role is to ensure that the agency has adequately considered and disclosed the environmental impact of its actions. Baltimore Gas & Elec. Co. v. Nat. Res. Defense Council, 462 U.S. 87, 97-98, 103 S.Ct 2246, 76 L.Ed.2d 437 (1983).

SUMMARY OF ARGUMENT

This Brief will demonstrate that Defendants' consideration of alternatives, their decision-making, their environmental review processes regarding approval of the 4-lane expansion of WIS 23, and their LSSFEIS, the 2014 FEIS, did not comply with the requirements of NEPA summarized above. Instead:

- The Legislature's enumeration of WIS 23 as a "major" project, outside of the existing mechanism for Transportation Projects Commission review and prioritization of such projects, made this a highly political project, which constrained WisDOT's options;[4]

- The WIS 23 project began as a 4-lane expansion project, and that's what it remained, regardless of whether the need for such expansion could be demonstrated during the years it has been under review;

- The agencies did not consider or evaluate an alternative, requested by the Wisconsin DNR, by the Wisconsin Department of Agriculture, Trade and Consumer Protection, as well as by 1000 Friends, that would combine a three-lane highway (with passing lanes) with other safety and mobility improvements: Transportation System Management techniques (reducing access points, adding turn lanes and auxiliary lanes at high volume intersections, adding traffic signals at high volume intersections, and adding gravel shoulders with pavement widening); and roadway reconstruction (which adds geometric improvements);[5]

- WisDOT repeatedly misused and misstated the significance of arbitrary traffic volume thresholds to reject consideration of alternatives other than 4-lane expansion, despite full awareness that 3-lane highways (2-lanes with added passing and/or left turn lanes) are capable of handling much higher volumes of traffic;[6]

- The stated need for the expansion project, based in large part on claims of inadequate capacity and excessive congestion, depended upon projections of future traffic volumes in the corridor that were overstated, inaccurate, and

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[4] 1000 Friends does not claim that politics must play no role in transportation agency activities, but political considerations do not allow agencies to forego compliance with the requirements of NEPA. One of the criteria under which passing lane alternatives were screened out from serious consideration as this project progressed was that expanding the highway by anything less than 5 miles of additional lanes failed to satisfy the corridor's enumeration as a major project by the Legislature. Finally, after multiple evaluations and decisions that downgraded or completely blocked serious consideration of passing lane alternatives, the 2014 FEIS noted: "To qualify as a major project according to the previously referenced 84.013(1)(a), and comply with this enumeration, WIS 23 must add 5 or more lane miles to the corridor. The enumeration process does not supersede the National Environmental Policy Act (NEPA)/Wisconsin Environmental Policy Act (WEPA) process. Through the NEPA/WEPA process, lesser alternatives may be selected. If they are selected, the project would no longer qualify as a major project and would no longer be eligible for funding under the Wisconsin Majors program." (R. 21386) However, as this Brief will demonstrate, that recognition that passing lane alternatives needed to be considered on their merits, not as some prohibited solution to the corridor's transportation needs, came too late to overcome or undo the biased and unfair treatment to which WisDOT had subjected passing alternatives until then.

[5] DNR noted that the 2004 DEIS considered the three components separately, but had not evaluated the consequences of combining all three. (R. 3172) DATCP requested that much the same improvements be considered and evaluated. (R. 11200, 11206, 11213) Their requests resemble the approach that 1000 Friends has advocated for this corridor.

[6] Similarly, WisDOT manipulated and misrepresented the status of WIS 23 under the 2020 and 2030 Corridors Plans, exaggerated the highway's significance to regional economic development, manipulated and abused a benefit/cost study to eliminate passing lane alternatives from consideration,

unreasonable. Those same overstated traffic projections were used to reject a passing-lane alternative, which was deemed inadequate to serve the projected ever-increasing volumes of future traffic. Contrary to the projections, vehicle travel throughout the country, in Wisconsin, and on this corridor has not steadily increased by at least .5% per year, the minimum growth projection that WisDOT now allows itself to use.[7]

- In February 2005, the Wisconsin Department of Agriculture, Trade and Consumer Protection responded to the 2004 DEIS for the project with an 18-page memorandum that questioned the validity of the methodology, reasoning, and conclusions set forth in the DEIS regarding the need and justification for the 4-lane expansion, regarding the evaluation of alternatives, and regarding the described consequences of the build alternatives. (R. 3191-3208; also at R. 11196-11213) DATCP's memorandum cited to more than 30 reports, books, articles and studies in the course of its description of the deficiencies and errors in the DEIS. (R. 11196-11213). WisDOT identified 39 "comments" in DATCP's memorandum. **Most of those comments -- 25 of the 39 identified by WisDOT -- were never responded to.**[8]

- When early 2012 counts of vehicles demonstrated a significant shortfall in actual traffic on WIS 23 compared to WisDOT's forecasts (which meant that expansion to 4-lanes throughout the corridor was not justified), WisDOT rushed to recount the traffic in June 2012. It then "evaluated" the safety performance and cost-benefit performance of a 3-lane/passing lane alternative (though not of the more comprehensive 3-lane upgrade that DNR, DATCP and individual citizens had requested). The cost-benefit analysis produced the desired result – the full-corridor 4-lane alternative was estimated to be about $2 million better in net benefits than the passing-lane alternative. However, the study's assumptions regarding the safety performance of both alternatives had been cherry-picked in 2005 to disfavor the passing lane alternative and to favor the 4-lane expansion.[9]

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[7]By 2012, at least, WisDOT admitted that "[i]n general, statewide counts seemed to peak in about 2005. . . . Wis 23 is not the only corridor which has experienced a decrease in traffic counts." (R. 21925). WisDOT's own records demonstrate that throughout Sheboygan County, vehicle miles traveled peaked in 2005, and declined over the following 8 years by a total of 8.4% through 2013; travel throughout Fond du Lac County peaked later, in 2010, but then declined more quickly over the following three years, declining by a total of 8.4% from the later peak through 2013. (WisDOT Vehicle Miles of Travel (DVMT) by County, available at www.dot.state.wi.us/travel/counts/vmt.htm)

[8] They were listed/described in cursory fashion in a table of Agency Comments in the 2009 SDEIS and noted as "Acknowledged"(R. 11163, 11167, 11170-11173); and included again in the same fashion in the 2014 FEIS." (R. 21834-21838). DATCP's memorandum is described as "Feels there are ambiguities in the DEIS. Inadequate information about farm properties and operations. DATCP does not believe the DEIS holds enough information to prove an expansion is necessary." (R. 11163, 21825) Without identifying or responding to the **substance** of 25 of the comments, the 2009 SDEIS and 2014 FEIS also described DATCP's memorandum as follows: "The letter also discussed issues from the DEIS such as farm displacement, choice of preferred route, project need, safety issues, access points, and economic development benefits." (R. 11166, 21829)

[9] The Benefit/Cost report noted that the result was very sensitive to the low (15%) reduction in crash rates that was assumed to result from adding passing lanes to the existing 2-lane highway. If this improvement were larger than 20%, the results might well change. The 15% improvement rate came from an admittedly "statistically

- The build alternative traffic volume projections used by WisDOT did not account for induced travel – that is, trips that would only occur because of improved increased speeds and reduced travel times resulting from the 4-lane expansion (as distinct from trips merely diverted to Wis 23 from elsewhere in the road network as a result of the expansion. This biased the evaluation of the eventual performance of the 4-lane expansion alternative, and rendered inadequate the evaluation of indirect impacts of the expansion, including effects on land use, development, sprawl, and air emissions.

- Before the 2014 Final EIS was issued in this case, updated future population projections for the communities in the WIS 23 project corridor and in the indirect and cumulative effects study area were released by the Wisconsin Department of Administration. Those population projections included much lower future populations for those communities than had previously been projected. (R. 21485) Population is a key input for making projections of future traffic. The new numbers meant that overstated population and population growth projections had been used to evaluate the need for the proposed expansion and the effectiveness of alternatives. Although the 2014 FEIS acknowledged and referred to the new population projections in its discussion of indirect and cumulative effects, the Agencies did not redo their overstated traffic projections or revisit their evaluation of the selected alternative or any alternatives.

PROJECT CHRONOLOGY: THE RECORD REVEALS HOW THIS PROJECT MADE ITS WAY TO THE 2014 FEIS

This project has a long history, and the administrative record contains several sets of draft and final Environmental Impact Statements. In order to evaluate whether Defendants have complied with the requirements of NEPA -- to judge whether the Defendants have adequately considered and disclosed the environmental impacts of their actions -- it is necessary to review what the record reveals about what information has been considered, what information has been

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insignificant" (i.e., "meaningless") survey. Moreover, WisDOT *never revealed* that its consultant had performed computerized modeling of the proposed WIS 23 passing lane alternatives to evaluate the safety improvements that could be expected from adding passing lanes. Those modeling results projected an expected reduction in crash rates of approximately 40%. Instead of using those results, or even providing an explanation in the EIS documents of why they were not being used, they were "thrown away", and never disclosed in any EIS documents, and as far as can be told from the record, were never disclosed to the coordinating state and federal agencies with interests in this project, much less to the public. (May 2006 Passing Lane and Cost Analysis, R. 4884; November 17, 2005 comments on the draft report, which note the results of the Interactive Highway Safety Design Model, the absence of any data or reasoned explanation not to believe them, and basically the decision to throw away the results, R. 3480-3481).

"thrown away," what information has been disclosed to other agencies and to the public, what information has been hidden away, and how decisions were made by WisDOT at various stages during this project's path to final agency approval. Plaintiff 1000 Friends believes that examination of this project's developmental history, particularly regarding data and decisions that were not highlighted -- nor in several cases ever revealed -- in the publicly distributed environmental documents, will demonstrate that neither the agencies' decision-making, nor the environmental review process, nor the final action of the Agencies regarding this project, was characterized by the objectivity, fairness, transparency and full disclosure mandated by NEPA.

On December 9, 1998, the District Director of WisDOT wrote Senator Elect James Baumgart, responding to his request for information on the Highway 23 project:

> I am pleased to tell you that the district has been able to schedule a portion of this project into the six year program. This initial construction will involve the expansion of the present two lane section of highway to four lanes westerly from the end of the present four lane Highway 23 roadway at Plymouth. . . .
>
> This project will be scheduled in the 2003 to 2005 time frame. While there will be difficult environmental challenges with the additional crossing of the river at Plymouth, I would hope that we will be able to have this project under construction during the 2003 construction season. Our present estimates, which are very preliminary, indicate a project cost of about $6 million, assuming the four lanes are extended to the Highway 23/County Highway "P" intersection.
>
> Unfortunately, l cannot commit to any further expansion of Highway 23 to the west because this expansion is considered as a major project. Because of the high cost and major economic and environmental impacts of these projects, major projects require enumeration by the Transportation Projects commission and the Legislature.

(R. 856)

In the 1999 Biennial Budget Bill, the Wisconsin Legislature enumerated "STH 23 between STH 67 and USH 41 in Sheboygan and Fond du Lac Counties" as a major highway project on which WisDOT "may proceed with construction." Wis. Stats. § 84.013(3)(ra).

Internal WisDOT emails on April 19 and 20, 2001 described the WIS 23 "project from STH 67 and USH 41 in Sheboygan Counties. It was included in the 1999-2001 biennial budget as an amendment, bypassing the normal TPC process. That means an EIS was never complete and now needs to be done before design work can begin." The estimated cost is $41.95 million. A small project to extend the existing 4-lane section of WIS 23 two to three miles to the west out of Plymouth, out to the highway 23/C intersection by adding lanes to the existing two-lane roadway, is mentioned. This is located at the eastern end of the segment enumerated by the Legislature in 1999. The estimated cost of the short 4-lane project is described as having grown from $6 million to $12 million. (R. 928-930).[10]

On October 11, 2001, Bobbi Jo Reiser of the Wisconsin Department of Natural Resources (DNR) wrote WisDOT about the Fond du Lac County portion of the WIS 23 corridor:

> The Department requests you consider the following when determining how STH 23 expanded:
>
> • Re-evaluate the need for the facility and how it will effect land use. The Department is concerned that a four-lane facility will degrade the natural scenic beauty along this highway corridor as well as promote unwarranted growth along only the highway corridor. What can DOT do to maintain the landscape while still achieving their objectives?

(R. 988)

An October 29, 2002 WisDOT STH 23 Project Information document described project "Concept" as follows: "Adding capacity to STH 23 by providing a 4-lane expressway from the city of Fond du Lac's east side to the city of Plymouth. No bypasses will be necessary." (R. 1305)

[10] That portion of WIS 23 west of Plymouth between WIS 67 and County P was expanded to 4 lanes in 2004 and 2005. (R. 21369)

A February 11, 2003 internal WisDOT email from Shirley Stathas of the WisDOT Bureau of Environment stated "The problem is – this project does not have a sufficient NEED and Rob [Wagner] has to develop one. That's the issue. After talking to Rob – he stated this is a backbone project and that may make a difference with FHWA.[11] However, when you don't have a well developed Need, you can have a ton of problems with other agencies and the public. At least the Need can get other agencies on board." (R. 1492)

A February 12, 2003 Public Information Meeting (PIM) handout described the WIS 23 Environmental Study – all identified alternatives being studied are 4-lane expressways or freeways throughout the entire corridor. (R. 1494)

On February 13, 2003, internal WisDOT emails discussed questions that were raised at the PIM about why this project isn't following the Trans 210 process, like other projects:

> This project was placed in the budget by a certain legislator. That legislator either got the project into the budget in a trade for support of something else or it was his/her hit for the budget. I believe it happened in the caucus process, which is late at night and with only some folks. Given that it happened behind closed doors and outside of the TPC process – there are no rules. Thus, the existence of TRANS is mute. . . .
>
> . . . the project is enumerated. Since it is already enumerated we are required to schedule and build it just like any other enumerated major project. It now holds the same status as any other major project that went through the entire TPC process.[12] (R. 1498)

Wagner circulated a draft Purpose and Needs section for the project's Environmental Impact Statement. Jaclyn Lawton and Shirley Stathas responded in internal WisDOT emails:

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[11] In fact, WIS 23 has merely been a "connector" segment, not a more important "backbone" segment of the state's highway system. (R. 2253, 10126)

[12] Wis. Adm. Code Chapter Trans 210 "sets forth the process and criteria used by the department to numerically evaluate projects considered for enumeration. This process for evaluating candidate major highway projects is used to advise the transportation projects commission. This chapter establishes a minimum score that a project shall meet or exceed in order to be eligible for recommendation to the transportation projects commission." Trans. Sec. 210.01 The chapter sets forth criteria and specific formulas for weighing flow and safety deficiencies, benefit cost ratios, environmental issues, and community support.

> [Lawton] The purpose and need should not include the solution (4-lane expressway). This draft threads the solution throughout the purpose and need. That needs to be cleaned up. (R. 1533)
>
> [Stathas] Under project purpose – you give much detail to Corridors 2020. Instead the statement about Corridors 2020 could be made but the attributes applied to project specific purpose. Corridors 2020 helps make your case but STH 23 need for improvement should be the driving factor throughout your Purpose and Need. (R. 1541)

On July 2, 2003, WisDOT sent the FHWA a notice of intent to prepare an environmental impact statement for the project. (R. 1617-1620).

The November 24, 2003, Federal Register included a Notice that an EIS will be prepared for the proposed construction of a 4-lane facility on approximately 19 miles of STH 23. Proposed alternatives were described as No Build, Upgrade the Existing Facility, and Construction of Added Lanes on Existing or New Alignment. (R. 1788-1989)

The Agenda for a February 12, 2004 STH 23 Majors Review Meeting listed as "Controversial issues:"

- "Pat Riley [an individual who had raised numerous questions about the enumeration of the project and questioned the need for a 4-lane]
- Super 2 [a type of 2-lane highway enhanced with passing lanes, left turn lanes, improved intersections]
- Low Traffic
- Alternate B
- Funding
- Fix by enhancements" (R. 2002)

On March 15, 2004, USEPA concurred in the Purpose & Need and Alternatives Carried Forth for the Draft EIS, based on its understanding that "existing traffic levels throughout the corridor are nearing or exceeding the 7000 vehicles per day threshold that is used when considering an upgrade of a 2-lane facility to a 4-lane facility." (R. 2043)[13]

[13] Actually, 8,700 vehicles per day is the threshold at which such an expansion, or the addition of passing lanes, might be considered, and a two lane highway with passing lanes can go up to a 12,000 threshold, or

A May 4, 2004 WisDOT Slideshow Update noted the Legislative enumeration of Highway 23 as a major project as part of the 1999 Biennial Budget, and states:

- "WIS 23 does not follow the Major Project Selection/Approval Process now signed into law (AB839)."[14] (R. 2098)

On May 11, 2004, Kassandra Walbrun of WIsDOT's Bureau of Equity and Environmental Services emailed Shirley Stathas after reviewing the draft EIS:

> . . . a comment is made in the matrix that the build alternatives will not change the overall character of the area and will better accommodate farm vehicles. There is no analytical basis in the document to back this statement up. In fact, considering that farm preservation and sprawl were noted in the document as a controversial factor on page B-3, it is clear that additional analysis on the secondary and cumulative effects of the project should have been reviewed. Also, how will this project, (making traffic flow faster) help farm vehicles? In fact, I would think its just the opposite. More analysis is clearly needed in order to justify this statement. (R. 2119)

In September 1-3, 2004 emails, WisDOT staff decided not to disclose in the draft EIS's discussion of secondary and cumulative effects of the project that the proposed improvement will not result in noticeable changes in travel speeds – an increase of between 0.7 and 2.5 miles per hour in free-flow speeds in various segments of the corridor in 2030, compared to current speeds, because it "will be red flag to the resource agencies, and raise additional questions on the justification for the project." (R. 2226-2227)

A September 23, 2004 WisDOT document reviewed the project's estimated cost increase to $62.3 million, and provided some insight into how the Legislature's

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even up to the range of 12,000 to 14,000 . (R. 2066, 2642, 3296, 15056) The record suggests how EPA was misled on this issue – the concurrence letter included the following statement regarding how EPA had obtained information about the project: " The U.S. Environmental Protection Agency (U.S. EPA) has reviewed letters from the Wisconsin Department of Transportation (WisDOT)-District 3: (1) dated July 24, 2003 regarding the Purpose & Need, and 2) dated November 10, 2003 regarding alternatives for this project. We have met with WisDOT staff to discuss this project and have participated in subsequent meetings and discussions regarding the project's purpose/need and alternatives."

[14] Wis. Stats. § 13.489(1m)(e), relating to the Transportation Projects Commission, provides: "(e) The department of transportation may not prepare an environmental impact statement or an environmental assessment for a potential major highway project unless the commission notifies the department under par. (d) that the project is approved."

enumeration of the project outside of DOT's normal prioritizing and planning process has complicated its progress:

> - The WIS 23 expansion project was enumerated and scheduled prior to having a corridor study completed or started. The corridor study was initiated behind typical study timelines to have a Final EIS prepared for design and real estate delivery.
> - The scope of the project had no details other than expansion to four lanes. Additional detailed works such as intersection improvements and trail issues have increased the time needed for the corridor study and forthcoming corridor selection.

(R. 2229)

On November 5, 2004, the Defendants issued a Draft Environmental Impact Statement for the Project. The DEIS described 4 Alternates for detailed study: No Build, and 3 Alignments for a 4-lane expanded highway. Alternates not selected for detailed study include a Three-Lane Roadway (Passing Lanes) (R. 2244, 2254-56) After describing the direct environmental impacts of the proposed expansion, and including them in a chart, the DEIS stated regarding indirect and cumulative effects:

> No known secondary and cumulative effects are expected to occur as a result of this project. The primary reason is because the transportation improvement will not change accessibility enough to generate changes in land use. (R. 2305)

With respect to impacts on economic development, it stated:

> The proposed build alternatives alone will not increase or decrease the potential for economic development. Drivers' travel time and ability to access properties will not change. (R. 2320)

Attached as an exhibit to the DEIS was an August 28, 2002 letter from Joanne Klein, environmental coordinator at the Wisconsin DNR, to Robert Wagner, stating:

> As discussed at the meeting the Department generally favors alternatives that minimize land disturbance, and minimize loss or degradation of important natural features, productive agricultural and public recreational land. We also favor alternatives that promote controlled development and coincide with active land use planning. Of the Alternatives A through E, presented at the meeting, the

> Department favors Alternative A, which uses the existing roadway and right-of-way. . . .
>
> The STH 23 crash data and traffic counts presented at the meeting suggest that expansion to a full four-lane highway may not be necessary for the entire corridor for the near future. We suggest that alternatives include a more modest one that meets safety standards with fewer negative effects. For example, passing and turn lanes, reduced number of and improved intersections may be sufficient in some sections to solve current problems and accommodate anticipated future conditions. The four-lane freeway corridor, in addition to converting extensive agricultural land, also encourages rapid changes in land use. The Department is concerned that corridor communities do not have the staff or resources to plan for subsequent growth and to avoid the problems that come with unplanned development. (R. 2552)

A December 15, 2004 internal WisDOT email from Bob St. Clair to Wagner and others noted that the 8700 ADT threshold for considering expansion to 4-lanes in the old manual is not sufficient "cover" for the proposed WIS 23 expansion:

> We have been through this many times with the Majors Program Group and other projects - including this one. True from a read the table of the old capacity manual 8700 is the "magic" number for 4 lanes. But the new capacity process suggests 12-14,000. We have many routes in the state above 8700 that we are not even looking at. I believe his point it that we should be looking at putting our money in those areas rather than in this route. Somehow it seems that we need to address the concern with more than the cover 8700 ADT give us. Maybe the safety angle might be better.
>
> You do not address staged construction. Seems to me that staged construction might be something we would want to consider even if we did not get this letter. At what year does the 8700 threshold get broken. If its in year 15 or beyond we have little to defend spending the money now on capacity.

(R. 2642)

A December 16, 2004 WisDOT email discussed how to respond to concerns raised by Leonard Sobczak, a newly appointed member of the TPC, over whether the proposed WIS 23 expansion is justified:

> I don't know about the validity of Leonard's claim that the EIS doesn't justify the project until 2030, we should probably check that, but I certainly believe the need is well out in time in comparison to other enumerations. (R. 2649)

On January 5, 2005, two public hearings were conducted on the DEIS. Leonard Sobczak gave testimony to the court reporter:

> - That traffic projections did not justify a 4-lane highway for many years;
> - That the project is legislative driven, has not followed normal Department decision-making, and has by-passed TPC evaluation, prioritization, and review;
> - That the accident rate on Highway 23 is significantly lower than average for a rural, two-lane state trunk highway;
> - That no positive effect on economic development is projected by the DEIS; and that every Wis DOT staff person he has ever contacted both in Madison and in District 3 agrees that there are greater highway priorities than this project. (R. 2727-2731)

The next day, an internal WisDOT email reported on the hearings, mentioning Sobczak's testimony criticizing the project, and forwarding a *Sheboygan Press* article reporting that Sobczak and others had called for a more modest project with limited access, enhanced intersections with turning lanes, and passing lanes, and had claimed that such a road could be built for half the cost or less of the four-lane highway. (R. 2995-2596)

In a January 11, 2005 email to Wagner and others at WisDOT, Johnny Gerbitz, FHWA Field Ops Engineer, noted that the department does have high quality 2-lane design standards, and can add passing lanes when feasible, but states that "Adding passing lanes does not add capacity or change the LOS."[15] (R. 3015-3016)

After attending the hearing, Harold Barfknecht, a supporter of the 4-lane expansion proposal, sent WisDOT a letter on January 18, 2005, stating:

> Much talk centered on "access points"; so I decided to make my own informal survey of the 12 miles from Town Rd UU easterly to U in Greenbush Township. (See enclosed North and South lists)
> Some thoughts are:
> • I found that an obvious 20% of the access points could be closed with little adverse impact - they are either duplicates or low usage.
> • 32% of the access points in this section are Field Entrances which may be used a few times in spring for planting and a few times in fall for harvest!

[15] In fact, the record indicates in several places that passing lanes can and do increase the Level of Service (LOS) and/or improve the carrying capacity of highways. (R.3296, 14825, 14872)

> • I do not know of a single crash at a field entrance or driveway (with the exception of one drunk or inattentive driver rear-ending a school bus near Banner Road).
> • Closing some town roads, improving the remaining higher traffic intersections and expanding to four lanes on the existing corridor would make this already safe road ultra-safe at the volumes forecast.
> • Perhaps the most unsafe access points now are at County G which was built on a curve and over a hill. It could be simply reengineered without moving it one-half mile north! (See enclosed photo) The curve and hill could be flattened a bit. (R. 3065-3067)[16]

Joanne Klein of the Wisconsin DNR's Milwaukee office commented on the DEIS in a January 30, 2005 letter, questioning whether the 4-lane expansion was really needed:

> I understand the Department's initial recommendation, to consider alternatives other than a full 4-lane expansion, does not fit the project's stated Purpose and Need. The legislative enumeration of the project in a previous budget, and the 2020 Corridors Plan, appear to impose constraints on the Purpose and Need that disallow less environmentally damaging alternatives. It remains hard for us to understand why these constraints remain in effect, given the extent of the environmental consequences, that the Plan was developed in the economic conditions of the late 1980s, and that traffic counts suggest the need for highway improvements are greater elsewhere in the region. (R. 3136)

Bobbi Jo Reiser, of DNR's Oshkosh office, sent in comments on the DEIS on January 31, 2005, including the following:

> - Under Need for Action, it states that STH 23 is the only major east-west route connecting USH 41 and 1-43. Please clarify why USH 10, STH 33, and STH 60 are not also considered major east-west connector routes.
>
> - The premise of the DEIS is to provide a safe and dependable highway connection to and from regional communities while reducing conflicts between local and through traffic. In the DEIS it is proposed that the best way to complete this is to construct a four-lane highway (Alternatives Section). These conclusions are primarily based off of the 2000 traffic count within the project limits. The traffic count indicates that the total vehicles per day range from 6300 to 13,600. The Department requests that the DEIS include details of this traffic study

[16] There is no indication that this information regarding potential reduction of access points and improvement to the County G intersection was ever considered in evaluating how well the existing two-lane road with added passing lanes and other improvements could serve higher traffic volumes. WisDOT seemed to carefully avoid evaluating a passing lane alternative that was accompanied by access controls, expanded shoulders, auxiliary turnoff lanes, and other enhancements.

(duration of the study, date(s) of the count(s), standard deviation of results, etc). This information is critical as the remainder of the DEIS is dependent upon the conclusions of this traffic study.

- The DEIS identifies independent intermediate options such as a three-lane highway, Transportation System Management techniques, and roadway reconstruction. The three-lane highway includes passing lanes. Transportation System Management (TSM) techniques listed in the DEIS include restricting and/or removing property owner's access to the highway, adding turning lanes and pavement marking for auxiliary lanes at high volume intersections, adding traffic signals at high volume intersections, and adding gravel shoulders with pavement widening. Lastly, roadway reconstruction is listed in the EIS as using similar techniques as the TSM's as well as geometric improvements.

-The Department would request that the WisDOT consider an additional option, which combines all three of these intermediate options. What Level of Service would this result in? Would it provide a safe and dependable highway?

- Under Secondary and Cumulative Effects, please reconsider including the statement, " ... no known secondary and cumulative effects are expected to occur as a result of this project." On a similar project in Fond du Lac County, it was agreed upon that secondary impacts of development are likely to occur with the creation of a 4-lane roadway around the City of Fond du Lac. The township, city, and county governments adopted stricter shoreland zoning ordinances. Urban areas exist on each termini of this project to protect the East Branch of the Fond du Lac River. It is highly probable that an improved infrastructure, as you propose, will encourage residential and commercial development to sprawl from Fond du Lac and Plymouth along this corridor.

- Throughout this section, it states that the build alternatives will provide "travel timesavings and improved safety due to reduced delays and congestion" as well as "improve the cost of moving goods and services between economic centers. Would you please quantify the average timesavings and cost savings this proposed roadway will offer? (R. 3171-3173)

On February 9, 2005, Mike Wyatt of the Agricultural Resource Management Division of the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP), charged with protecting the state’s agricultural resources, as well as public health and the environment,

responded to the DEIS. DATCP's 18-page memorandum questioned the validity of the methodology, reasoning, and conclusions set forth in the DEIS regarding[17]:

- the purpose and need for the 4-lane expansion, and its justification;

- the lack of data in the DEIS to justify WisDOT's projection of future traffic increases, and based on a review of data separately provided by WisDOT upon request, DATCP noted trends in the historical data that "throws into question the DEIS assertion that 'Traffic is steadily increasing' along STH 23." (R. 3195-3196; 11200-11201);

- the subjective and arbitrary nature of WisDOT's LOS criteria for acceptable highway performance, and of its thresholds for highway expansion decisions;

- the better than average safety performance of WIS 23 compared to average crash rates for rural state trunk highways, and the Wisconsin State Highway Plan 2020's acknowledgement that "Driver behavior (such as excessive speed; alcohol or other drug impairment; failure to yield or obey traffic signals; and aggressive driving) accounts for 75% to 85% of all highway crashes. Roadway factors, such as design and condition, account for 10% to 20% of crashes; and vehicles factors account for 5% of crashes." (R. 3200, 11205)

- the importance of the density of access points on issues of highway capacity and safety, stating:

> "access density alone could account for two-thirds of the crash frequency along STH 23. Lack of information on access density for the state trunk highway sample being used for comparison with STH 23 makes drawing any conclusions questionable. The importance of access also suggests that a strategy to reduce the number of access points could considerably improve safety without the need for a capacity increase."(R. 3201, 11206)

and suggesting an alternative:

> "An effort could be made to reduce the number of access points on STH 23 by providing alternative access for residences and farm fields. An access control plan is recommended in the DEIS for the CTH "K" to CTH "UU" subsegment. (p. UU-13) Arguably, given the evidence that access is a more important variable than capacity in addressing safety issues, an access control plan for the entire project corridor could obviate the need

[17] DATCP's memorandum cited to more than 30 reports, books, articles and studies in the course of its description of the deficiencies and errors in the DEIS. (R. 3191-3208; also at R. 11196-11213). WisDOT identified 39 "comments" in DATCP's memorandum. **Most of those comments -- 25 of the 39 identified by WisDOT --were never responded to.**

> for an expansion to four lanes. This could include closing low-traffic cross roads (most of the roads crossing the STH 23 corridor are low traffic) and grade separating others." (R. 3206, 11211)

- regarding the claimed benefits of increasing highway capacity on economic development or tourism; (R. 3201-3205; 11206-11210)

- regarding the elimination of alternatives from consideration, stating:

> It is not clear why various "No Build" alternatives were not included for further study by the DEIS. Various improvements or changes to road operation are possible without choosing the Build alternatives. These options could address many of the concerns about the STH 23 corridor. This is especially relevant given the apparent inadequacy of the rationale for the "Build" alternatives based on traffic volumes, level of service, safety concerns and other factors described above.
>
> In particular, given the questionable assumptions about future traffic volumes, the dismissal of the Three Lane Roadway option, using more passing lanes, appears based more on the predetermined designation of the corridor in the Corridors 2020 plan. But the level of service class assigned by Corridors 2020 for a road is not necessarily based on objective criteria. (See discussion in Level of Service section above.) The Corridors 2020 threshold to build four lane roads is stated to be 8700 vehicles per day in year 2020 (DEIS, p. II-12), but Alba and Beimborn computations suggest a threshold for STH 23 that would be about 17,700 ADT.[18](R. 3205-3206; 11210-11211)

- and regarding the described consequences of the build alternatives, refuting the DEIS' statement that "No known secondary and cumulative effects are expected to occur as a result of this project," and setting forth reasons for expecting secondary and cumulative impacts within the project corridor and outside it in the Sheboygan and Fond du Lac urban centers which it would link. (R. 3206-3208, 11211-11213)

On February 18, 2005, Wagner emailed WisDOT's Patrick Fleming for assistance in evaluating the reasoning used in the DEIS to eliminate the passing lane alternative from consideration:

[18] Like DNR, Wisconsin's other resource protection agency, DATCP requested consideration of adding passing lanes, expanding shoulders, reducing access points, adding auxiliary lanes as truck climbing lanes and to aid right turns, and intersection improvements such as grade separation. (R. 3206, 11211, 11706)

> I've put together some of that information that you said would help to determine the effectiveness of passing lanes on STH 23. I've included the portion/bullet points from the draft EIS that we used to dismiss the passing lanes portion. If you could look at those and advise if those points are valid, not valid, or maybe not applicable. The traffic forecast for the design year, if using the 12000 ADT mark, show that the section between CTH W and CTH T are below that requirement. That seems to be the 8 mile section in question for passing lanes. (R. 3297)

The bullet points in the DEIS referred to by Wagner, that gave the stated reasons for eliminating the passing lane alternative, and the language in the DEIS that claimed to describe the requirements of the state's Facilities Development Manual (FDM) for various types of facilities, read as follows:

> 4. **Three-Lane Roadway or Passing Lanes** do not meet the long-term needs for WIS 23 and was not brought forward for study because of the following reasons.
> • WIS 23 is recommended as a four-lane roadway in Wisconsin's Corridor 2020 report.
> • WisDOT's policy for passing lanes does not recommend WIS 23 for passing lanes.
> • WIS 23 exceeds the current standards for a four-lane facility in the design year (2030).
> • Passing lanes will not improve the Level of Service (LOS) on WIS 23.
> • Passing lanes provide only a ten-year transportation solution in a limited area and do not add capacity to the highway.
> • Only 8 miles of WIS 23 fall within the traffic criteria for adding passing lanes, which is 7 miles shorter than recommended (15 to 50 miles) for building passing lanes.
> • WisDOT design standards for three-lane highways are not met in the limited 8-mile section possible for passing lanes on WIS 23. (R. 2256)

and

> FACILITY TYPE
> **Three-Lane Highway (Passing Lanes)**
> • Passing lane additions require strict access control within the length of the passing lane. Access is limited to minimal driveway/field entrances throughout the passing section. Access via public streets should not be allowed in passing lane sections. (R. 2274)

On February 21, Fleming responded to Wagner, with copies to other WisDOT staff, informing him that the stated reasons for eliminating passing lanes from consideration were unfounded:

> **There is nothing magical or concrete about the 12,000 ADT for a maximum design volume to incorporate passing lanes.** The "Low-Cost Methods For Improving Traffic Operations On Two-Lane Roads, informational guide shows that the upper value for one-way DHV of that study is 700. The FDM indicates 1,400 for two-way DHV or about 12,000 ADT with a K100 of about 12%. **A Canadian study indicates that passing lanes operate effectively to around 15,000 ADT. I believe it is this same Canadian study says that there are no adverse operational effects of passing lanes even with ADT levels as high as 20,000 or 25,000 ADT** however, the benefit/cost (B/C) is substantially reduced.
> **The B/C ratio may be quite high for passing lanes depending on how easy it is to keep construction costs low. Some passing lane sections within a corridors may not require bridge widening, high cuts or fills, or even culvert extensions which will help considerably to keep construction cost down.**
>
> Summary Of Considered Alternatives document, page 2, the "Three-Lane Highway (Passing Lanes). **It is stated that passing lanes require strict access control. It also states that access via public streets should not be allowed in passing lane sections. I'm not sure where this idea or philosiphy comes from because it isn't in the FDM.** The FDM does say that passing lane areas should be access controled early in the process, which doesn't preclude access it only identifies where access is allowed and in the future additional access points may be difficult to justify. Driveways and sideroads should be avoided in the merge area or within 500 feet down stream from the end of the merge. Higher volume sideroads (500 ADT or greater) should be avoided within the passing lane if possible. If a higher volume sideroad is necessary within the passing lane area consider installing a protected left turn bay to remove the turning traffic from the through traffic.
>
> Summary Of Considered Alternatives document, page 11, the "Three-Lane Highway (Passing Lanes). I believe Joe Nestler has already explained why the Passing Lane Corridors map in FDM 11-15-10 does not show WIS 23 as a passing lane corridor. Page 12,
> - 2nd bullet - **The LOS will be improved by incorporating passing lanes but at this time we can not quantify that.** The LOS with the projected volumes may however be within the LOS D range we aren't sure.
> - 3rd bullet - **The 8 miles you refer to could actually be over 15+ miles if the projected ADT was allowed to go to 13,000.**

 5th bullet - It appears that **there is mis-information in in the text that i'm not sure where it came from.** FDM 11-15-10 recommends to the designer to select a passing lane section where access can be avoided if possible. Driveways, field entrances and low ADT sideroads (500 or less) aren't a serious problem. It really depends on the traffic turning left off the main highway. Left and right turns onto the main highway from the sideroad are not as much of a crash problem. The 500 ADT on sideroads is not an absolute, meaning that if you have one that may be 600 or 700 it may be more problematic but depends on the turning traffic from the mainline. If the sideroad traffic is in the 1000 ADT range (1,700 projected for CTH G) and this section is required within the passing lane section then it may be desireable to provide protected left turn bays for the turning traffic and improve the Intersection Sight Distance as provided in FDM 11-10-5 and Corner Clearance as provided in 11-25-1.

Bottom line - it appears that passing lanes should be evaluated in terms of benefit/cost. If you have high cost of construction, bridges, high cuts or fills, many culvert extensions, high volume sideroads etc. that drive up the intial cost and/or less than the design life may be achieved from the passing lane concept until the 4-lane divided alternative is needed, passing lanes may or may not be justified. The benefit is the crash reduction, driver frustration reduction, driver comfort improvement, LOS improvement and possibly the reduced travel time, if any, and the delay in cost of constructing the 4-lane construction. (Emphasis added, but typographical errors in original) (R. 3296)

WisDOT informs DATCP that it has decided not to pursue the improvements to the two-lane highway that DATCP has recommended, requests that DATCP recommend one of the Build Alternatives. On February 22, 2005, DATCP responds to this request:

> Thank you for the opportunity to comment on the Draft Environmental Impact Statement (DEIS) for the proposed improvements to STH 23 between Plymouth and Fond du Lac. As discussed previously, DATCP does not believe that the DEIS demonstrates that a four-lane facility is required to meet the stated needs of the project.
>
> However, WisDOT has decided not to pursue the options of: widening the shoulders; access control plans; increasing the percentage of STH 23 that allows for passing; constructing truck climbing lanes; or spot improvements that would correct problems at intersections and curves. Consequently WisDOT is requesting that DATCP recommend one of the Build Alternatives.

DATCP recommends against Build Alternative 3 (as well as 4, 5, and 6 which are variants of Alternative 3) as affecting larger numbers of acres of farmland, but because of a lack of detailed

information cannot make an informed recommendation regarding 1 or 2. DATCP also requests that WisDOT consider "our previous comments" at WisDOT's scheduled February 28 meeting regarding the project. (R. 3303)

WisDOT's Joseph Nestler discovers that materials prepared for the February 28, 2005 Wis 23 corridor selection meeting still contain the false or misleading bullet points from the DEIS that Fleming had evaluated. Nestler emails Brett Wallace, WisDOT District 3 Planning and Operations Chief on January 28, 2005 regarding their reappearance:

> You and I have discussed these and I thought we agreed in 144B last week (after BB meeting) that these items would be corrected or eliminated prior to appearing in future documents. Most of the bullet points listed above can be proven false or can be seriously questioned as to their accuracy. It is because of this vulnerability that the Department is reintroducing passing lanes into the FEIS (agreed by Chesnick & Wolfgram + public commitment in letter from Secretary to Sobczak) so that we have a selection process that can withstand intense scrutiny. I'm bothered that this text continues to find life; I worry that it can only cause trouble for us.
> Hopefully, I'm overreacting to the text, but by not knowing the direct intent or the audience, it seems like more of the same direction -- a direction that we've committed to reverse. (R. 3364-3365)

March 1, 2005 minutes of the Corridor Selection Meeting say passing lanes will be further evaluated as an interim improvement to building 4-lanes, yet being committed to buying 4-lane right of way:

> District 3 recommends using Alternative 1, the existing highway alignment for the WIS 23 improvement. After corridor approval from Madison, further investigation will be done on the interim improvement of WIS 23 using passing lanes with right-of-way for 4-lanes being officially mapped and possibly purchased. (R. 3368-69)

An April 24, 2005 article in the *Milwaukee Journal Sentinel* reports:

> State officials are contemplating building passing lanes on part of Highway 23 instead of widening the entire road, as legislators who crammed the proposal into the budget six years ago expect.

The Department of Transportation's Mark Wolfgram said last week that building passing lanes on the rural portions of the road between Plymouth and Fond du Lac would shave millions off the $95.6 million project.

Lawmakers ordered the road widened in 1999, before the DOT had studied how soon a bigger highway would be needed. Critics say the project, scheduled to begin in 2009, smacks of pork barrel politics trumping the state's transportation needs. But area legislators say the project is the keystone to building the economy from Fond du Lac to Sheboygan.

Engineers still must study whether passing lanes would be feasible through the area's rolling hills, said Wolfgram, the DOT's transportation investment management administrator.

If they are, the highway could be widened near Plymouth and Fond du Lac but left as a two-lane road - with occasional passing lanes - through rural areas, Wolfgram said. The state would buy enough right of way to widen the full stretch 10 to 20 years later.

. . .

Major highway projects are supposed to be studied by the department and reviewed by the Transportation Projects Commission, which forwards projects it deems worthy to the Legislature and governor. But in 1999, before the department studied Highway 23 in detail, legislators wrote the project into the state budget, which then-Gov. Tommy G. Thompson signed.

The cost of the project has more than doubled from its original estimate of $39.5 million.

Last year, faced with an audit showing out-of-control costs for major highway projects, legislators passed a law barring them from approving future road work the way they did for Highway 23.

Supporters of the widening said the road is crucial to spurring the region's economy.

. . .

About 6,800 vehicles a day drove the rural portions of Highway 23 in 2000, according to a DOT traffic study. Those volumes could rise as high as 13,000 by 2030, the study says.

The DOT's study of the road says four lanes would be needed when the road reaches 8,700 vehicles a day, but a traffic expert called that figure into question.

Ed Beimborn, director of the Center for Urban Transportation Studies at the University of Wisconsin-Milwaukee, said a wider road might not be needed until traffic reaches 15,000 vehicles a day. He also cast doubt on whether traffic would grow as much as the DOT estimates.

"If the traffic is going to double in 20 years, what does that say about the population of Sheboygan and Fond du Lac?" he said. "They would have to grow far more rapidly than they have in the past." (R. 3484-3485)

On June 2005, WisDOT announced that the start date for the WIS 23 project is moved back from 2009 to 2013. The project cost has increased to an estimated $95.6 million.

WisDOT had Strand Associates, Inc., review opportunities for Passing Lane Alternatives on the WIS 23 Corridor, and Strand responded on August 24, 2005 with two alternatives, each of which would add 4 passing lanes to the corridor. (R. 3578)

Tom Lynch at Strand emailed Rob Wagner a draft passing lane report, which Wagner forwarded to Scott Nelson of WisDOT's NE Region for comments. On November 17, 2005, Nelson sent his comments to Wagner:

> I reviewed the report and have the following comments:
>
> 1) **Questionable of whether or not the difference in cost in present worth dollars is significant.** Also, in general you almost need to question a $1,200,000,000 estimate based on numerous assumptions being figured out to the nearest $100.
>
> 2) Page 1... STH Log says the shoulder width is 10' not 6' as noted in the report. This will likely change the results of the IHSDM [International Highway Safety Design Model computer software] results.
>
> 3) Page 2-2 to 2-4
>
> **IHSDM gave reductions in crashes which were deemed unrealistic. I would tend to agree with this. However, my understanding is the program is based on empirical data. To discount the program results based on one study on STH 26 from US 151 to US 41 may be a stretch. It becomes an even further stretch when you read the footnote that says due to the small sample size this data on STH 26 is likely statistically insignificant.**
>
> Center for Research and Education - Iowa State University -- I am not sure how they rearranged the crash density equation to get the crash rate equation. When you plug in an ADT of 10,000 the result is 0.00000106. I would have them re-check or explain how they came up with this equation.
>
> WisDOT Central Office Crash Rate Inventory -- Likely a fair assumption that even though a two lane STH 23 currently has a crash rate 25% below the statewide average, they would still expect a 43% reduction in crashes.
>
> **We may have some difficulty in explaining why we chose the methodology we did.** If I was looking at this from the outside and favored passing lanes I would have some pretty big concerns with this portion of the analysis. **Basically, we have decided to throw away the IHSDM analysis because we don't anticipate the effect will be as great as 40% shown in the results. However, we do think**

if we go to a four lane facility it will reduce the crash rate 43% based on our past data. Why do we accept one and not the other? The IHSDM is based on empirical data so why would we doubt the results? It would likely be equally hard to explain why we think the crash rate would stay the same if we added the passing lanes. We have no data to back why the crash rate would stay the same. Likewise, we have no data to explain why we do not believe the IHSDM results.

4) Page 2-8 .... Did they take into account the cost to maintain 4 lanes vs. 3 lanes vs. 2 lanes?

Don't mean to be too critical of the report, but I assume some the four-lane opponents will likely try to pick apart the report as well. If I was one of them, I would start with the safety portion of the report because the report says it has a big impact on the final results. (Emphasis added.) (R. 3840-3841)[19]

January 16, 2006 emails summarize WisDOT discussions regarding the Highway 23 Passing Lane Analysis. "The passing lane analysis should get a 15% reduction in crashes, based upon a Michigan study documented in a Missouri DOT report." (R. 4085)[20]

February 2006: WisDOT NE Region Passing Lane Recommendation for WIS 23 selects 4-lane expansion over interim construction of passing lanes. Based on Projections that current ADT that ranges from 7000 to 13,600 on various segments will increase by 2035 to 11,325 to 22,825. Says 4-lanes will reduce crashes by 43%, and that "National reports suggest the crash rate for passing lanes may decrease from 5 to 15 percent from a two-lane highway." Cost-Benefit Analysis indicates both passing lane alternatives have approximately the same overall total 50-year costs (crashes, added time, construction, maintenance, operation costs, construction costs) as 4-lane option. The passing lane total costs are approximately .75% or 1.5% higher, or about $3-$6 million more, than the 4-lane, which has been credited in the analysis with an advantage of up to $10 million on crash costs over the passing lane alternative. Again, no

[19] See also, footnote 8, *supra*.
[20] No mention is made of the existence of the IHSDM modeling of WIS 23 showing a 40% improvement.

mention is made of WisDOT's IHSDM modeling which predicted that passing lanes would reduce crashes by 40%. (R. 4308)[21]

In May 2006: The Passing Lane and Cost Analysis prepared by Strand for WisDOT compares a number of interim alternatives for adding passing lanes before expanding all of the highway corridor to 4 lanes.

- Using the IHSDM Model to model the highway's operations, it found that expanding the highway to 4-lanes on the eastern portion, and constructing passing lanes on the eastern portion of the Corridor (east of County G) satisfies the Corridors 2020 Objective of LOS C for traffic in both directions through 2041. (Option 2A) (R. 4890, 4898).

- The document includes an analysis of costs and benefits that concludes that the net benefits of the immediate full-corridor expansion to 4 lanes has approximately $3-7 million of greater net benefit than any of the interim passing lane options. (R. 4899)

- Each of the passing lane options is debited with the same right of way costs as the full 4-lane option – WisDOT assumes that the end result for all options is for a full freeway to be built through the entire corridor someday. (R.4896)

- "The cost benefit analysis is very sensitive to the crash component." (R.4902) The document refers to three studies, one showing passing lane crash reduction rates of 42%, one at about 9%, and another in the range of 12-24%.[22] Since WIS 23 already experiences crash rates below the state average, it says "it is less likely that passing lanes will substantially reduce the crash rate", and a 15% reduction in crash rates was used for this analysis. "The study did perform a sensitivity analysis to see how this reduction influences the outcome of the economic analysis. The study findings remain unchanged for passing lane crash reductions of up to 20%." (R/. 4902-4903).

- To assess the reduction in crash rates from expand to 4-lanes, the analysis compared typical crash rates for different types of facilities, and found a 43% difference

[21] The estimated NO BUILD 50 year Crash Costs for the Existing WIS 23 highway were $123,505,000. (R. 4644) Accordingly, each 5% change in the crash rate on the highway would produce a change of approximately $6.175 million, or 5% of that total, in the evaluation.

[22] There is no mention in the document of the 40% reduction in crash rates that was the result of modeling WIS 23 with the same IHSDM software that was used in this report to determine LOS operations of each of the alternatives. As noted above, "We decided to throw away the IHSDM analysis." Consequently, **there was no explanation, and could be no explanation given, as to why a 15% crash rate reduction was selected in the face of two different approaches indicating a roughly 40% reduction in crash rates from adding passing lanes**. Moreover the IHSDM projection of a 40% reduction was site-specific, based on the specific physical characteristics, traffic patterns, and operational conditions of WIS 23, so it ought to have been given more weight than a couple of studies on roads that may or may not have been anything like WIS 23.

between those typical crash rates. The document acknowledged that "[t]his data is not specific to the WIS 23 corridor, which has a crash rate that is 25% lower than the state average." [The typical rate for the Rural STN>3500, then is one-third higher than the WIS 23 actual rate. 100/75 = 4/3]

- Nevertheless, in calculating the expected crash rate from expanding to 4-lanes, the analysis applied the 43% reduction from the study of typical rates for types of highway facilities to WIS 23's existing, lower than typical crash rate, yielding a crash rate of 57% of WIS 23's existing rate [100 – 43 = 57]. The **proper** calculation would have reducde the typical Rural STN>3500 crash rate by 43% (because the study had determined typical crash ates for facility types, and was not specific to the WIS 23 corridor). Reducing the crash rate for a typical Rural STN> by 43% would have resulted in a crash rate for a 4-lane expresswayone-third higher than that calculated by Strand. Instead of a crash rate 57% of WIS 23's current rate, correctly assigning a typical expressway crash rate to the expanded highway yields a crash rate of 76% of the current WIS 23 crash rate. [57% x 4/3 = 76%] [23]

In October 2006, WisDATCP prepared an Agricultural Impact Statement relating to the project. It continued to question the justification for the proposed expansion: "After reviewing the projected traffic volume, safety and other data presented to justify the project's construction in 2013, the need for the highway's expansion may be questioned." (R. 5236)

As of July 2009, it was noted that more than 3 years have lapsed since the Draft EIS was approved so a Re-Evaluation is needed at a minimum, and potentially a Supplemental EIS. (R. 9948)

Meanwhile, WisDOT staff were continuing to work on a draft of a Final EIS. Dave Platz of NE Region emailed Wagner his comments on September 4, 2009, attaching comments from Tracey, which included a rebuttal to the language in the 2004 DEIS to the effect that a two-lane

[23] The document compares each of the Options with the No Build Costs or Benefits, so does not allow a direct computation of costs. However, the difference between 57% and 76% [amounting to 19%] of the 50-year Crash Costs of the No Build Option is huge. The 50-year No Build Crash Costs total is $123,505, 000. (R. 4644) **An error of 19% of that amount in favor of the immediate full build option in the analysis amounts to a change of $23.5 million.** Obviously, reducing the 4-lane Option's net benefits by such a huge amount would have revealed the passing-lane Options to be much more cost-effective than a 4-lane expansion (even without making any separate adjustment to the arbitrary and unreasonably low crash reduction benefits that Strand and WisDOT used for adding passing lanes, as a result of "throwing away" the IHSDM modeling results that were favorable to passing lanes.)

highway segment existing between 4-lane segments on the west and on the east lacked "continuity:"

> A 19 mile corridor that is 2-lanes almost the entire length is not a system that lacks continuity. This should not be used as a "need for action." Delete the paragraph. (R. 10073-10075)

The September 14, 2009 Federal Register includes a Notice of Intent to Prepare a Supplemental Draft EIS for the project. (R. 10087)

The October 2009, Connections 2030 Long-Range Multimodal Transportation Plan includes Definitions of the "Connector System: **Two- and four-lane highways** directly linking other significant economic and tourism centers to the Backbone system." (R. 10126, 10130) It describes WIS 23 Mid-Term (2014-2019) as "Construct enumerated project from US 151 to WIS 67, which may include adding lanes and/or constructing candidate expressway upgrades." (R. 10124, 10129)

On December 23, 2009, Defendants issued a Supplemental Draft Environmental Impact Statement for the Project. (R. 10814-11762) It:

- States that "Traffic is steadily increasing along WIS 23."
- Projects ADT on segments of WIS 23 varying between 12,200 and 18,400 by the 2035 Design Year under No Build. (R.10854)
- States that "Truck volumes on WIS 23 are very high" at almost 14% of total volume.(R. 10855)[24]
- Describes the three-lane passing lane alternative as being examined and not carried forward for study as a long-term solution (R. 10866-10869), with the Passing Lane and Cost Analysis attached as an Appendix R. 11504-11547).[25]
- It does not respond to most of the comments submitted by DATCP in response to the 2004 DEIS. They are listed/described in cursory fashion in a table of Agency Comments and noted as "Acknowledged"(R. 11163, 11167, 11170-11173). DATCP's memorandum is described as "Feels there are ambiguities in

[24] DATCP's February 2005 letter had objected to this characterization in the earlier DEIS, as the 1999 Fond du Lac Area Transportation Study had found the average proportion of trucks in the traffic stream for the area was 12.4%, not significantly less than what the DEIS claimed was the case for WIS 23.

[25] The SDEIS contained no mention of the IHSDM modeling which predicted a 40% reduction in the crash rate from adding passing lanes to WIS 23, nor any mention that such information had been "thrown away" and disregarded.

the DEIS. Inadequate information about farm properties and operations. DATCP does not believe the DEIS holds enough information to prove an expansion is necessary." (R. 11163) Without identifying or responding to the **substance** of 25 of the comments, the SDEIS also described DATCP's memorandum as follows: "The letter also discussed issues from the DEIS such as farm displacement, choice of preferred route, project need, safety issues, access points, and economic development benefits." (R. 11166)

On February 24, 2010, a Public Hearing is conducted on the SDEIS, in an open house format. (R. 12938)

On June 3, 2010, Defendants issue a Final Environmental Impact Statement.(2 Vols. at R. 12578-13043, 13044-13623). In this FEIS:

- The preferred alternative is full 4-lane expansion, coupled with corridor preservation, and various interchange decisions.
- Significant changes from the previous draft relate to corridor preservation for future interchanges and overpasses, inclusion of the Ice Age Trail, addition of an interchange at G, and changes to other intersections.
- The Passing Lane and Cost Analysis report is included in an Appendix. (R. 13366-13398)[26]

On September 27, 2010, Defendants issued a Record of Decision. The ROD approved the preferred alternative components identified in the FEIS. (R. 13933-13950)

June 6, 2011: Plaintiff filed its Complaint in this Action. A stay of further proceedings was requested by the parties, and granted by the court, until July 2014.

On January 10, 2012, WisDOT Traffic Forecast Reports for the No Build Alternative project that only the short westernmost segment of the WIS 23 corridor, between US 151 and County K in Fond du Lac, will reach or exceed 12,000 AADT by Design Year 2035.[27]

[26] Again, not a word about the IHSDM safety rate modeling favorable to passing lanes.

[27] Since the record is replete with evidence that adding passing lanes to 2-lane highways can handle traffic volumes up to and exceeding 12,000 AADT, including WisDOT's own Traffic Volume Charts for WIS 23 showing 8,700 to 12,000 as the range for adding passing lanes, these projections all but obliterated the justification for spending what is now estimated at $166 million of state and federal money. (See, for example, R. 15056) The response of Robert Wagner, the Project Manager, to the news that there wasn't the need to spend this money: "We got the traffic forecasts…Build looks good, no build, not so much." (R.14630)

On January 11, 2012, FHWA issued a Notice of Intent to prepare a Limited Scope Supplemental Environmental Impact Statement for the project. (R. 14631-14634)

On January 16, 2012, in response to the new, lower traffic projections, Walt Raith of the East Central Regional Planning Commission disagrees with the forecasts, saying they ignore the predictions from the regional traffic demand model showing much greater traffic. (R. 14635.)

On January 20, 2012, Jen Murray, Chief of WisDOT's Traffic Forecasting Section, informs Raith that the recent traffic forecasts will stand, noting that they are based on the most recent actual traffic counts: [2011], and on counts that have been going down since 2001; that the higher 2005 forecast contained several errors; and that the traffic demand model "seems to be over-assigning traffic counts in the base year," (for example, assigning 14,600 trips to a segment for 2005, where actual 2005 count was 8,600). (R.14659)[28]

A January25, 2012 internal WisDOT Alternatives Discussion document identifies Weaknesses in the Alternatives Review:

- "In the Purpose and Need Screening criterion

1. Improve System Linkage – assumes that only a 4-lane is consistent with the Corridors 2030 Connector Route designation. Opponents may view this as an arbitrary qualification – there are other 2-lane Connector routes within the state.

2. Highway Geometry – assumes Passing Lane alternative does not provide left-turn refuges (opponents could say it is possible).

[28] It needs to be understood that while the Regional Travel Demand Model might reasonably accurately forecast traffic volumes on high traffic volume roads with 50,000 AADT on up to 100,000+ AADT, its margin for error increases greatly for low-volume roads. That is the point of the screenline results Figure on page 90 of the Model Development, Validation and Users Guide for the Fox Valley Regional Travel Demand Model (developed for the Wisconsin Department of Transportation-Northeast Region, among others). (R.23700). Observe how rapidly the blue upper threshold and brown lower threshold markers diverge from 0% error as you move left (down in volume on the chart). The AADT traffic counts on the segments of WIS 23 at issue in this corridor have ranged from a few thousand up to a little more than 11,000. The margin of error of the TDM methodology when projecting future traffic volumes for the busiest of those segments is greater than 20% plus or minus, and according to the Figure, soars to a range of 30% plus or minus, or even more than that, for the less busy segments. That is sufficient reason by itself to be skeptical of assertions that an environmentally damaging highway project needs to be constructed based on wildly fluctuating future traffic volume projections – particularly when so many traffic trends have been on a downward trajectory.

3. Access Management - Assumes that Passing Lane Alternative access control measures (eg prohibiting left turns from sideroads) are not possible. (opponents could say it is possible)

4. Safety – provisions associated with this criterion are the same as highway geometry and access management – eg factors are repeated.

- In the development of the Passing Lane Alternative

1. The Passing Lane alternative includes expanding WIS 23 to 4-lanes in 2025 (as assumed in the 2006 Passing Lane Report). Opponents may view a 10 year delay as overly short. Should it be extended to beyond 2025?

2. The Passing Lane alternative includes purchasing the right-of-way for a 4-lane facility when the passing lanes are constructed in 2015. Because of this, the R/W impacts are the same for the Passing Lane as for the 4-Lane Build On-alignment alternative. Opponents may view this as inflating the impacts of the two-lane alternative.

3. Because R/W acquisition is ignored, the 4-Lane Build On-alignment alternative has a higher Present Net Benefit. If R/W acquisition was included, it is likely that the Passing Lane Alternative could have a higher Present Net Benefit.

4. The Passing Lane study used substantially higher traffic volumes in its traffic analysis. If the most recent traffic forecasts were used, the results would likely be different." (R. 14669-14671)[29]

A pair of February 8, 2012 WisDOT Briefing papers on the WIS 23 project provided updates on traffic projections:

> "New Forecast Issues: Methodology - we are using the region demand model that was not available nor used in previous forecasts. Growth curves - latest forecasts reflect lower count numbers taken in 2011. Future growth rates are much less than past ones, 0.5% growth versus 2%. Risks to project – not only the time delay for the SDEIS is at risk, but the validity of the project may be questioned." (R.14747)

> "We have recently completed new traffic forecasts that fall short of the FDM guidance for expansion. . . . We are finding the 2011 and 2012 traffic counts to be lower than previous count years. The new forecasts use lower future growth rates than in the past, 0.5% growth versus 1.5%. Statewide, vehicle miles travelled reached a peak in 2005." (R. 14749)[30]

[29] These criticisms of the Alternatives Review were not discussed in the LSDSEIS or in the LSDFEIS (the 2014 FEIS), and the Passing Lane Study itself was included in appendices as explaining and justifying the elimination of passing lane alternatives, without any discussion or acknowledgement of these issues.

[30] The associated No Build traffic forecasts (R. 14759, 14,760) were similar to those from January – only the westernmost segment exceeded 12,000 AADT in 2035.

February 2012: Wis Highway Capacity Software Passing Lane Analysis Draft shows that a 2-lane highway with passing lanes meets the No Build Level of Service Standard C for the entire corridor through 2044, and through 2061 for the portion east of County G. (R. 14825)

On February 24, 2014, Bethaney Bacher-Gresock of FHWA emails Wagner and others at WisDOT regarding the implications of the reduced traffic counts and future traffic projections:

> The original projected design year traffic counts were key to the justification and selection of the 4-Lane Build On-Alignment Alternative and the dismissal of the Passing Lane Alternative. **Based on the new traffic counts and projections, we are concerned about the ability to demonstrate that either the 4-Lane Build On-Alignment or the Passing Lane Alternative would fully meet the original purpose and need for the Wis 23 project. Thus, FHWA requires a more comprehensive analysis and documented explanation of existing and projected conditions and project impacts in order to determine if there is justification to continue to move forward with the 4-Lane Build On-Alignment Alternative or if another alternative should be evaluated.** If we cannot fully demonstrate, based on the revised traffic volumes, that the Passing Lane Alternative meets the project's purpose and need and that the 4-Lane Build On-Alignment Alternative is the appropriate selected alternative, it may be necessary to fully evaluate the Passing Lane Alternative or other lesser-impact alternatives or to consider revising the purpose and need of the project. Under either of these scenarios, a Limited Scope Supplemental EIS would no longer be appropriate and a broader-focused SEIS would need to be prepared. (Emphasis in original) (R.14861)

On March 1, 2012, Walt Raith of East Central Regional Planning Commission suggests to Wagner that the unemployment rate "seems to mirror the traffic count data", and that if the unemployment rate gets back to 5% or 6% again, traffic on the corridor would likely come back. "Am I grasping for straws?" He attaches graphs showing unemployment rates and numbers of unemployed persons in Sheboygan and Fond du Lac sharply rising in late 2008 and 2009. (R. 14,876-14,880)[31]

[31] Raith's suggestion ignored the fact that travel throughout Wisconsin seemed to have peaked in 2005, as did traffic on this corridor, years before the rise in unemployment after the financial crisis of late 2008, and that the rate of growth in traffic had significantly diminished even before 2005. Yes, he <u>was</u> grasping at straws.

Despite the fact that the observed decline in traffic counts preceded the rise in unemployment rates by several years, in a March 6, 2012 Project Briefing Paper, WisDOT adopts Raith's explanation for the reduced traffic counts:

> The significant down turn in the economy is likely causing the substantial downswing in trips. Between the metro areas of Fond du Lac and Sheboygan the below graphs show over 8400 unemployed. The two metro area unemployment rates have been higher than the state and national rates at times in the last few years. When the economy rebounds, commuting traffic between the urban areas and other commuter sheds will return to WIS 23, in addition to increased truck traffic. (R. 14904)[32] [33]

In a March 6, 2012 email, Mike Silence, the modeler in WisDOT's Traffic Forecasting Section, criticized the NE Region's use of old forecasts with known errors, creating their own forecast procedures, and using "an array of made-up numbers." (R. 14,917)

A March 20, 2012 Passing Lane Analysis draft showed Alternative 1A (2-lane with passing lanes/no left turn lanes) able to provide LOS C operations through 2036 on the western segment and through 2054 on the eastern segment of the WIS 23 project corridor. (D. 14936)

In the hope of coming up with higher counts, WisDOT had traffic on WIS 23 counted again. An internal WisDOT email noted that "if the new 23 Traffic Counts are higher than the last counts, the NE Region will be submitting as soon as possible an updated traffic forecast request to Mike in Central Office Forecasting." (R. 15126)

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[32] Apparently, no one at WisDOT could remember that traffic counts had been falling since around 2005, not 2008 – or were they as eager to grasp at straws as Raith?

[33] Under the heading "Traffic Forecast explained by Traffic Forecasting Section," the briefing paper documents that neither the TAFIS traffic projection model nor the NE Region Travel Demand Model includes any provision for considering induced travel, that is adding to the total number of trips in a region when additional capacity shortens travel times, causing people to make completely "new" trips because their "time cost" has diminished:
"In areas of the state where there are no models, only the TAFIS output is used. This is an "unconstrained" output. It looks at past counts and projects the counts forward **without any regard to type of facility**. In STH 23's case, there is a model; the NE model. The forecasts in areas of the state where there are models are "constrained" forecasts. This means that the traffic output to the system is influenced by the amount of traffic the system can handle. More specifically, **the change in geometry does not add trips. Rather, the change in the network simply redistributes the trips that are already generated by the future socioeconomic data**. It is then compared to TAFIS." (R. 14906)(Emphasis supplied)

The new counts indicated more traffic than the counts in February 2012. (R. 15139)

New traffic forecasts on July 8, 2012 based on the June 2012 counts indicated that constructing a passing lane alternative would result in AADT levels within the 8,700 – 12,000 range through 2035 for all segments of the corridor except a short segment on the west end between Highway 151 and County UU. (R. 15147).

The FHWA's own nationwide traffic volume data for rural highways is in the Administrative Record. Review of the data in FHWA Traffic Volume Trends – Rural shows a 14.1% decline from 2002 to 2012 for Estimated Rural Other Arterial (Non-Interstate) Annual Total Miles, and a 13.4% decline from 2002 to 2012 for Estimated Rural Annual Total Miles, nationwide.[34]

The Administrative Record includes a Spring 2013 Report by U.S. PIRG Education Fund and Frontier Group entitled A New Direction: Our Changing Relationship with Driving and the Implications for America's Future. (R. 15585-15652) The report documents the end of the Driving Boom, a six decade-long period of steady increases in per-capita driving in the United States from the end of World War II to 2004, and discusses causes of the decline in per capita and total miles driven since then, as well as implications of this change in driving patterns:

- Americans drive no more miles in total today than we did in 2004 and no more per person than we did in 1996. (R. 15589)
- A return to the steady growth in per-capita driving that characterized the Driving Boom years is unlikely given the aging of the Baby Boom generation, …anticipated reductions in the percentage of Americans in the labor force, and the peaking of demand for vehicles and driver's licenses and the amount of time Americans are willing to spend in travel. (R. 15590)
- The Millennial generation has led the recent change in transportation trends – driving significantly less than previous generations of young Americans. . . .

[34] Compare the relevant annual travel volumes reported for 2002: 436,305 million Rural Other Arterial Miles and 1,128,458 million Rural Total Miles (R. 15490); with those reported for 2012: 374,650 million Rural Other Arterial Miles and 977,626 million Rural Total Miles (R. 15510). On a national level, rural travel peaked a dozen years ago.

Young people aged 16 to 34 drove 23 percent fewer miles on average in 2009 than they did in 2001 – a greater decline in driving than any other age group. (R. 15590-15591)

- Workers tend to drive more miles than non-workers, and [b]etween 1970 and 2000, the share of Americans in the labor force increased from just over 60 percent to a peak of 67.3 percent. Since 2000, however, the share of Americans in the labor force has dropped to 63.6 percent, a level roughly equal to that of 1979. The drop in labor force participation began well before the current recession and is expected to continue well beyond it, largely due to the aging of the Baby Boom generation. A 2011 Congressional Budget Office report projected that the participation rate would drop to 63 percent by 2021. (R. 15599)
- During the Driving Boom, the number of licensed drivers, and the ratio of vehicles to licensed drivers increased. Since 2006, however, vehicle ownership per licensed driver has declined by 4percent, suggesting that Americans may have reached a limit in the number of vehicles they can beneficially use. (R. 15599-15600)
- During the Driving Boom years, an increasing share of the population held a license to drive. By 1992, 90 percent of the driving-age population of the United States was licensed to drive – an all-time high . . . .Since then, however, the percentage of driving-age Americans holding driver's licenses has stagnated and then declined – by 2011, 86% of driving-age Americans held driver's licenses, the lowest percentage in 30 years. (R. 15600)
- People in their prime earning and child-rearing years tend to drive the most. . . .Young people and older people, on the other hand, are less likely to drive. The Baby Boom generation is now passing through the prime driving years and heading toward retirement. [Between 2000 and] 2010, the share of Americans in the [highest-driving] 35 to 54 year-old age bracket fell [from 29.5 percent of the U.S. population] to 27.9 percent and by 2020 it is projected to fall further to 24.8 percent. (R. 15601-15602)
- At the same time, the share of population in the [lower-driving] 65 and older age bracket is projected to increase dramatically between now and 2040. IN 1980, seniors 65 and older made up 11 percent of the population; by 2040, their share of the population is expected to roughly double to 21 percent. A greater share of Americans, therefore, will soon be in age groups that have historically driven fewer miles. This demographic shift can be expected to reduce the number of miles driven per capita when averaged across the entire population. (R. 15602)
- The trend toward reduced per-capita VMT, which peaked in 2004, began long before the recent recession. . . Among young people, per-capita driving declined among both those with jobs and those without them between 2001 and 2009. Among 16 to 34 year-olds with jobs, per-capita vehicle travel declined by 16 percent during that time span. (R. 15610)
- After moving in lockstep for decades, trends in economic growth and growth in vehicle travel have diverged in recent years, with per-capita GDP generally growing faster than per-capita vehicle travel since the late 1990s, suggesting that economic

> growth and vehicle travel are no longer as closely correlated as they once seemed to be. (R. 15610)[35] [36]

On July 5, 2013, Defendants issued a Limited Scope Supplemental Draft Environmental Impact Statement for the project. (Vol. 1, R. 17842-18345; Vol. 2, R. 18346-18665) Its purpose is stated as: " • Updating and clarifying portions of the original Purpose and Need. • Enhancing and clarifying the discussion of alternatives that do not include capacity expansion. • Clarifying the discussion of impacts to Section 4(f) properties and reconsidering determinations on three of those resources. • Revising, updating, and clarifying the ICE analysis. [and] • Seeking additional public involvement and offering a hybrid style public hearing." (R. 17842)

The preferred alternative has been altered from that in the 2010 FEIS with modifications to a number of intersections or connections; there has been an updated "screening analysis of alternatives including a "Hybrid Alternative" which contemplated and dismissed expanding the western segment of the corridor to 4 lanes and adding passing lanes to the eastern segment on an interim basis; in other respects, the recommendations and conclusions of this document are much as those of the 2010 FEIS. [37]

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[35]For these, and other reasons, including the rapid spread of mobile and internet-connected activity which enables many activities to be conducted and tasks accomplish without physical travel, it is not reasonable for transportation authorities to predict significant consistent growth in vehicle travel, and certainly not reasonable to predict increasing per-capita vehicle travel in coming decades. Nevertheless, WisDOT's TRAFIS projecting system mandates a minimum .5% annual growth in traffic projections.

[36] US DOT Undersecretary Polly Trottenberg said, in testimony before a subcommittee of the House Transportation and Infrastructure Committee: "It is generally recognized that the decline in VMT, and the corresponding decrease in fuel tax revenue between 2007 and 2009, was partially a reflection of fewer people and goods moving on our Nation's highways as economic activity slowed. However, evidence suggests that the flattening or decline of VMT is a long-term trend independent of the recession, as VMT has generally continued to decline annually since 2009 when the economy began to recover. (R. 19506)

[37] Since Plaintiff believes the shortcomings of the this LSDEIS largely correspond to the shortcomings of the FINAL EIS document regarding this project, the 2014 LSFEIS, detailed examination of that topic will be addressed below in the context of that final document.

On August, 28, 2013, Defendants conducted a Public Hearing on the LSSDEIS, in a hybrid format which combined elements of a town hall hearing and of an open house meeting.[38] [39]

Counsel for 1000 Friends testified at the hearing that 1000 Friends opposed the expansion project because it was too costly given the inadequacy of the state transportation fund to maintain and repair the highways and local roads already built in the state;[40] because it is not needed to address safety issues that are present at some specific locations on the corridor; that it is not needed because traffic volumes have been decreasing, not increasing, in Wisconsin, and elsewhere in the country; and that the expansion project would not result in significant economic development but would damage the agricultural economy.[41] (R. 19782-19785)

1000 Friends submitted written comments regarding the LSSDEIS on September 30, 2013. Those comments:

- Objected to the 4-lane expansion and urged that improvements be made to the existing 2-lane highway, such as passing lanes, left-turn lanes and site-specific improvements

[38]The notice for the public hearing stated: "Because of projected cost increases to major projects statewise, WisDOT has rescheduled the construction of WIS 23 to begin in 2018 and be completed in 2020." (R. 19653-19654) During the question and answer session of the hearing, a member of the audience asked, in view of the large drop in traffic projections from one environmental document to another, whether WisDOT is planning to do a relook at those numbers in a few years to see if their current projections are on track. The WisDOT representative responded, "…back to the traffic, you know, now that this is delayed, I would think that there's a very good chance that we would look at traffic, again. You know, typically, traffic is –is counted in every county every three years, and I believe the last time it was done in Fond du Lac/Sheboygan was in '11, and that's when this came out and we looked at the numbers, and they did go down, and so we took counts again, because it seems, you know, we were wondering why it did go down. And so we did inspection counts in 2012. So, I would think the next time would be '14, and since this is – we would still in the midst, I think we would do traffic counts then." (R. 19767-19769)

[39] On September 4, 2013, within a week of the hearing, State Senators Joe Leibham and Rick Gudex, along with 4 Representatives from the area, announced that WisDOT had restored the start date for construction on WIS 23 to 2015. (R. 19834)

[40] The 2014 FEIS notes that there is funding in the 2013-2015 Biennial Transportation Budget to begin construction on this project in 2015, the situation now is that Governor Walker has in the last few days proposed bonding – that is, borrowing -- $1.3 billion dollars in order to fund the transportation fund for the coming budget period.

[41] The 2014 FEIS, much like the initial DEIS in 2004, includes an economics impact evaluation matrix. In response to the question, "What effect will the proposed action have on the potential for economic development in the project are? The box next to "The proposed project will have no effect on economic development." (R. 21580) The narrative at this portion of the document suggests that that efficient movement of goods may benefit businesses located in urbanized areas such as Fond du Lac and Sheboygan, but does not address whether the magnitude of such changes is likely to be significant. WisDOT considered only a portion of Fond du Lac and did not investigate the City of Sheboygan at all in its assessment of indirect and cumulative impacts, however.

at intersections with significant safety problems, rather than replacing a highway with a better than average accident safety record;

- Asserted that WisDOT's projection of ever-increasing traffic in the future using a tool that assumes the growth rate may not be less than .5% per year is arbitrary and unreasonable in view of the 8 to 10 year pattern of decreases and leveling off of traffic;
- Noted that VMT per capita in the United States peaked in 2004; that future increases in traffic are likely to be from population growth, not in miles driven per person; that Wisconsin is a state with low population growth; that the growth of female participation in the workforce has reached its peak; that Millennials are driving less; that WisDOT's own budget projections for coming years do not anticipate increases in numbers of drivers' licenses or car registrations; that telecommuting and shopping and socializing on the internet each eliminate the need for people to travel by car; and that VMT stopped tracking GDP around 2000 to 2001;
- Noted that alternatives including improving the existing highway with passing lanes, turn lanes, and other site-specific upgrades were rejected from consideration because they could not meet the requirements of WisDOT's faulty projections of future traffic needs; and
- Commented that the LSSDEIS inadequately addressed indirect and cumulative impacts of the project. (R.19857-19864).

The 2014 LSSFEIS/ROD – 2014 FEIS

On March 17, 2014 the Defendants issued the Final EIS document in this chronology, the Limited Scope Supplemental Final Environmental Impact Statement/Record of Decision

(LSSFEIS/ROD). (Vol. 1, R. 21309-21916; Vol. 2 R.21917-22262) Plaintiff will attempt to summarize errors and omissions in that FEIS in this chronology.

On page ES-4, regarding "System Linkage", the FEIS states that as a Connector route, WIS 23 "should be upgraded to current standards for roadway capacity and alignment." (R. 21326) As previously noted, the 2030 Corridors Plan includes both 2 and 4-lane highways within the definition of Connector,(CITE) and the threshold for investigating 4-lane improvements on Connector Routes with Passing is 12,000 AADT. (R. 15056) However, WisDOT refused to evaluate a comprehensive passing lane alternative for upgrading WIS 23 to those standards, as requested by DNR (a combined 2-lanes alternative with passing lanes and Traffic System Management and Geometric improvements- wider shoulders, auxiliary lanes, etc), by DATCP, and by 1000 Friends.[42] Moreover, in evaluating only a bare-bones 2-lanes with passing alternative, WisDOT utilized excessive traffic projections, using a tool that assumes at least a .5% annual growth rate (R. 14855, 14972,15376, 15452), despite the record demonstrating patterns of declining travel and traffic counts, rather than growing traffic, in the United States, in Wisconsin, on this corridor, and in rural areas in general.

Regarding "Transportation Demand and Regional Economic Development" the FEIS asserts that the current roadway does not adequately meet the regional transportation needs of

[42] Section 404 of the Clean Water Act and its implementing regulations 40 C.F.R. Sec. 230.10(a)provide that the discharge of dredged or fill material into wetlands will generally not be permitted if there is a "practicable alternative to the proposed discharge [or fil] that would have less adverse impact on the aquatic ecosystem. 1000 Friends' review of the Administrative Record strongly suggests that not all "practicable alternatives" to the proposed 4-lane expansion through the entire project corridor have been evaluated. One would expect the US EPA, the US Army Corps of Engineers, and the Wisconsin DNReach to have an interest in full and fair evaluation of a comprehensive passing lane alternative, using future traffic projections that have some consistency with the substantial recent track record of stable or declining VMT and traffic. However, that same review of the Record indicates that those agencies have been kept largely or completely in the dark about this as a result of the manner in which internal decisions about the project have been made and as a result of what information has been communicated to the agencies (and to the public) through the NEPA documents, and what information has been held within transportation agency files until the Administrative Record was compiled and filed with this court.

numerous economic sectors and decreases the region's competitiveness. (R. 21326) DATCP's response to the initial DEIS demonstrated the lack of correlation between investments in road projects such as this project and regional competitiveness. (R.11200, 112006-11211) Moreover, the results of WisDOT's land use "expert panel" workshop indicate that this expansion project is not important to economic development, either within the corridor, or outside it. With respect to almost every one of the survey questions put to the panel, regarding whether building or not building the proposed project would increase or decrease various measures of development, more than a majority, and in many cases an overwhelming majority, of the responses were either that it would have no significant effect, or that the expert had no opinion. (R. 22119-22155) That is consistent with the answer on the environmental impacts screening form for the project to the effect that "The proposed project will have no effect on economic development in the project area." (R. 21580) It is also consistent with the approach of the 2014 FEIS in evaluating indirect and cumulative effects (ICE). WisDOT defined the ICE Study Area as barely extending beyond the eastern and western ends of the project corridor itself – including only the eastern portion of the City of Fond du Lac and not extending beyond the City of Plymouth on the east. It provided maps to the expert panel members that did not extend beyond that study area for the workshop session (e.g., R. 22105), and it included virtually no information in the FEIS regarding expected or potential ICE beyond the mapped study area.

If expansion of this highway corridor was as important to the regional economy as WisDOT suggests when it evaluates alternatives to see whether they satisfy the project's purpose and need, then the ICE analysis of the FEIS is woefully inadequate. On the other hand, if the ICE analysis is sufficient, then WisDOT's claims of regional economic importance for this highway expansion project as a basis for the purpose and need for the project are unfounded.

DATCP's substantial comments on the economic impacts of the proposed project probably have it right – whether or not this highway is expanded as proposed will not make much if any difference to the region's economy, for the many substantive reasons included in DATCP's comments, but it will likely affect the distribution of its economic activity somewhat, with the most significant impacts occurring in the form of development in Sheboygan and Fond du LAC, along with some sprawl development concentrated near expressway interchanges.[43] (R. 11200, 11206-11213) In either case, the FEIS has it wrong, because WisDOT really didn't look very hard, or in the right places to determine those effects.

With respect to "Existing and Future Traffic Volumes and Resulting Operation," the FEIS states "Many portions of WIS 23 exceed the threshold that warrants a 4-lane facility. By 2035, most of the corridor will exceed these thresholds." The traffic volume projections based on the June 2012 traffic counts demonstrate that even with WisDOT's excessive traffic growth assumptions, only the portion of WIS23 west of CTH UU would exceed the 12,000 AADT threshold for Connector routes with passing lanes by 2035. (R. 15147) [44] The western end of the corridor needs considerable improvement to deal with connections to US 151, to CTH K and CTH UU, as it is located in or adjacent to urbanized portions of the City of Fond du Lac, unlike the rural remainder of the 19 mile corridor. Site-specific measures to address the needs of the western end of this corridor should not drive expansion of the remainder of the corridor into an expressway facility, when even overstated growth projections do not justify such expansion.

The FEIS describes the high number of access points as a safety and mobility problem, but once again WisDOT has refused to evaluate an alternative which includes access controls

[43] Indeed, most all of the 25 of DATCP's February 2005 comments that were identified by WisDOT and only "acknowledged" in the subsequent environmental documents remain applicable to the 2014 FEIS.

[44] Equally importantly, the LOS evaluations that rated a 2-lane passing alternative as failing to meet LOS criteria were performed on a bare-bones passing alternative, without access restrictions, wider shoulders, auxiliary turn lanes at appropriate intersections, etc. – a more comprehensive passing alternative ought to perform better.

and other TSM and geometric improvements as part of a comprehensive 2-lane highway with passing alternative. DATCP, Harold Barfknecht, and 1000 Friends each recommended access controls as part of a passing lane alternative, but it has been apparent throughout the environmental review process for this project that WiSDOT is unwilling to evaluate such a comprehensive alternative, and evaluate its operational performance, and its environmental benefits as compared to the selected 4-lane expressway project.

With respect to safety, the FEIS acknowledges that the overall WIS 23 crash rate is below the statewide average for a 2-lane rural state road.[45] 1000 Friends agrees that some locations experience higher than average crash rates, but submits that the appropriate solution is site-specific safety improvements tailored to those priority locations, not a $166 million conversion of 19 miles of rural highway into a 4-lane expressway. The unwillingness of WisDOT to conduct an objective, even-handed Benefit/Cost comparison between a comprehensive passing lane alternative and a full 4-lane expansion alternative was demonstrated most clearly by what was done with the IHSDM safety modeling results that, if disclosed to other agencies and the public, would have put the passing lane alternative in an exceedingly good light. Deciding to throw them away is about as far from objectivity and the use of good science as one can get.

In section 1.3 of the FEIS, at page 1-4 (R. 21370), it states: "The Preferred Build Alternative which was presented in the 2010 FEIS and remained the Preferred Build Alternative in the LS SDEIS and this LS SFEIS/ROD, focused on the immediate capacity and safety needs of the WIS 23 roadway and is planned to begin construction in 2015." Even based on the second round of 2012 traffic counts, the only segment where there might arguably be current

[45] At R. 21379, it asserts that WIS 23's overall corridor non-deer collision crash rate is "slightly below the statewide average for a 2-lane rural highway." As already noted several times above, it is about 25% lower than that average. If that were the only shortcoming in the FEIS, pointing it out would be unfair "flyspecking."

capacity needs would be the stretch west of County K, which needs to be addressed in terms of its connection to the US 151 bypass and urban Fond du Lac. (That is the only location at which an AADT that exceeded 12,000 was found during the June 2012 counts).[46] (The better than average safety record of the WIS 23 corridor means that improvements that address safety at the west end of the corridor and at the County W intersection are all that could be called "immediate." See Figure 1.3-7 at p. 1-14 (R. 21380) A fair and objective evaluation of a comprehensive passing lane alternative could have been done years ago, and some improvements could already have been put in place, but WisDOT did not heed the multiple requests for such an evaluation.

THE FEIS AND THE EVALUATIONS WHICH IT CONTAINS ARE BASED ON OVERSTATED POPULATION PROJECTIONS

Traffic volume in a particular area may affected by a number of factors, but one of those factors certainly is the population of the area; another is the per capita number of miles driven by the people who make up that population.[47] WisDOT's TAFIS traffic volume projections are the result of modeling based on historic traffic volume and other data at a specific state trunk highway traffic count site (R. 15415); the other method used by WisDOT for projecting traffic volumes, the NE Region Travel Demand Model, explicitly uses population as a key input. (Northeast Regional Model Notes, R. 22652) The traffic volume projections used in the FEIS are described as utilizing a combination of both methodologies.[48] (R. 21373) As a

[46] At that location, an AADT of 12,181 was rounded to 12,200 for the July 2012 Traffic Forecast Reports. (R. 15139, 15156, 15157)

[47] The trend of declining per capita miles driven since 2004 , and some reasons for that trend, were discussed above at pages 38-42.

[48] An explanation of how TAFIS and TDM projections are reconciled or combined into AADT projections that are then used by WisDOT to evaluate project alternatives is found in a number of memos stating the principle that in reconciling the result, or coming to a compromise between them, the projections produced by TAFIS should not be adjusted by more than 10%,-- but also indicating that sometimes that might be allowed.(R. 15414-15416; 21927-

result, the projected population of the area is a key input in arriving at the volume projections that form much of the basis of the FEIS' evaluation of how well various alternatives will serve the purpose and need of the project in the coming decades.

The 2014 FEIS notes at page 4-11 (R. 21485) under the heading "Population Trends" that new population projections for 2040 became available in January 2014:

> In January 2014 the Wisconsin Department of Administration (WDOA) released population projections for 2040. These new population projections have lower growth rates than the ones presented for 2030 in the 2013 LS SDEIS. In many instances the 2040 population projections are less than those for 2030. The slower population growth may also slow the rate of development expected in the corridor. The anticipated locations and types of development remain unchanged and the basic findings of this indirect effects analysis also remain unchanged. Table 4.4-1 shows the official WDOA's 2030 and 2040 population projections for each of the municipalities included in this ICE study area.

Figure 1.3-3 on page 1-7 of the 2014 FEIS (R. 21373), entitled "June 2012 Traffic Counts, 2010 FEIS 2035 Forecasts, and 2013 LS SDEIS/2014 LS SFEIS/ROD 2035 Forecasts", is identical to Figure 1.3-3 on page 1-7 of the 2013 LS SDEIS (R. 17880), except for the new reference to "24 LS SFEIS/ROD" in the title. That indicates that new traffic projections were not done for use in the 2014 FEIS, using the available, lower population growth information from the Wisconsin DOA for evaluating how well the project alternatives would meet the operational purposes and needs of the project in the future. Instead the analysis in the 2014 FEIS is based on the traffic projections that were prepared in 2012 for use in the 2013 LSSDEIS.

Why does this matter? Table 4.4-1 from the 2013 LSSDEIS projects an increase of 13,426 people in the total ICE study area between 2010 and 2030, a period of 20 years, for an

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21928; 21939-21940) 1000 Friends was not able to find actual projections that TAFIS and TDM produced independently of each other for the various segments of the WIS 23 corridor, either for design year 2035, or for any other dates. We could not identify any documentation of how those two sets of independent numbers led to the AADT projection numbers which were adopted by WisDOT and disclosed in either the 2013 LSSDEIS or the 2014 FEIS..

overall increase of 19.1% over that time. (R. 17985)[49] An increase of 13,426 people over 20 years is an average of 671 people added to the ICE study Area's population per year. Compare Table 4.4-1 from the 2014 LSSFEIS. It projects an increase of only 7,177 people in the total study area, but over a 30 year period, from 2010 to 2040, for an overall increase of 10.09% over that longer time. (R. 21485). 7,177 added people over 30 years is an average of only 239 additional people per year. Thus, **the updated population figures from Wisconsin DOA clearly put WisDOT on notice that the population in the area potentially affected or influenced by the WIS 23 project will be growing only about one-third as quickly as was assumed when WisDOT's traffic projections in the 2013 DRAFT and 2014 FINAL EIS documents were made.**

The record includes substantial support for and numerous reasons why it is unlikely for increases in per capita driving to occur in this area.[50] The updated DOA population growth projections demonstrate that at the time the FINAL FEIS/ROD was issued only a bit more than one third of the population growth that had been assumed for the purpose of making WisDOT's future traffic projections was actually expected to occur. Using traffic projections that were known to overestimate actual traffic volumes to evaluate the need for this $168 million project, and using them to evaluate the feasibility of much less costly and much less environmentally damaging alternatives cannot pass the NEPA tests of objectivity and good science.

ARGUMENT

[49] The ICE Study Area is the geographic area whichWisDOT has determined is appropriate for evaluating the indirect or cumulative effects of the project, in essence the area in which the project may have some significant effect or influence. One would expect some resemblance between this area and the area which influences the amount of driving along the WIS 23 corridor.

[50] Among those reasons are the relatively elderly populations of the area, particularly in Sheboygan County.

THE FEIS IS INADEQUATE BECAUSE ITS EVALUATION OF NEED, COMPARISON OF ALTERNATIVES, AND DESCRIPTION OF IMPACTS ARE ALL PREMISED ON UNREASONABLY HIGH AND INVALID PROJECTIONS OF TRAFFIC GROWTH.

The NEPA documents for this project have repeated over and over again that a 4-lane expansion was needed because traffic in the corridor was constantly increasing, and that continued increases in the future were going to increase congestion beyond the capacity of the existing 2-lane highway, and beyond the capacity of a 3-lane/passing lane alternative. As the above Chronology demonstrates, the Driving Boom years are over, and more recent trends have shown declines in both per capita travel and in total travel, in the WIS 23 corridor, in Wisconsin, and around the country. This is the case, regardless of whether WisDOT is willing to take a hard look at those facts and their implications.

Nevertheless, the Defendants prepared the 2014 FEIS and issued their Record of Decision approving a full-corridor expansion of WIS 23 into a 4-lane expressway on the basis of projections of increasing traffic volumes on the corridor from 2012 through the 2035 Design Year. Table 1.3-1 Traffic Forecasts, shows expected increases up and down the line when the June 2012 Counts are compared with the Updated 2035 No-Build Forecasts -- WisDOT is projecting significant increases in AADT in all of the segments of the WIS 23 project corridor.[51] (R.. 21374).

1000 Friends submits that these projections of consistent increasing traffic volumes are

[51] The June 2012 Counts for the two easternmost segments, County T-Count A, and County A to County P appear to be reversed: 8,000 should appear in the June 2-12 Counts Table above 9,500 in the bottom data box. The count numbers on Figure 1.3-4, which shows the AADT numbers on a map of the corridor, are correct.

arbitrary and unreasonably high, that they are not supported by evidence or valid reasoning, and that they unfairly and unreasonably biased the evaluation process for this project in favor of an expanded 4-lane expressway and against the feasibility of a passing lane alternative. The FHWA's own nationwide traffic volume data for rural highways is in the Administrative Record. Review of the data in FHWA Traffic Volume Trends – Rural shows a 14.1% decline from 2002 to 2012 for Estimated Rural Other Arterial (Non-Interstate) Annual Total Miles, and a 13.4% decline from 2002 to 2012 for Estimated Rural Annual Total Miles, nationwide.[52] By 2012, at least, WisDOT itself grudgingly admitted that "[i]n general, statewide counts seemed to peak in about 2005 . . . [and that] . . . Wis 23 is not the only corridor which has experienced a decrease in traffic counts." (R. 21925). WisDOT's own records demonstrate that throughout Sheboygan County, vehicle miles traveled peaked in 2005, and declined over the following 8 years by a total of 8.4% through 2013; travel throughout Fond du Lac County peaked later, in 2010, but then proceeded to decline quickly over the following three years, declining by a total of 8.4% from that peak through 2013. (WisDOT Vehicle Miles of Travel (DVMT) by County. (www.dot.state.wi.us/travel/counts/vmt.htm)

The 2013 U.S. PIRG report, "A New Direction: Our Changing Relationship with Driving and the Implications for America's Future," documented the end of the Driving Boom, six decades of steady increases in per-capita driving in the United States from the end of World War II to 2004, and discussed causes of the decline in both per capita and total miles driven since then. (R. 15585-15652) The preceding Chronology summarized several demographic, economic, and technological reasons underlying the shift in driving habits among Americans that have

[52] Compare the relevant annual travel volumes reported for 2002: 436,305 million Rural Other Arterial Miles and 1,128,458 million Rural Total Miles (R. 15490); with those reported for 2012: 374,650 million Rural Other Arterial Miles and 977,626 million Rural Total Miles (R. 15510). On a national level, rural travel peaked a dozen years ago.

brought the Driving Boom to an end. 1000 Friends' written comments on the 2013 LSSDEIS noted the pattern of vastly overstated traffic projections by WisDOT that had occurred during the progress of this project to that date. Those comments also criticized the lack of transparency with respect to WisDOT's preparation of AADT projections – specifically that no information was provided regarding the AADT projections produced for the WIS 23 corridor by WisDOT's TAFIS system, no information was provided regarding the projections produced by the NE Region's Travel Demand Model, and no specific information was provided regarding how those separate projections were reconciled or compromised into segment by segment projections for the time frames relevant to the project (e.g. 2015, 2025, 2035)

In the 2014 FEIS, and in WisDOT's separate written response to 1000 Friends' comments, WisDOT in essence responded on the topics of "Current Travel Trends" and "WisDOT's Forecasting Procedure Acknowledges Current Travel Trends" by saying something like the following (paraphrased): Yes, we know that traffic growth has started to plateau. Yes, we know of a variety of reasons why people believe that has happened, so we're now projecting a lower rate of growth than we used to. We have a new traffic demand model that we didn't have before, so we're using two methods to come up with our projections. That's more than the one method that most states are using, so our method may be considered more rigorous than other states. No specific information regarding the separate numbers that each method produced was made available, and no more specific explanation of how the separate numbers were combined was provided other than the statement that TAFIS numbers are not to be adjusted by more than 10%, unless an exception is made.[53]

[53] 1000 Friends would urge the court to examine the Record at 22265-22272, part of an Appendix to the 2014 FEIS, where 1000 Friends' comments on these topics are reproduced, along with Defendants' responses, to assess whether we have fairly paraphrased their response. The point is that even while trying to "acknowledge" assertions that

What we know from the record is that WisDOT's TAFIS methodology mandates projecting at least .5% annual growth in AADT (unless there is some undefined exception), and that Defendants have not advanced any valid reason for believing that the underlying demographic reasons for declining travel have changed or are about to change. The only reason that appears in the record for expecting a return to earlier traffic growth patterns is their belief that the reduced travel was the result of the economic recession, and that traffic will rebound to previous levels and beyond as the economy recovers.

However, US DOT Undersecretary Polly Trottenberg has acknowledged, in testimony before a subcommittee of the House Transportation and Infrastructure Committee: "It is generally recognized that the decline in VMT, and the corresponding decrease in fuel tax revenue between 2007 and 2009, was partially a reflection of fewer people and goods moving on our Nation's highways as economic activity slowed. **However, evidence suggests that the flattening or decline of VMT is a long-term trend independent of the recession, as VMT has generally continued to decline annually since 2009 when the economy began to recover."** (Emphasis supplied) (R. 19506)

The historical data regarding actual declines in travel, including USDOT's data on declining travel on the nation's rural arterial highway system is clear. The Defendants failed to provide either evidence or reasoning in the 2014 FEIS for their belief that despite these

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travel and traffic have declined, Defendants seem incapable of accepting that that is indeed what has been happening, instead saying, "Since 2007, two years after the 2005 WIS 23 traffic forecasts were prepared, total vehicle miles traveled (VMT) in the United States has started to plateau,," (R. 2268) and, "It is unclear exactly how the recent stabilization of VMT compares in urban areas, where trips are shorter and more transit is available, versus rural areas which generally have longer trips and limited transit." (R. 22269 This refusal to see or inability to accept facts for what they are perhaps resembles in some way the behavior of Wall Street investment bankers before the financial crisis of 2008, who could not imagine real estate prices ever declining, and who risked vast sums of their and other peoples' money on a variety of complex securities in reliance on mathematical formulas that assumed that those prices would always increase, and never decline.

established patterns, significant, consistent, year on year increases in travel are going to occur on WIS 23 for the coming 15, 20, or 25 years. Nevertheless, that is what the FEIS asserts is going to happen.

There are additional reasons to be skeptical about the validity of WisDOT's projections of ever-increasing traffic on WIS 23. First, the pattern of large overestimates by WisDOT of growth in AADT on this corridor from the beginning of the project should raise questions about the agency's "expertise." Compare the 2035 No Build Forecasts of AADT from the 2010 FEIS, ranging from 18,400 for the County K-County UU segment on the west end, to 12,200-13,400 for the County W-County G segment at the middle of the corridor, with the corresponding No Build Forecasts used in the 2014 FEIS, which were 12,300 for that western segment and 9,100 for the middle segment. The change in the projected AADT for 2035 between the two FEIS documents, issued less than 4 years apart, amounted to a decline of 33% from the earlier projection for the western segment, and a decline of 25%-32% for the middle segment. That variability should highlight the uncertainty and imprecision of WisDOT's AADT projection methodologies.

Another reason for skepticism about the reliability of WisDOT's traffic projections is the lack of transparency in how WisDOT combines the separate projections made by TAFIS and by the Northeast Region Traffic Demand Model. An explanation of how TAFIS and TDM projections are reconciled or combined into AADT projections that are then used by WisDOT to evaluate project alternatives is found in a number of memos – each of them stating the principle that in reconciling the result, or coming to a compromise between them, the projections produced by TAFIS should not be adjusted by more than 10%,-- but also indicating that sometimes that might be allowed.(R. 15414-15416; 21927-21928; 21939-21940) 1000 Friends

was not able to find actual projections that TAFIS and TDM produced independently of each other for the various segments of the WIS 23 corridor, either for design year 2035, or for any other dates. We could not identify any documentation regarding how those two sets of independent numbers led to the AADT projection numbers which were adopted by WisDOT and disclosed in either the 2013 LSSDEIS or the 2014 FEIS..

Moreover, while WisDOT touts the sophistication of the Regional Traffic Demand Model which it has used, along with TAFIS, in producing the set of traffic projections for the 2014 FEIS, it was conspicuously silent in the FEIS about the margin of error for projections made by the TDM – there is no mention of the subject at all. However, the Administrative Record does contain the Fox Valley Regional Travel Demand Model: Model Development, Validation and Users Guide. (R. 23611-23813). As noted in footnote 28, *supra*, that document does address the model's margin of error. Figure 5-2 Screenline Results demonstrates that the margin of error for TDM projections for highways with traffic volumes as low as those experienced in the WIS 23 corridor ranges from something greater than 20% plus or minus for the highest volume segment at the west end of the corridor to 30% plus or minus, or even more than that, for the segments with less traffic.(R. 23700) That is sufficient reason by itself to be very skeptical of assertions that an expensive and environmentally damaging highway project needs to be constructed based on wildly fluctuating future traffic volume projections; and to be equally skeptical of assertions that a much less damaging passing lane upgrade could not feasibly satisfy the future traffic volumes, when they are heavily based on such an imprecise projection tool. The importance of each of these reasons to question the validity and accuracy of Defendants' traffic projections is heightened by the fact that even a "bare-bones" passing lane alternative could provide sufficient capacity, and meet acceptable LOS operational guidelines, if the projected traffic volumes were

even modestly lower than those projected by Defendants in the 2014 FEIS.

THE FEIS IS INADEQUATE BECAUSE IT FAILED TO FAIRLY AND OBJECTIVELY CONSIDER WHETHER A PASSING LANE ALTERNATIVE WAS FEASIBLE.

As noted above, Defendants' use of overstated traffic projections unfairly biased their early evaluations of whether a passing lane alternative could satisfy the corridor's transportation needs, leading to such an alternative not being carried forward for serious consideration. However, in January 2012,when Defendants were faced with traffic counts that were sufficiently low to put the justification for any 4-lane expansion in serious jeopardy, WisDOT's behavior demonstrated that using overstated traffic projections was only one of a number of mechanisms they were willing to use to avoid objectively and fairly evaluating a passing lane alternative.

Early on, there were assertions by WisDOT that 8,700 AADT was the threshold at which 2-lane roads needed to be expanded to 4-lane highways;[54] assertions that because WIS 23 was a "backbone" highway in Wisconsin's 2020 Corridors Plan, it needed to be expanded to 4 lanes; then assertions that even as a less important "connector" highway, that status required expansion to a 4-lane expressway; claims that because WIS23 had been enumerated by the Legislature as a "major" project, it must be expanded to 4 lanes; claims that as a connector its expansion was necessary for regional economic development (while WisDOT's ICE analysis barely extended beyond the project corridor itself); suggestions that the existence of significant declines in travel

[54] And the troubling fact that after receiving its information about the project from WisDOT, USEPA understood that that threshold was 7,000 AADT.

on rural arterial highways was unclear; and grasping for straws such as an imagined but nonexistence correlation between unemployment rates and travel volume.

And then, when new, lower traffic counts and corresponding traffic projections pulled the floor out from under any traffic volume justification for the proposed expansion to a 4-lane expressway, came the Benefit/Cost analysis. That study was prepared in order to reject a passing lane alternative as having lower net benefits than the 4-lane expressway that was WisDOT's goal all along. The Chronology set forth above amply demonstrates WisDOT's failure to objectively evaluate the passing lane alternative, its"throwing away" of modeling results that would have given that alternative a considerable advantage in terms of reduced crash costs, and its failure at every subsequent step of the NEPA process to disclose the existence of those results. As if that were not sufficient, WisDOT also unfairly biased the Benefit/Cost analysis by improperly calculating the crash rate improvement to credit to the 4-lane expansion option, giving it an unwarranted advantage of about $23.5 million. 1000 Friends respectfully submits that this pattern of events and actions does not and cannot comply with NEPA's requirements of objectivity and use of good science. It cannot be reconciled with an agency's duty to take a "hard look" at the impacts of its proposed action, at the feasibility of all reasonable alternatives, and at the impacts of those alternatives. WisDOT hasn't even come close to fulfilling its NEPA obligations on this project.

In addition to evaluating a bare-bones passing lane alternative in a biased, unfair manner, WisDOT refused to ever consider a <u>comprehensive</u> passing lane alternative that combined into one alternative the addition of passing lanes, access restrictions or controls, wider shoulders, auxiliary or turnoff lanes, and geometric improvements –despite the Wisconsin DNR, the Wisconsin DATCP, individuals and 1000 Friends each having requested consideration of such

an alternative. The record is replete with evidence that a passing lane alternative augmented with those additional upgrades would provide improved mobility and a higher level of service (LOS) than the bare-bones alternative that was given cursory treatment by WisDOT, and that it would have improved safety performance. Since the magnitude of those improvements was never evaluated by Defendants, the record does not support their elimination of such an alternative from consideration.

The court should declare that the FEIS is inadequate for failing to adequately and fairly evaluate the feasibility of a passing lane alternative to serve the corridor's transportation needs, and that the Defendants have failed to comply with the requirements of NEPA on this project.

THE FEIS IS INADEQUATE BECAUSE IT FAILS TO CONSIDER AND **RESPOND TO** SUBSTANTIAL COMMENTS FROM THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION REGARDING THE VALIDITY OF THE AGENCY'S METHODOLOGY, REASONING AND CONCLUSIONS REGARDING THE NEED FOR THE PROPOSED EXPANSION, EVALUATION OF ALTERNATIVES, AND ANALYSIS OF INDIRECT IMPACTS.

The Wisconsin Department of Agriculture, Trade and Consumer Protection has significant responsibilities for protecting and managing agricultural resources, the environment, and public health. The comments it submitted in response to the DEIS in January of 2005 were related to its established responsibilities, were substantive in nature, and were supported by reasoning and substantial references. Many of them were comparable to issues or points raised by the DNR, by 1000 Friends, or by published research materials in the record. The duty of the Defendants to respond to the comments was clear. As to some 25 of the comments, there was no

"Response." All there was were cursory, misleading summaries of the topics raised, without more than a hint as to their substance, and the word "Acknowledged."

1000 Friends submits that this makes a mockery of the coordination and cooperation duties imposed on agencies by NEPA. Burying these substantive comments, some of which were consistent with what WisDOT itself recognized as "controversial" issues or as "weaknesses" in their process or decisionmaking, cannot amount to compliance with NEPA. The court should declare that Defendants' failure to respond to the substantial comments of DATCP rendered the 2014 FEIS inadequate.

THE FEIS IS INADEQUATE BECAUSE IT FAILS TO ACCOUNT FOR OR ADDRESS THE IMPACTS OF INDUCED TRAVEL

The duty under NEPA to consider the impacts of induced travel of a highway expansion project is clear. Here, the descriptions of the nature of both the TAFIS and TDM traffic projection methodologies make it clear that they do not account for induced travel. The record is not ambiguous. Neither methodology accounts for induced travel – that is, new trips that are taken when an expansion of a highway speeds up traffic sufficiently to cause people to take trips that were too time consuming or too inconvenient to take before the expansion took place. Those induced trips are distinguished from already existing trips that are simply redistributed to the new or expanded highway from other roadways in the road network, again, because they have become relatively less costly in terms of time or inconvenience. The Forecasting Memos in the record that explain traffic counts and forecasting make explicit that both tools used by WisDOT to produce traffic projections for this project do not consider induced travel. A

September 27, 2012 Memo describes TAFIS as compiling historic traffic volume information and other data at a specific highway traffic count site and then performs a regression analysis to predict future traffic at that site. It states, "**TAFIS does not take into account classification data, roadway number of lanes or land use development patterns to predict traffic patterns**." (R. 15415);[55] A similar memo describes the workings of the TDM model used for the 2012 projections:

> The 2012 forecasts are considered "constrained" forecasts. In other words, the traffic output to the system is influenced by the amount of traffic the system can handle. Change in the number of lanes does not add trips. The model simply redistributes the trips that are already generated by the future socioeconomic data to address the network changes. (R.15379-15380)

An earlier memo from the Forecasting Section described both methodologies in similar fashion, indicating clearly that neither provides for generating, or counting, "new" rather than redistributed trips:

> **Traffic Forecast explained by Traffic Forecasting Section**
>
> In areas of the state where there are no models, only the TAFIS output is used. This is an "unconstrained" output. It looks at past counts and projects the counts forward without any regard to type of facility. In STH 23's case, there is a model; the NE model. The forecasts in areas of the state where there are models are "constrained" forecasts. This means that the traffic output to the system is influenced by the amount of traffic the system can handle. More specifically, the change in geometry does not add trips. Rather, the change in the network simply redistributes the trips that are already generated by the future socioeconomic data. It is then compared to TAFIS. (R. 14906; similar language in other documents at 14898, 14943-14945, 14985, 14995-14996, 15379)

THE FEIS IS INADEQUATE BECAUSE IT FAILED TO UTILIZE UPDATED POPULATION INFORMATION IN EVALUATING THE NEED FOR THE PROPOSED EXPANSION, IN EVALUATING ALTERNATIVES,

[55] Since it does not take into account the classification of the highway site or the number of lanes, it does not even "know" whether a highway has been expanded, or lanes have been added. It certainly is not adding in "new" trips as a result of increased highway capacity that isn't even one of its inputs.

OR IN ANALYZING THE IMPACTS OF THE EXPANSION

The discussion of the contents of the 2014 FEIS earlier in this Brief, ahead of the Argument section, pointed out that new information was included that had not appeared in the 2013 LSSDEIS:

> In January 2014 the Wisconsin Department of Administration (WDOA) released population projections for 2040. These new population projections have lower growth rates than the ones presented for 2030 in the 2013 LS SDEIS. In many instances the 2040 population projections are less than those for 2030. The slower population growth may also slow the rate of development expected in the corridor. The anticipated locations and types of development remain unchanged and the basic findings of this indirect effects analysis also remain unchanged. (R. 21485)[56]

This was a bombshell, and should have been recognized as such by the Defendants. As explained in greater detail in the earlier discussion of the FEIS itself, the new, considerably lower projected population figures for the communities in the ICE Study Area for the project meant that the traffic projections done in 2012, using the June 2012 traffic counts were premised on higher population growth rates, and thus higher population totals, in the ICE study area, than those that the DOA had issued as of the date the 2014 FEIS and ROD were approved. The 2012 traffic projections were done using population data reflecting that an average of 671 additional people would be added per year to the ICE study area population. However, that much population growth was no longer expected, and the new, lower amount was only 239 additional people per year, a little more than a third of the earlier figure. However, despite

[56] The FEIS simply does not address whether the new, lower population projections might affect any of WisDOT's previous projections of traffic growth, the need for the proposed expansion, or the feasibility of alternatives.

population being a significant input to the TDM Model, the Defendants did not stop to update the traffic projections, using the new population inputs.[57]

With traffic projections at the heart of multiple issues for this project, the failure to take the steps needed to prepare new traffic projections, to re-evaluate the need for the proposed expansion and the feasibility of alternatives on the basis of those revisions is a serious deficiency. It is certainly not using the most up to date or complete information, particularly because there is no question that the information was available to WisDOT before the FEIS was issued on March 17, 2014. This isn't "after the fact" information.

The court should declare that Defendants' failure to prepare new traffic projections and to evaluate the selected alternative as well as other alternatives on the basis of those new projections was a violation of the requirements of NEPA.

CONCLUSION OF ARGUMENT ON THE MERITS

For all of the above reasons, Plaintiff 1000 Friends submits that the FEIS is inadequate, and requests the court to enter a declaratory judgment finding that Defendants' environmental review process regarding this project, including each of the Final Environmental Impact Statements and Records of Decision, have failed to comply with the requirements of NEPA. The court should also vacate each of those Records of Decision.

[57] Perhaps they simply had their minds made up, and were no more willing to consider the most recent and best population data than they were to pay attention to crash rate information that disfavored the 4-lane expansion, or to seriously entertain the idea that the decades of consistent, year after year increases in traffic had passed, and that traffic volumes and congestion could actually decrease, just as real estate prices decreased in 2008. Or perhaps they were so cowed by the demands of legislators that their enumerated pet project simply get underway. In any case defendants were not entitled to simply announce in the FEIS that this new information was available, include the substance of it, and ignore its implications for project decision-making. The fact that it may have become politically uncomfortable to fairly and objectively evaluate the preferred alternative against other alternatives does not justify a failure to comply with NEPA's requirements.

THE NEED FOR AND APPROPRIATENESS OF INJUNCTIVE RELIEF

Having demonstrated Defendants' failure to have complied with the requirements of NEPA, plaintiff 1000 Friends then needs to address the appropriate relief for the court to provide in response to the violations. The Supreme Court addressed the standard for issuance of permanent injunctions in NEPA cases as follows in *Monsanto Co. v. Geertson Seed Farms*,130 S.Ct. 2743, 2756 561 U.S. 139, 177 L.Ed.2d 461 (2010):

> "[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; ***157** (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L. C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, ——, 129 S.Ct. 365, 380–382, 172 L.Ed.2d 249 (2008).

The Supreme Court reversed the court of appeals' affirmance of the district's court's entering of an injunction prohibiting APHIS from deregulating RRA pending completion of an EIS and entered a nationwide injunction prohibiting almost all future planting of RRA. The Court held that rather than presuming that an injunction should issue in a NEPA case unless there is a good reason why an injunction should not issue, "a court must determine that an injunction should issue under the traditional four-factor test set out above." *Id.*, at 2757.

Plaintiff 1000 Friends submits that the record here satisfies that traditional four-factor test.

1 and 2. Irreparable Harm and Absence of Monetary Remedies

Monetary relief is not available under NEPA, and the only remedies available are equitable in nature: a declaratory judgment and injunctive relief. The Supreme Court has long recognized that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Production Co. v. Gambell, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987). So has the Seventh Circuit. *U.S. Environmental Protection Agency v. Environmental Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990). S*ee also Scherr v. Volpe*, 466 F.2d at 1034 (failure to consider environmental consequences of proposed highway project is the kind of irreparable harm under NEPA sufficient to support preliminary injunction); *Highway J*, 656 F.Supp.2d at 877 (irreparable harm due to construction of part of highway project); *Barta v. Brinegar*, 358 F.Supp. 1025, 1030 (W.D. Wis. 1973) (construction of highway segment in the absence of NEPA review and consequent inability to restore area to previous environmental status would cause irreparable harm); *Habitat Educ. Center v. Bosworth*, 381 F.Supp.2d 842, 863 (E.D.Wis. 2005) ("In cases involving environmental injury, legal remedies are usually inadequate.").

Here, it is undisputed that the proposed 4-lane expansion would convert 424 acres of land (including 225 acres of cropland) and 48 acres of wetland to highway right of way; affect 48 acres of upland or woodland habitat; displace 33 residences, 19 farms, and 10 other businesses; sever an additional 5 farms; encroach on floodplains; and affect several threatened and endangered species.(R. 21338) As a result of their failure to seriously consider a 3-lane/passing lane alternative, defendants have never specifically documented how much of this destruction or alteration of the WIS 23 corridor environment could be avoided, but it is

obvious that adding a 12-foot passing lane at a number of locations, left-turn lanes and auxiliary lanes at some intersections, and widened shoulders at some locations would require a much smaller footprint, and cause much less environmental destruction than the 4-lane expansion project's addition of two entirely new travel lanes, separated by a 100 foot wide median from the other two travel lanes, together with full shoulders, on and off ramps, and freeway intersections stretching along the entire 19 mile corridor. The irreparable damage to plaintiff's members' environmental and esthetic interests – including their enjoyment of the rural character of the corridor and its meadows, wildlife habitat, wetlands and wildlife—clearly satisfies the irreparable injury test.

Irreparable harm may also occur not only from direct harm to environmental resources, but from failing to consider required effects or reasonable alternatives. *See, e.g., Florida Wildlife Fed. v. U.S. Army Corps of Engineers*, 404 F.Supp.2d 1352, 1362 (S.D. Fla. 2005).

> "[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered". . . NEPA was designed to prevent the "real environmental harm" that could occur through "inadequate foresight and deliberation," especially in light of the "difficulty of stopping a bureaucratic steam roller, once started."

Sierra Club v. U.S. Army Corps of Engineers, 645 F.3d 978, 986-7 (8th Cir. 2011), *quoting Sierra Club v. Marsh,* 872 F.2d 497, 500, 504 (1st Cir.1989). *See also Davis*, 302 F.3d at 1114-15. Irreparable harm is found, "especially when coupled with 'the added risk to the environment that takes place when governmental decision makers make up their minds without having before them (a NEPA compliant) analysis . . . of the likely effects of their decision upon the environment.'" *Habitat Educ. Center*, 381 F.Supp.2d at 865, *citing Heartwood, Inc. v. U.S. Forest Service,* 73 F.Supp.2d 962, 978-79 (S.D.Ill.1999) and *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1271-72 (1st Cir.1996). 1000 Friends submits that the record in this case

conclusively demonstrates that such irreparable harm has been demonstrated with respect to this project.[58]

3. The Balance of Equities

"'It is far more consistent with the purposes of [NEPA] to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible.' . . . Failure to grant an injunction here could allow further investment of resources into [the highway project], particularly for acquisition of right of way, or for further design work on the 4-lane alternative, making its abandonment or alteration in light of environmental concerns increasingly costly and increasingly difficult." *Northside Tenants' Rights Coalition v. Volpe*, 346 F.Supp. 244, 249 (E.D. Wis. 1972) (internal citation omitted).

The equity issues here are also strong. This project has been high on WisDOT's "to do" list, not because it went through Wisconsin's Transportation Projects Commission process for vetting and prioritizing major highway projects, but because it was slipped without public scrutiny into a biennial budget bill, and because political pressure from a few legislators was able to push up its construction schedule by several years within a week of the public hearing on the FEIS. That action alone would seem to seriously implicate NEPA's purposes of supporting public involvement in and public understanding of agency decisions and their impacts on the environment. The Defendants may argue that traffic volumes and safety concerns are reasons for continuing to proceed with design, property mapping and property acquisition. While intersection improvements at the west end of the corridor, and perhaps at County G, may be in

[58] Indeed, the harm has been ongoing since issuance of the first ROD in September 2010 – with only some interruptions, WisDOT has been acquiring right of way not just for the construction of the proposed 4-lane expressway, but for its ultimate pet project, conversion of the expressway into a freeway, with grade-separated overpasses at intersections, expanded clear zones, frontage roads, and the like. This activity, like the agency decision-making on whether a passing lane alternative could serve the transportation needs of this area, is premised on WisDOT's unshakeable belief that traffic volumes are just going to continue on growing, as they have "always done" since World War II, just perhaps at a slower rate.

order at some point in the future, it should be kept in mind that traffic levels through the corridor are very far from levels that would require a 4-lane expressway, and that the current two-lane highway has crash rates that are significantly lower than the state average for two-lane rural trunk highways. Modest safety improvements to the existing 2-lane road, through WisDOT's 3R program, would not be precluded by an injunction against further activities to advance the 4-lane expansion project in the absence of full and complete compliance with the requirements of NEPA. Given the substantial deficiencies and violations of NEPA's requirements that appear to have permeated WisDOT's management and decision-making on this project, 1000 Friends submits that this is not a case where a simple Supplemental Environmental Statement can cure the violations.

Moreover, defendants have been on notice for years regarding many of the deficiencies in their environmental review process, and have obstinately proceeded ahead on the path towards their chosen destination, regardless of the views of other agencies, regardless of the results of unbiased studies (such as the IHSDM modeling), and regardless of the results of the work of other agencies (DOA's population projections) . Other specific examples include the 18 pages of comments from Wis DATCP in February 2005, the pleas from Wisconsin DNR to reconsider the need for the 4-lane expansion in view of its large environmental impacts and to seriously consider a 3-lane/passing lane alternative that included safety upgrades, intersection improvements, and improved geometries, and similar pleas from citizens in the corridor who sought upgrading of the existing highway, not its expansion into an expressway.

4. The Public Interest is Served by Issuing an Injunction.

NEPA established a national policy of protecting the environment as a way of

> promoting human health. 42 U.S.C. § 4321. . . . The Court believes that the public interest is naturally harmed when agencies act arbitrarily to implement NEPA policy . . .

Heartwood, Inc., 73 F.Supp.2d at 979. In *Winter*, the Supreme Court found that the public interest did not weigh in favor of a preliminary injunction because environmental benefits were outweighed by national defense requirements. 555 U.S. at 26. But there are post-*Winter* cases holding that where something as publicly significant as military readiness is not part of the equation, environmental concerns may be more relevant. **"**Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest." *South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior***,** 588 F.3d 718, 728 (9th Cir. 2009). *See also, Wildlands v. U.S. Forest Service*, 791 F.Supp.2d 979, 994 (D.Or. 2011) ("The public interest is extremely high in having federal agencies take a 'hard look' at the environmental consequences of their proposed actions in advance of a final decision to proceed with that action."); *Brady Campaign to Prevent Gun Violence v. Salazar***,** 612 F.Supp.2d 1, 26 (D.D.C. 2009) ("There is no question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely. . . . The public also has an interest in ensuring that the [agency action] . . . does not give way to unintended environmental consequences that have not (but should have) been evaluated by Defendants.") "[J]ust as important as the public interest in potential economic gains is 'the public's confidence that its government agencies act independently, thoroughly, and transparently when reviewing permit applications.'" *Sierra Club v. U.S. Army Corps*, 645 F.3d at 997-8. *Also cf., Duct-o-Wire Co. v. U.S. Crane*, 31 F.3d 506, 510 (7th Cir. 1994) (public interest served by injunction requiring party to provide more information, rather than less); *Bontrager v.*

Indiana Family & Soc. Serv. Admin., 697 F.3d 604, 611-12 (7th Cir. 2012) (looking at purpose of statute to find public interest weighs in favor of injunction effectuating that purpose). Here, the public interest is served not only by protecting environmental resources in the WIS 23 corridor that need not be destroyed, but also by ensuring that an objective and fair evaluation of the proposed project, its reasonable alternatives, and its impacts occurs in fulfillment of NEPA's action-forcing and full disclosure requirements, before irreversible actions are taken.

CONCLUSION

The Defendants clearly failed to consider a manifestly reasonable alternative to the current plan; evaluated the need for the proposed 4-lane expansion on the basis of overstated, biased and unreasonable traffic projections; screened out a limited passing lane alternative on the basis of those biased traffic projections and biased safety and cost-benefit analyses; misrepresented criteria for considering and selecting appropriate highway types; selectively utilized and rejected data regarding the safety and operational characteristics of alternatives in a biased, unreasonable manner; failed to respond to substantive comments by Wis DATCP; failed to utilize the most recent Wis DOA population projections in projecting future traffic volumes and in evaluating the feasibility of alternatives; and failed to adhere to anything even remotely resembling use of fair and objective methods and good science..

For all those reasons, this court should enter a declaratory judgment that Defendants have failed to comply with the requirements of NEPA in approving the 2014 FEIS (LSSFEIS) and issuing the Record of Decision for this project. In addition, the court should enter an injunction prohibiting defendants from proceeding with any further activities to advance the 4-lane

expansion project which was approved in the ROD, including additional design work or expenditures, or mapping or acquisition of property or right of way, until and unless they have fully complied with the requirements of NEPA.

Dated this 2d day of February, 2015.
Respectfully submitted,

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