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U.S. Department of Transportation  
1200 New Jersey Ave. SE, Room W12-140  
Washington, DC 20590  
*via electronic submission at* [www.regulations.gov](http://www.regulations.gov)

Re: Docket Number DOT-OST-2021-0036

Dear Ms. Kohl:

The undersigned faith leaders, civil rights organizations, environmental groups, and public interest advocates submit these comments in response to EO 13990 and proposed rule 86 FR 23876, docket number DOT-OST-2021-0036. We have long been involved with transportation from a civil rights, environmental, health, social and environmental justice, and economic development perspective. We write today in response to this administration's commitment to, and request for, input regarding more equitable policies and practices within the transportation agencies.

## **I. Introduction**

As the Federal Highway Administration (FHWA) noted long ago, “[f]air distribution of the beneficial and adverse effects of the proposed action is the desired outcome.”<sup>1</sup> To accomplish this, the U.S. Department of Transportation (DOT) must eliminate the silos among modes of transportation, which often prevent a fair and meaningful environmental justice and National Environmental Policy Act (NEPA) review. Specifically, the agency needs to recognize the inextricable link between highways and public transit and mandate holistic evaluation of inter-modal and multi-modal transportation in all planning and project development. By separating the analysis, including Title VI and environmental justice analysis, for various modes of transit by agency, it is difficult if not impossible to evaluate goals through the lens of community health and racial justice. DOT needs to ensure that its civil rights investigators are prepared to do so.

In the Milwaukee region – as in many parts of the country – people of color, especially Black and Latinx residents, are far more likely to lack cars, drivers licenses, or both, and thus to depend on modes other than single occupancy vehicle (SOV) access to meet their transportation needs.<sup>2</sup> Thus to achieve equity in transportation and health outcomes, DOT must first require that any assessment of reasonable alternatives in planning and project development include multi-modal alternatives, especially where racial disparities in transportation system usage exist. DOT must also ensure deep and meaningful consideration – based on, among other things, the input and perspective of affected communities – of the social, economic, and interrelated indirect and cumulative effects of a project on communities of color. Finally, the Department must work to avoid, minimize, or mitigate those effects—in that order. Doing so will not only further environmental justice and reduce health

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<sup>1</sup> FHWA Guidance on Environmental Justice and NEPA (Dec. 16, 2011), available at [https://www.environment.fhwa.dot.gov/env\\_topics/ej/guidance\\_ejustice-nepa.aspx](https://www.environment.fhwa.dot.gov/env_topics/ej/guidance_ejustice-nepa.aspx).

<sup>2</sup> Southeastern Wisconsin Regional Planning Commission, VISION 2050 Plan Report, available at <https://www.vision2050sewis.org/report>.

disparities, but also help meet the administration’s goals to limit climate change.

While there are numerous policy, planning, and guidance documents that have been issued by DOT or its constituent agencies over the years supporting these perspectives – many of which are cited herein - we urge the administration to promptly begin taking the steps necessary to convert these documents into formal regulations.<sup>3</sup> In the interim, the Department should ensure that existing guidance reflects the policies and priorities discussed below and issue new guidance where it does not. It also should immediately reverse the rescission of Title VI and Environmental Justice guidance and policies as well as guidance and policies relating to the environment and climate change,<sup>4</sup> and reinstate the guidance and policies.

## **II. Collaborate with Communities of Color in all Aspects of Planning and Project Development and Construction**

DOT itself has set out a standard for engaging communities of color in the decision-making process. It is critical that the Department impose the same requirement on state and local agencies and other federal funding recipients – and decline to authorize or certify any planning or project that fails to comply with these requirements. These standards also should be included as regulatory authority. The DOT standard states:

Public engagement and participation in decision-making is a fundamental principle of [environmental justice] and is critical to achieving outcomes that reflect the needs of all affected stakeholders to the greatest extent feasible. Minority and low-income communities have historically borne disproportionately high and adverse human health or environmental effects of transportation infrastructure projects. Active and meaningful participation of all affected communities will help ensure that transportation plans and projects avoid, and when avoidance is not possible, minimize, or mitigate these impacts on minority and low-income populations. For this reason, DOT is committed to using public engagement to encourage and empower [environmental justice] populations to engage meaningfully in the planning and implementation of DOT programs, policies, and activities.

DOT is committed to engaging minority and low-income populations in the transportation decision-making process across all relevant OAs, from the earliest stages of planning through project implementation, including maintenance and

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<sup>3</sup> These include the direct Title VI regulations, such as those at 23 CFR Pts. 200, 230, and 49 CFR Pt. 21, and also the regulations on, for example, planning assistance and standards, 23 CFR Pt. 450, and engineering and traffic operations, 23 CFR Pts 620-669, and the Federal Transit Administration, 49 CFR Pts 601-674. There are so many interlocking policy, planning and project development standards and guidance that cross reference each other that it is extremely difficult, if not impossible, to identify all of them. See, e.g., <https://www.fhwa.dot.gov/planning/>. Setting overarching standards and requirements therefore is particularly critical.

<sup>4</sup> See, e.g., FHWA Memorandum, Rescission of FHWA Policy and Guidance concerning Title VI of the Civil Rights Act of 1964 (Apr. 25, 2019), available at <https://www.fhwa.dot.gov/civilrights/programs/docs/FHWA%20Rescission%20Policy%20Memorandum%20Title%20VI%20April%2025%202019.pdf>; FHWA Transmittal of Withdrawal of CEQ Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (May 19, 2017), available at [https://www.fhwa.dot.gov/environment/sustainability/resilience/policy\\_and\\_guidance/ceqwithdrawal.cfm](https://www.fhwa.dot.gov/environment/sustainability/resilience/policy_and_guidance/ceqwithdrawal.cfm).

operation, to ensure that affected communities are able to influence decision outcomes. Part of DOT's outreach strategy includes building relationships with stakeholders, including State and local partners who help fund our transportation systems and those who serve underserved populations. Coordination with community leaders to develop locally appropriate outreach plans is critical, as those leaders are ideally positioned to champion the public engagement process and disseminate information to their constituents.

DOT continues to explore additional traditional and nontraditional strategies for engaging minority and low-income populations. . . DOT also will ensure that communities with Limited English Proficiency (LEP) and low literacy populations have access to information to the fullest extent feasible and that their participation in providing input into decision-making is encouraged.<sup>5</sup>

Agency use of categorical exclusions also harms environmental justice communities because it cuts the community out of critical local decision making by skipping an alternatives analysis and opportunity for public comment. DOT should adopt NEPA regulations that require agencies to use at least an environmental assessment where the community has raised environmental justice issues. In particular, FHWA's categorical exclusion regulation should be modified to state that "unusual circumstances" preclude the use of a categorical exclusion and define "unusual circumstances" to include "substantial controversy on environmental or environmental justice grounds."<sup>6</sup>

### **III. Collect Accurate and Adequate Demographic Information**

Collection of full and accurate demographic information is critical for planning and project development. A project must identify existing environmental justice communities, including "demographic information on the general population in the project study area. Social characteristics should include identification of the ethnicity, age, mobility and income level of the population."<sup>7</sup> It is critical that an agency define the boundaries of the affected community broadly enough to reflect the whole community impacted by the transportation project, instead of narrowly defining the affected community as only those community members living directly adjacent to the transportation project boundaries. Project development must also include:

proactive efforts to ensure meaningful opportunities for public participation including activities to increase low-income and minority participation. Include in the document the views of the affected population(s) about the project and any proposed mitigation, and describe what steps are being taken to resolve any controversy that exists. Document the degree to which the affected groups of minority and/or low-income populations have been involved in the decision-making process related to the

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<sup>5</sup> U.S. DOT, Environmental Justice Strategy (Dec. 15, 2016), available at <https://www.transportation.gov/transportation-policy/environmental-justice/environmental-justice-strategy> ; see also FHWA Environmental Justice Reference Guide (Apr. 1, 2015), pp. 32-36, available at [https://www.fhwa.dot.gov/environment/environmental\\_justice/publications/reference\\_guide\\_2015/fhwahep15035..pdf](https://www.fhwa.dot.gov/environment/environmental_justice/publications/reference_guide_2015/fhwahep15035..pdf).

<sup>6</sup> 23 C.F.R. § 771.117(b).

<sup>7</sup> FHWA Guidance on Environmental Justice and NEPA (Dec. 16, 2011), available at [https://www.environment.fhwa.dot.gov/env\\_topics/ej/guidance\\_ejustice-nepa.aspx](https://www.environment.fhwa.dot.gov/env_topics/ej/guidance_ejustice-nepa.aspx).

alternative selection, impact analysis and mitigation.<sup>8</sup>

Some considerations for a meaningful demographic analysis come directly from FHWA guidance and include the following, although these are not necessarily the only relevant considerations:

- Have practitioners collected recent data on race, color, national origin, limited English proficiency (LEP), and income? Have they overlaid these data with transportation data to consider the relationships between them?
- Are the geographic boundaries for analysis reasonable and logical?
- Does the program, policy, or activity create a[n] adverse effect in the short-, medium-, or long-term that is predominately borne by minority and/or low-income individuals or is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the general population?
- Have practitioners solicited input from potentially impacted minority and low-income populations and integrated that into the analysis?<sup>9</sup>

In addition, the “[a]nalysis should use mapping tools, such as geographic information systems (GIS), and integrate community concerns voiced through public involvement.”<sup>10</sup>

In conducting this analysis, it is also critical not to lump all “minority” populations under the single label of “minority,” and instead review any specific effects on, for example, Black, Latinx, Asian, or Native American residents in the area, since different communities may have different circumstances (e.g., differential access to vehicles) or needs. Further, to provide meaningful comparison of benefits and burdens and of the effects on specific communities, the same analyses must be conducted for white non-Hispanic persons.

Because many transportation system and project metrics are predicated on commuting times, we also urge the agency to require collection and disaggregation of data on employment and unemployment/non-participation in the workforce. For example, if the purported benefit of a project is to reduce commuting time, but a disproportionate number of members of one or more racial minority groups are unemployed, those persons will not obtain any benefit. Having that information is thus critical to a meaningful assessment of whether a project benefits or burdens a given community.

#### **IV. Prioritize Environmental Justice and Climate Considerations in Project Selection**

State DOTs, Metropolitan Planning Organizations (MPO), and other planning agencies must – explicitly or implicitly – develop and prioritize project selection criteria focused on equity and climate goals. Project selection comes up most often in development of the Transportation Improvement Program (TIP), a process which already authorizes project prioritization.<sup>11</sup> Too often,

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<sup>8</sup> *Id.*

<sup>9</sup> FHWA Environmental Justice Reference Guide (Apr. 1, 2015), p. 12, available at [https://www.fhwa.dot.gov/environment/environmental\\_justice/publications/reference\\_guide\\_2015/fhwahep15035..pdf](https://www.fhwa.dot.gov/environment/environmental_justice/publications/reference_guide_2015/fhwahep15035..pdf).

<sup>10</sup> *Id.* at 42.

<sup>11</sup> See 23 CFR § 450.326(n).

however, that prioritization focuses on the flawed and discriminatory congestion metrics that exacerbate SOV travel discussed below, Sec. IV.B., or on other metrics that do not provide equitable benefits to affected communities.

Instead, those regulations, as well as similar regulations affecting state TTPs, and associated policy guidance, should require prioritization of environmental justice criteria, criteria to improve health and ameliorate climate change. For example, in an MPO such as that covering metropolitan Milwaukee, where Black and Latinx persons disproportionately depend upon public transit and also are frequently segregated outside of suburban and exurban communities, the agencies could require criteria such as authorizing inclusive affordable housing and supporting public transit access to authorize any federally-funded road project in that community.<sup>12</sup>

As it stands now, policy and practice not only allow, but incentivize – by funding new and expanded highways – segregative suburban sprawl by communities that resist public transit access. By flipping that paradigm on its head, increased equity and reduced SOV emissions could be achieved in many communities.

In addition, priority also should be given to repair of existing roads and infrastructure, rather than new construction, “improvements” that expand impermeable surface footprints, or capacity expansion, with a focus on ensuring repair of infrastructure in environmental justice communities.

To address the purported inability to fund these projects, the agencies should *also* require prioritization of flexible funding – such as Surface Transportation Block Grant Program funds – for transit projects, when those projects are necessary to achieve equity and/or meet climate goals.

## **V. Require that Reasonable Alternatives Analysis Include Consideration of Multi-Modal Options and Relative Benefits and Burdens to Environmental Justice Communities for Each Option**

A core part of project development is a reasonable-alternatives analysis. Changing rules and policies to emphasize alternatives to highway and other road construction, improvement and expansion, and reducing reliance on “congestion” as a core, if not *the* core, metric in decision-making, is critical to achieving both environmental justice and climate goals.

### *A. Prioritize Multi-Modal Alternatives that Incorporate Transit*

Efforts to reduce travel demand are a critical part of any assessment of alternatives.<sup>13</sup> We urge the administration to update the language of this regulation to mandate not only *consideration*, but also *prioritization*, of such strategies in the reasonable-alternatives analysis (as well as in the TTP criteria discussed above), combined with a focus on repair – not expansion or footprint-increasing “improvements” – of existing highways. Doing so will inevitably require meaningful consideration of multi-modal alternatives to SOV travel.

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<sup>12</sup> The Milwaukee MPO currently has a very limited and, for practical purposes, ineffective, version of such criteria – which take a back seat to countervailing criteria such as road congestion.

<sup>13</sup> See, 23 C.F.R. § 450.320(b) (“consideration should be given to strategies that . . . reduce single occupant vehicle (SOV) travel”).

This also will provide a clear environmental justice benefit. In many places, and certainly in the Milwaukee region, improving and expanding transit is required to ensure that communities of color receive a fair share of the benefits of transportation system investments. As noted above, low-income households and a number of minority populations are particularly dependent on public transit because a disproportionate number of persons in those communities lack cars, drivers' licenses, or both. And, of course, reducing SOV travel and increasing transit will further climate goals. Public transit is also a more active form of movement within the community than commuting by automobile—i.e., encouraging walking short distances to and from transit stops that has a cumulative beneficial impact on physical activity and health, and at the same time, decreases air pollution. In fact the FHWA policy has, for decades, been to consider a transit alternative “on all proposed major highway projects in urbanized areas over 200,000 population.”<sup>14</sup>

Refusing to incorporate a transit alternative – a common approach in current decision-making - can result from a biased process. Reducing commuting time for (overwhelmingly white and already advantaged) suburban drivers also creates a discriminatory social and economic effect. Where persons of color are *more likely than whites* to depend on transit and *less likely than whites* to commute by car, there is disproportion, whether or not a majority of employed persons of color may commute by car. Unfortunately, agencies often refuse to consider and ensure implementation of investments in transit and multi-modal infrastructure, or demand management as reasonable alternatives to highway projects, particularly projects in urban areas. This occurs, *inter alia*, when proposed alternatives are arbitrarily considered and rejected as stand-alone alternatives while agencies refuse to consider comprehensive alternatives that combine coordinated public transit investments, improvements in pedestrian and bicycle infrastructure, and serious travel demand management efforts, which together could meet project goals. Planning and project development policies and manuals should require consideration of transit supportive policies such as improved land use decisions, incentivizing employers to stagger shift starting times and reward transit use and rideshare, reducing free or subsidized parking, and the like.

Conversely, alternatives that, for example, include transit increases, may benefit environmental justice communities. Certainly, DOT should require not only an analysis of adverse effects, but also an analysis of relative benefits of each alternative for environmental justice communities. For example, an analysis of the benefits to these communities of multi-modal projects and/or of *not* increasing a project footprint or capacity. In considering a transit increase alternative, evaluate the relative effects of *that* alternative, including the relative effects for persons of color.<sup>15</sup> Analysis of environmental justice and climate change impacts should also be mandated as part of a review of alternatives.

Changing trends in travel behavior are also widespread and support increased transit rather than the continuing highway expansion predicted in the past. These changes include, for example, a leveling off of the number and percentage of women in the workforce, automobile saturation, the baby boom generation passing peak travel age, increased costs of owning and operating vehicles, a 23%

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<sup>14</sup> FHWA, Technical Advisory T6640.8A, Sec. V.E.3, available at [https://www.environment.fhwa.dot.gov/legislation/nepa/guidance\\_preparing\\_env\\_documents.aspx#soc](https://www.environment.fhwa.dot.gov/legislation/nepa/guidance_preparing_env_documents.aspx#soc).

<sup>15</sup> 40 C.F.R. § 1502.14(a), (b).

per-capita vehicle miles traveled (VMT) decline among young persons, and a resurgence in compact living.

Perhaps most significantly, the COVID-19 pandemic caused a drastic rise in remote work which will impact travel, likely for years to come.<sup>16</sup> Employers and employees found that large portions of office work can be accomplished online, with potentially huge savings in terms of commuting time and increased productivity.<sup>17</sup> It is increasingly unlikely that once the pandemic abates, work and travel patterns, and patterns of land use, will return to pre-pandemic levels. “Employers that can are going to keep this flexibility, whether it’s two days a week, three days a week, but they are going to allow their employees to work off-site because they’ve shown that they can.”<sup>18</sup> Pre-pandemic, approximately five percent of American paid working hours were performed from home, and a recent University of Chicago study predicts that post-pandemic, approximately 20% will be performed from home.<sup>19</sup> Therefore, this is the perfect time to move away from failed policies to expand highways and move towards multi-modal reasonable alternatives.

Regulations should require transit construction and expansion as a reasonable alternative to be incorporated into any project, at least in areas with a minimum population density. Indeed, 23 U.S.C. § 503(c)(4)(G) requires the Secretary of Transportation to report on how the program has “[o]ptimized multimodal system performance” and “[i]mproved access to transportation alternatives.”<sup>20</sup> Optimized multimodal system performance is measured by, among other things, bike ridership, use of rideshare, and VMT avoided through transit.<sup>21</sup> Improved access to transportation

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<sup>16</sup> US PIRG: Highway Boondoggles 6: Big Projects. Bigger Price Tags. Limited Benefits (2020), p. 4, available at [https://uspirg.org/sites/pirg/files/reports/USP%20Boondoggles%20Report%20Nov20\\_web.1.pdf](https://uspirg.org/sites/pirg/files/reports/USP%20Boondoggles%20Report%20Nov20_web.1.pdf).

<sup>17</sup> “Why Working from Home Will Stick,” Becker Friedman Institute Working Paper NO. 2020-174, Univ. of Chicago, April 21, 2021, pp. 25, available at <https://bfi.uchicago.edu/working-paper/why-working-from-home-will-stick/>.

<sup>18</sup> “The Way Back: Work from Home Ripple Effects,” Milwaukee Magazine, May 2021, p. 26; available at [www.milwaukeeceomag.com](http://www.milwaukeeceomag.com). See also, “Biden administration moves toward making the pandemic work-from-home experiment permanent for many federal workers,” The Washington Post, May 24, 2021, available at [https://www.washingtonpost.com/politics/federal-employees-working-from-home/2021/05/23/73c34304-b8db-11eb-a6b1-81296da0339b\\_story.html](https://www.washingtonpost.com/politics/federal-employees-working-from-home/2021/05/23/73c34304-b8db-11eb-a6b1-81296da0339b_story.html); Special report: “The Future of Work; from Desktop to Laptop,” The Economist, April 10, 2021, pp. 6-8, available at [https://www.economist.com/special-report/2021-04-10?utm\\_source=google&utm\\_medium=cpc&utm\\_campaign=a\\_21futurework&utm\\_content=srsitelink&gclid=Cj0KCOjw--GFBhDeARIsACH\\_kdaFV9M-90H90HV0NaLi2RYn2p0uWKG8eMTwVs5zIA1i9DDDeuZwdq-waAgt8EALw\\_wcB&gclid=aw.ds](https://www.economist.com/special-report/2021-04-10?utm_source=google&utm_medium=cpc&utm_campaign=a_21futurework&utm_content=srsitelink&gclid=Cj0KCOjw--GFBhDeARIsACH_kdaFV9M-90H90HV0NaLi2RYn2p0uWKG8eMTwVs5zIA1i9DDDeuZwdq-waAgt8EALw_wcB&gclid=aw.ds); “Gov. Tony Evers' Administration Imagines Future with Less Office Space, More Remote Work,” Wisconsin State Journal, May 28, 2021, available at [https://madison.com/wsj/news/local/govt-and-politics/gov-tony-evers-administration-imagines-future-with-less-office-space-more-remote-work/article\\_23de37d1-b7bf-5e1d-9763-ef8a677cb6ee.html#utm\\_source=madison.com&utm\\_campaign=%2Fnewsletter-templates%2Fnews-alert&utm\\_medium=PostUp&utm\\_content=85b31c63842754f21c75f7e34de583801dfb08d8n](https://madison.com/wsj/news/local/govt-and-politics/gov-tony-evers-administration-imagines-future-with-less-office-space-more-remote-work/article_23de37d1-b7bf-5e1d-9763-ef8a677cb6ee.html#utm_source=madison.com&utm_campaign=%2Fnewsletter-templates%2Fnews-alert&utm_medium=PostUp&utm_content=85b31c63842754f21c75f7e34de583801dfb08d8n).

<sup>19</sup> “Why Working from Home Will Stick,” *supra*.

<sup>20</sup> See, e.g., FHWA Evaluation Methods and Techniques: Advanced Transportation and Congestion Management Technologies Deployment Program, Dec 2019, p. 7, available at <https://ops.fhwa.dot.gov/publications/fhwahop19053/fhwahop19053.pdf> (“Increased demand for transportation services following a level of service improvement can come from ... induced travel (e.g., an auto traveler making a recreational trip to a central business district that would not have been made without the introduction of a new high occupancy toll lane).”).

<sup>21</sup> FHWA Evaluation Methods and Techniques: Advanced Transportation and Congestion Management Technologies Deployment Program, *supra*.

alternatives is measured largely by access to transit, specifically number of households close to a public transit stop, ridership, and number of new riders.<sup>22</sup>

### B. *Change Focus Away from “Congestion” and “Level of Service”*

The core purpose of transportation infrastructure is to provide access to work, education, healthcare, groceries, recreation, and other daily needs. To work toward increased equity, goals and policies must stop defining and prioritizing congestion as a core metric for success. The speed of car travel is a poor proxy for determining whether a transportation network succeeds at efficiently connecting as many people as possible to the things they need, and even less of a proxy for determining whether environmental justice communities – who are less likely to rely on SOV travel – are so connected. Further, climate change-causing emissions increase when highways expand, induce sprawl development and cause vehicles to travel more miles.

Congestion can become a problem when it *seriously* obstructs access to the resources people need, but congestion and car speeds alone do not establish whether a transportation network succeeds at connecting as many people as possible to the things they need, as efficiently as possible. Moreover, the FHWA “does not have regulations or policies that require specific minimum [Level of Service] LOS values, though existing recommendations may be misinterpreted as federal requirements.”<sup>23</sup> In fact, a narrow emphasis on vehicle speed and delay – *i.e.*, LOS - is routinely used as a core metric, if not *the* core metric, underlying transportation decisions, from the standards engineers use to design roads to the criteria states and metropolitan planning organizations use to prioritize projects for funding. This leads the U.S. to build and expand freeways reflexively, almost on autopilot, perpetuating the cycle that produces yet more traffic.<sup>24</sup>

Policies that establish the speed of rush-hour traffic as the goal of federal transportation investments inevitably result in environmentally destructive and racially inequitable highway expansion projects. To effectuate equity, changes must be made to those policies and practices, such as the FHWA Project Design and Development Manual, among others,<sup>25</sup> to deemphasize metrics involving vehicle speed and delay as justification for highway construction, improvement, and capacity expansion. DOT itself recognizes, “as the transportation industry broadens its goals beyond congestion reduction and associated capacity expansion, some find the traditional role of automobile-only LOS too narrow to address the many factors considered by comprehensive performance management.”<sup>26</sup>

Yet FHWA’s standards for designing roads direct engineers to build wide lanes and wider roads almost by default. The agencies use a delay-based “A through F” grading system to evaluate all roads, called level of service (LOS). This grading system, and the goal of moving

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<sup>22</sup> FHWA Evaluation Methods and Techniques: Advanced Transportation and Congestion Management Technologies Deployment Program, *supra* at 27-28.

<sup>23</sup> U.S. Department of Transportation, Level of Service Case Studies: Evolving Use of Level of Service Metrics in Transportation Analysis, available at <https://www.transportation.gov/office-policy/transportation-policy/level-service-case-studies>.

<sup>24</sup> “The Congestion Con,” Transportation for America (March 2020) p. 5, available at <https://t4america.org/maps-tools/congestion-con/>.

<sup>25</sup> See also, e.g., U.S. Department of Transportation, Relevant USDOT Resources, available at [https://www.transportation.gov/sites/dot.gov/files/docs/LOS%20Case%20Study%20Resources\\_508.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/LOS%20Case%20Study%20Resources_508.pdf).

<sup>26</sup> U.S. Department of Transportation, Level of Service Case Studies: Evolving Use of Level of Service Metrics in Transportation Analysis, *supra*.



roads from lower grades like D and F to higher grades like B or C, is a primary determining factor in the funding of transportation projects and design of roads. Focusing on delay and speed rather than access leads agencies to widen roads as a default when traffic slows rather than address the factors that produce more traffic – and without considering the fact that expansion routinely leads to even more traffic. Since 1980, the U.S. has added more than 870,000 lane-miles of highway, yet congestion was worse immediately before the COVID pandemic than it had been since the early 1980s.<sup>27</sup> Designing wide roads so that cars can travel at high speeds also makes it less safe and less convenient to travel using other modes of transportation like walking or biking for short local trips, further compounding congestion.

And by allowing faster vehicle travel, congestion reduction also may actually make travel *less* safe. In 2020, for example, congestion decreased but vehicle fatalities increased by 7.2%, representing the highest number of fatalities since 2007.<sup>28</sup> “Fatalities *per mile driven* rose by 24%, the biggest increase since 1924,” in large part due to faster speeds.<sup>29</sup> In California, citations for driving over 100 mph doubled during the pandemic.<sup>30</sup>

Over the decades, highway-induced sprawl has encouraged population and job flight from many of America’s urban central cities, and left many communities of color isolated from areas of economic vitality and job growth.<sup>31</sup> That sprawl leads to longer car trips and produces more traffic – also exacerbating emissions - in an ongoing cycle.<sup>32</sup> And, as discussed below, that sprawl is often racially segregated.

While expanding highways continues to garner support, FHWA stated years ago that expanding highways is not the antidote to congestion:

Adding ... lanes to existing freeways will add large amounts of capacity to the roadway network. However, there are other improvements to the transportation system that can reduce or manage congestion, albeit in a more localized area. Widening arterial roads, providing street connectivity, provide grade separations at congested intersections and providing high- occupancy vehicle (HOV) lanes all will help to mitigate congestion. Also, adding capacity to the transit system, whether it is to the bus system, urban rail system or commuter rail system will assist in relieving congestion on the roadway network.<sup>33</sup>

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<sup>27</sup> US PIRG: Highway Boondoggles 6: Big Projects. Bigger Price Tags. Limited Benefits (2020), at p. 1, available at [https://uspirg.org/sites/pirg/files/reports/USP%20Boondoggles%20Report%20Nov20\\_web.1.pdf](https://uspirg.org/sites/pirg/files/reports/USP%20Boondoggles%20Report%20Nov20_web.1.pdf).

<sup>28</sup> National Highway Transportation Safety Administration, 2020 Fatality Data Show Increased Traffic Fatalities During Pandemic, June 3, 2021, available at <https://www.nhtsa.gov/press-releases/2020-fatality-data-show-increased-traffic-fatalities-during-pandemic>.

<sup>29</sup> “A Dark Conundrum: Americans are Driving Less, but More are Dying in Car Accidents,” *The Economist* (Apr. 3, 2021), available at <https://www.economist.com/graphic-detail/2021/04/03/americans-are-driving-less-but-more-are-dying-in-accidents> (emphasis added).

<sup>30</sup> “A Dark Conundrum: Americans are Driving Less, but More are Dying in Car Accidents,” *supra*.

<sup>31</sup> See, e.g., Baum-Snow, Nathaniel. “Did Highways Cause Suburbanization?” *The Quarterly Journal of Economics*, vol. 122, no. 2, 2007, pp. 775–805, available at [http://www.econ.brown.edu/Faculty/Nathaniel\\_Baum-Snow/hwy-sub.pdf](http://www.econ.brown.edu/Faculty/Nathaniel_Baum-Snow/hwy-sub.pdf).

<sup>32</sup> US PIRG: Highway Boondoggles 6: Big Projects. Bigger Price Tags. Limited Benefits (2020), *supra* at 28.

<sup>33</sup> FHWA, Traffic Congestion and Reliability: Trends and Advanced Strategies for Congestion Mitigation, Section 4.1.1, available at [https://ops.fhwa.dot.gov/congestion\\_report/chapter4.htm](https://ops.fhwa.dot.gov/congestion_report/chapter4.htm) ; see also Anderson, Michael L. 2014. "Subways, Strikes, and Slowdowns: The Impacts of Public Transit on Traffic Congestion." *American Economic Review*, 104 (9):

Thus, we urge adoption of policies that measure and encourage the alternatives that will increase equity and improve our climate: apply accessibility for the entire community as the core goal for the federal transportation program in performance management and project selection. Phase out outdated metrics like level-of-service for narrowly evaluating rush hour delay. Policies have long encouraged and rewarded sprawl by spending limited funding to expand highways to accommodate additional traffic, which those highways induced. Instead, DOT should orient transportation funding to prioritize and reward localities that seek more efficient ways of moving people, such as bringing together destinations in land use planning, managing driving demand, and facilitating travel by other modes. These policy changes would mitigate climate change, which disproportionately harms communities of color, and would also address some of the impacts of the many decades of inequitable and discriminatory transportation decisions that have adversely impacted communities of color and disabled people.

## **VI. Require Robust Analysis of Effects on Environmental Justice Communities**

As part of the analysis of the environmental impacts of the project, agencies must take a “hard look” at the effects of the project – and the comparative effects of all reasonable alternatives.<sup>34</sup> “Effects includes ecological, . . . aesthetic, historic, cultural, economic, social, or health [effects], whether direct, indirect, or cumulative.”<sup>35</sup> In addition, the starting point must be to evaluate the relative effects of all reasonable alternatives, not just the final one the agencies wish to pursue. An alternative not presumed to be the best choice may have fewer adverse effects on communities of color than the originally preferred alternative, which is why a comparative analysis is necessary.

Guidance and regulations also should be strengthened to clarify that those analyses must be performed separately with respect to environmental justice communities. For example, and as discussed more fully below, there should be an evaluation of *overall* health effects, and also, separately, of health effects on communities of color and other environmental justice populations. And those analyses must take adverse effects seriously – not, as routinely happens now, look for ways to claim that no adverse effects exist. Suggestions for more specific regulatory guidance on addressing some of these effects are identified below.

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2763-96, 2763, available at [https://www.nber.org/system/files/working\\_papers/w18757/w18757.pdf](https://www.nber.org/system/files/working_papers/w18757/w18757.pdf) (“Transit is most attractive to commuters who face the worst congestion, so a disproportionate number of transit riders are commuters who would otherwise have to drive on the most congested roads at the most congested times. Since drivers on heavily congested roads have a much higher marginal impact on congestion than drivers on the average road, transit has a large impact on reducing traffic congestion.”).

<sup>34</sup> See, e.g., 40 C.F.R. §§1502.14(a),(b); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989).

<sup>35</sup> 40 C.F.R. § 1508.8.

### *A. Evaluate Racial Effects as Social Effects*

Regulations should explicitly state that social effects include racial effects, as well as effects on other environmental justice populations. According to the FHWA's own guidance, "[e]xplicit consideration of potential effects on minority and low-income populations is required in NEPA documents."<sup>36</sup> Similarly:

[t]he effects of a project on the elderly, handicapped, nondrivers, transit-dependent, and minority and ethnic groups are of particular concern and should be described to the extent these effects can be reasonably predicted. Where impacts on a minority or ethnic population are likely to be an important issue, the EIS should contain the following information broken down by race, color, and national origin: the population of the study area, the number of displaced residents, the type and number of displaced businesses, and an estimate of the number of displaced employees in each business sector. Changes in ethnic or minority employment opportunities should be discussed and the relationship of the project to other Federal actions which may serve or adversely affect the ethnic or minority population should be identified.

The discussion should address whether any social group is disproportionately impacted and identify possible mitigation measures to avoid or minimize any adverse impacts.<sup>37</sup>

Regulations should reflect this guidance language to ensure that environmental justice communities are involved in all aspects of planning and project development, and that their needs and concerns are fully considered and meaningfully addressed.

### *B. Require Health Impact Analysis*

The guidance and regulations should emphasize that indirect and cumulative health effects analyses are required, and that they must be done in a way that ascertains the potential effect on communities of color. Given the significant health risks and many racial disproportions, no project should go forward without incorporating a Health Impact Analysis.<sup>38</sup>

This includes evaluating the effect of increasing traffic closer to where people live. Bringing more traffic through dense neighborhoods "produces documented environmental and health consequences such as locally hazardous air pollutants [and] globally significant greenhouse gas emissions . . ." <sup>39</sup> Those consequences can include asthma, other lung disease, and heart disease, and

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<sup>36</sup> FHWA Guidance on Environmental Justice and NEPA (Dec. 16, 2011), available at [https://www.environment.fhwa.dot.gov/env\\_topics/ej/guidance\\_ejustice-nepa.aspx](https://www.environment.fhwa.dot.gov/env_topics/ej/guidance_ejustice-nepa.aspx).

<sup>37</sup> FHWA Technical Advisory T6640.8A at Sec. V. G. 3.e, available at [https://www.environment.fhwa.dot.gov/legislation/nepa/guidance\\_preparing\\_env\\_documents.aspx#soc](https://www.environment.fhwa.dot.gov/legislation/nepa/guidance_preparing_env_documents.aspx#soc)

<sup>38</sup> U.S. Center for Disease Control, NEPA Frequently Asked Questions, available at <https://www.cdc.gov/healthyplaces/NEPAfaq.htm>.

<sup>39</sup> Mayors Innovation Project, Rethinking the Urban Freeway: Option for Rebuilding, Replacing, Altering or Otherwise Addressing Aging Freeways, at p. 3 (2013), available at <https://docs.google.com/viewerng/viewer?url=https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-ebeling.pdf>.

those emissions disproportionately affect people of color.<sup>40</sup> Meanwhile, the COVID-19 pandemic has magnified the racialized health burdens of living near highways.<sup>41</sup>

Asthma is also a racial equity issue. Black Americans are three times more likely than white Americans to die from asthma and five times more likely to visit the Emergency Department because of asthma.<sup>42</sup> The CDC indicates a triple jeopardy effect amongst these populations, who are known to suffer from poor nutrition and inadequate health care coverage and also tend to be at higher risk of exposure to residential air pollution, suggesting disproportionately larger adverse health effects from an increased exposure to air pollution.<sup>43</sup> Disparities are even worse in Wisconsin.<sup>44</sup> To the extent that residents near the highways are poor, they may even lack the ability to keep *indoor* air cleaner, for example with air conditioning.

In addition:

[u]rban freeways tend to concentrate truck traffic. Diesel trucks present a much greater threat to nearby residents than passenger vehicle traffic due to their more harmful emissions and, to a lesser extent, the noise and vibration they produce. Long-term exposure to diesel emissions is linked to lung cancer as well as heart disease. Short-term exposure can cause irritation of the eyes, nose, throat and lungs, as well as coughing, headaches, lightheadedness and nausea. Exposure to diesel exhaust may also

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<sup>40</sup> American Lung Association, *Living Near Highways and Air Pollution*, available at <https://tinyurl.com/hn8mcr8>. See, also, e.g., Christopher Tessum, et al., “PM<sub>2.5</sub> Polluters Disproportionately and Systemically Affect People of Color in the United States,” *Science Advances*, Vol. 7, no. 18, April 28, 2021, available at <https://advances.sciencemag.org/content/7/18/eabf4491>; Center for Disease Control and Prevention, *CDC Health Disparities and Inequalities Report—United States 2013*, p. 49, *Morbidity and Mortality Weekly Report* (Nov. 22, 2013), available at <https://www.cdc.gov/mmwr/pdf/other/su6203.pdf>; American Lung Association, *Who Is at Risk?: Some People Face Greater Risk from Air Pollution*, available at <https://www.lung.org/clean-air/outdoors/who-is-at-risk>; Brugge, Durant & Rioux, “Near-highway pollutants in motor vehicle exhaust: A review of epidemiologic evidence of cardiac and pulmonary health risks,” *Environmental Health* 2007, 6:23, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1971259/pdf/1476-069X-6-23.pdf>; Graham, “Living Near Highways May be Hazardous to Your Health,” *Digital Journal* (Nov. 6, 2013), available at <https://www.sott.net/article/268439-Living-near-highways-may-be-hazardous-to-your-health>; “Road Traffic Pollution as Serious as Passive Smoke in the Development of Childhood Asthma,” *Science Daily* (March 21, 2013), available at <https://tinyurl.com/n5tx2c3b>; Sierra Club, “Highway Health Hazards” (2004), available at [https://vault.sierraclub.org/sprawl/report04\\_highwayhealth/report.pdf](https://vault.sierraclub.org/sprawl/report04_highwayhealth/report.pdf) (citing 24 studies indicating relationship between highway traffic and diseases such as asthma and cancer); and “Poor Americans More Likely to Have Respiratory Problems, Study Finds,” *The New York Times*, May 28, 2021, available at <https://www.nytimes.com/2021/05/28/health/tobacco-smoking-poor-americans.html> (quoting Dr. Steffie Woolhandler, a primary care physician and a professor of public health and health policy: “An affluent person would probably not choose to live near a highway because there is diesel exhaust and car exhaust, and would not choose not to live near a factory or power plant. . . . A poor person doesn’t necessarily have that choice.”).

<sup>41</sup> See Wendy Xiao, *The Road to Racial Justice: Resolving the Disproportionate Health Burden Placed on Communities of Color by Highway Pollution*, *Columbia Human Rights Law Review*, Iss. 52.2, pp. 924, 928 available at [http://blogs.law.columbia.edu/hrlr/files/2021/02/911\\_Xiao.pdf](http://blogs.law.columbia.edu/hrlr/files/2021/02/911_Xiao.pdf).

<sup>42</sup> Asthma and Allergy Foundation of America, (2020), *Asthma Disparities in America: A Roadmap to Reducing Burden on Racial and Ethnic Minorities*, available at <https://www.aafa.org/media/2743/asthma-disparities-in-america-burden-on-racial-ethnic-minorities.pdf>.

<sup>43</sup> Center for Disease Control and Prevention, *CDC Health Disparities and Inequalities Report—United States 2013*, p. 49, *Morbidity and Mortality Weekly Report* (Nov. 22, 2013), available at <https://www.cdc.gov/mmwr/pdf/other/su6203.pdf>.

<sup>44</sup> Wisconsin Department of Health Services, *Wisconsin Asthma Burden Report 2020*, pp. 14, 16, 17, available at <https://www.dhs.wisconsin.gov/publications/p02412-20.pdf>.

aggravate chronic respiratory symptoms and increase the frequency and intensity of asthma attacks. Noise from diesel trucks poses another important, although less understood, risk to nearby communities. Along with annoyance, noise exposure can contribute to cardiovascular disease, cognitive impairment in children, sleep disturbance, and tinnitus—the sensation of sound in the absence of an external sound source.<sup>45</sup>

According to EPA, near-highway concentrations of some pollutants, such as nitrogen dioxide, contribute to serious health problems, including cancer.<sup>46</sup> Research also finds that ultrafine particles emitted by vehicles, which are not regulated by EPA, also cause serious adverse health effects for those living near highways—effects comparable to those caused by smoking cigarettes.<sup>47</sup> “Freeways also add to elevated temperatures in their vicinity through the heat island effect, making heat waves more severe and contributing to negative health outcomes.”<sup>48</sup> DOT should reject agency conclusions that congestion reduction projects are *de facto* beneficial for environmental justice communities based on an alleged reduction in air pollution due to reduced idling.

Finally, any analysis of health impacts must consider whether, and to what extent, affected communities – especially environmental justice communities – have ready access, or any access at all, to medical care. For example, stating that asthma can be addressed with regular doctor visits or medication may be cold comfort to a person without health insurance. Those issues, including their environmental justice implications, must be analyzed.

### C. Analyze Induced Demand and Sprawl Development

Given the country’s segregation and profound and continuing racial disparities, guidance and regulations must clarify that indirect and cumulative effects encompass the well-documented phenomenon of induced travel demand<sup>49</sup> and of urban sprawl – particularly when such sprawl is racialized. 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.”<sup>50</sup> Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.<sup>51</sup> Guidance

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<sup>45</sup> Mayors Innovation Project, *supra* at 4 (2013).

<sup>46</sup> U.S. Environmental Protection Agency, Nitrogen Dioxide (NO<sub>2</sub>) Pollution, Basic Information about NO<sub>2</sub>, available at <https://www.epa.gov/no2-pollution/basic-information-about-no2>; U.S. Environmental Protection Agency, Particulate Matter (PM) Basics, available at <https://www.epa.gov/pm-pollution/particulate-matter-pm-basics#PM>; Wetekamp, Chelsea, et al, An Examination of National Cancer Risk Based on Monitored Hazardous Air Pollutants (March 2021), available at <https://ehp.niehs.nih.gov/doi/pdf/10.1289/EHP8044>.

<sup>47</sup> David Levin, “Big Road Blues,” Tufts Now (Aug. 16, 2012) pp. 3-6, available at <https://now.tufts.edu/articles/big-road-blues-pollution-highways>.

<sup>48</sup> Mayors Innovation Project, *supra* at 4.

<sup>49</sup> See FHWA Evaluation Methods and Techniques: Advanced Transportation and Congestion Management Technologies Deployment Program, Dec 2019, p 49, available at

<https://ops.fhwa.dot.gov/publications/fhwahop19053/fhwahop19053.pdf> (“Increased demand for transportation services following a level of service improvement can come from ... induced travel (e.g., an auto traveler making a recreational trip to a central business district that would not have been made without the introduction of a new high occupancy toll lane).

<sup>50</sup> 40 C.F.R. § 1508.8(b).

<sup>51</sup> 40 C.F.R. § 1508.7.

and regulations thus must mandate consideration of the racial or other environmental justice impacts, such as whether facilitating suburban or exurban residential development is likely to increase segregation in a region.<sup>52</sup>

At the same time, any environmental statement must be required to conduct a meaningful and detailed evaluation and analysis including, but not limited to, an analysis of the potentially beneficial effects (including the relative effects on communities of color) of *not* “improving” or expanding highway capacity, and of constricting suburban growth. In other words, any planning or environmental document must consider whether not acting could benefit affected communities in a greater or different way than acting, such as by incentivizing more concentrated urban development instead of suburban development by *not* reducing travel times to suburbs.

Transportation agencies must examine the social – including explicitly racial - economic and other effects of facilitating access to employment, health care, and other necessities and amenities for (disproportionately white) drivers while refusing to consider a transit alternative upon which (disproportionately minority) persons depend. Failing to address this will *increase* the (un)employment, poverty and income disparities and thus *per se* have an adverse effect on minority communities, such as “destruction or disruption of . . . a community's economic vitality; . . . adverse employment effects; . . . [and] . . . isolation, exclusion or separation of minority or low-income individuals within a given community or from the broader community.”<sup>53</sup>

An agency must also consider the extent to which its actions will exacerbate or induce growth. 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.”<sup>54</sup> While “a single highway- improvement project might have minimal environmental consequences, combining that project with those that preceded it and others that are anticipated might reveal a more serious overall impact.”<sup>55</sup> Moreover, an evaluation of the effect of facilitating suburban sprawl development *must* be considered in context, as an issue of pervasive and deep-rooted segregation.

#### *D. Evaluate Effects of Highway Expansion – and Alternatives - on Local Communities*

Urban freeways disrupt local commerce and degrade the business districts they run through. Freeways are known to “lower property values, increase blight, and maintain marginal neighborhoods nearby.”<sup>56</sup>

People driving through a city on a freeway have limited opportunity to patronize local businesses, so

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<sup>52</sup> This is certainly true in the Milwaukee metropolitan region, which has by far the lowest Black suburbanization rate in the country. Levine, Marc V., “The State of Black Milwaukee in National Perspective: Racial Inequality in the Nation’s 50 Largest: Metropolitan Areas in 65 Charts and Tables” (2020). *Center for Economic Development Publications*. 56, available at [https://dc.uwm.edu/ced\\_pubs/56](https://dc.uwm.edu/ced_pubs/56).

<sup>53</sup> FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, *FHWA Order 6640.23A* (2012), available at <https://www.fhwa.dot.gov/legregs/directives/orders/664023a.pdf>.

<sup>54</sup> *Highway J*, 656 F.Supp.2d at 887. *See also, e.g., MICAH*, 944 F.Supp.2d at 671-3; *Davis v. Mineta*, 302 F.3d at 1122; *City of Davis v. Coleman*, 521 F.2d 661, 676 (9<sup>th</sup> Cir. 1975); *Senville v. Peters*, 327 F.Supp.2d 335, 348-9 & n. 11 (D.Vt. 2004) (must evaluate effects including “induced growth,” “[o]ften referred to as ‘sprawl’ . . .”).

<sup>55</sup> *Highway J*, 656 F.Supp.2d at 888.

<sup>56</sup> “Rethinking the Urban Freeway” *supra* at 3.

local economic opportunity is diminished through the freeway corridor.<sup>57</sup> “Negative community impacts from transportation projects often are most acutely felt by low-income and minority populations.”<sup>58</sup> Returning traffic to city streets, and to downtown in general, can have a positive economic impact as well. For example, Milwaukee’s removal of the mile-long Park East freeway spur ultimately led to urban development without the damaging increase in traffic that opponents predicted.<sup>59</sup> And because too much parking (and driving) hurts cities, *reducing* driving and parking is likely to enhance economic and social benefits.<sup>60</sup>

A transit-expanding plan also could provide additional benefits in the form of employment to disproportionately minority residents. This could include “jobs directly created in construction and related employment, as well as the employment that occurs as the initial expenditures for [light rail] LRT ripple through the regional economy,” especially if coordinated with other kinds of economic development. Operating and maintaining the system also could add jobs.<sup>61</sup> In addition, a transit-expanding plan could provide economic development benefits to the minority neighborhoods disproportionately hurt by urban highways. This has occurred in various cities.<sup>62</sup>

## VII. Avoid, Minimize, and Mitigate Discriminatory Effects

Where there is a disparate impact on minority groups, the agencies must “[f]ollow the protocol of avoidance first, then minimization, and finally measures to offset or rectify the adverse effects.”<sup>63</sup> To the extent that the identified effects are long term, any avoidance, minimization or mitigation must be similarly long term. For example, providing mitigation only during construction for an effect that is expected to be long-standing or permanent (such as urban sprawl) must be deemed inadequate.

The FHWA Environmental Justice Reference Guide states:

The NEPA process requires practitioners to consider mitigation of adverse effects for all populations. Practitioners develop alternatives that avoid, minimize, or offset/rectify adverse effects and should consider minority and low-income populations early in this process. Practitioners should identify whether minority or

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<sup>57</sup> “Rethinking the Urban Freeway” *supra* at 2.

<sup>58</sup> FHWA, “Environmental Justice Emerging Trends and Best Practices Guidebook.” FHWA-HEP-11-024 (2011) p. 6, available at [https://www.fhwa.dot.gov/environment/environmental\\_justice/publications/guidebook\\_2011/eiguidebook110111.pdf](https://www.fhwa.dot.gov/environment/environmental_justice/publications/guidebook_2011/eiguidebook110111.pdf).

<sup>59</sup> “Park East Corridor: The Freeway Teardown that Helped Put Milwaukee on the National Stage this Summer,” Milwaukee Independent, Feb. 13, 2020, available at <http://www.milwaukeeindependent.com/syndicated/park-east-corridor-freeway-teardown-helped-put-milwaukee-national-stage-summer/>.

<sup>60</sup> *See, e.g.*, Garrick & McCahill, “How Too Much Parking Hurts Cities,” Better!Cities and Towns online (2013).

<sup>61</sup> FHWA, “Environmental Justice Emerging Trends and Best Practices Guidebook” *supra* at 2.

<sup>62</sup> *See, e.g.*, Hook, Lotshaw & Weinstock, “More Development for Your Transit Dollar,” (2013) p. 6, available at <https://itdpdotorg.wpengine.com/wp-content/uploads/2013/11/More-Development-For-Your-Transit-Dollar-ITDP.pdf> (“While a tough regional economy and shrinking population forced many of the surrounding cities to cut public services and reduce jobs in the public and private sectors, Cleveland managed to transform a modest \$50 million investment in bus rapid transit into \$5.8 billion in new transit-oriented development. By putting bus rapid transit (BRT) along a strategic corridor and concentrating government redevelopment efforts there, Cleveland managed to leverage \$114.54 dollars of new transit-oriented investment for every dollar it invested into the BRT system, adding jobs and revitalizing the city center.”); *See also Id.* at p. 7 (“Both BRT and LRT can leverage many times more TOD investment than they cost.”)

<sup>63</sup> FHWA Guidance on Environmental Justice and NEPA *supra*.

low-income populations experience any disproportionately high and adverse effects under any of the proposed alternatives. If disproportionately high and adverse effects on minority or low-income populations do exist, practitioners must assess whether any practicable mitigation measures or alternatives would avoid or reduce the effects on those populations.<sup>64</sup>

It is critical that these requirements be imposed and implemented not only by policy guidance, but also by regulation– to avoid, minimize and mitigate, in that order, and to mandate long term mitigation for projects with long term effects. As the FHWA’s Guidance on Environmental Justice and NEPA states:

If there is a disproportionately high and adverse effect on an environmental justice population, after taking benefits and mitigation into account, the NEPA document must evaluate whether there is a further practicable mitigation measure or practicable alternative that would avoid or reduce the disproportionately high and adverse effect(s). FHWA will approve the proposed action only if it determines no such practicable measures exist, and the FHWA determination ought to be stated in the document. The NEPA document needs to describe how the impacted populations/communities were involved in the decision-making process. The document needs to also identify what practicable mitigation commitments have been made.

In addition, if the affected population is a minority population protected under Title VI, FHWA must not approve the proposed action unless FHWA determines:

- 1) There is a substantial need for the project, based on the overall public interest; **and**
- 2) Alternatives that would have less adverse effects on protected populations have either:
  - a) Adverse social, economic, environmental, or human health impacts that are more severe; **or**
  - b) Would involve increased costs of an extraordinary magnitude.

The FHWA’s Environmental Justice Reference Guide also makes clear that affected communities must be involved in the process of determining appropriate mitigation efforts, and provides some examples of potential strategies:

Practitioners can work with communities in a variety of ways to avoid, minimize, or mitigate adverse effects. Examples include, but are not limited to, the following:

- Setting aside a portion of the budget for eligible small-scale community-driven projects.

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<sup>64</sup> FHWA Environmental Justice Reference Guide (Apr. 1, 2015), *supra* at 46.



- Drafting community benefits agreements, which are project-specific, legally binding contracts between project sponsors and community representatives that outline projects' benefits to communities.
- Supporting Safe Routes to School initiatives, which help children walk or bicycle to school safely.<sup>65</sup>

Practitioners should work collaboratively with the affected populations when choosing among the many ways to deliver benefits and mitigate impacts.<sup>66</sup>

Further, FHWA should mandate that in the highway context the agencies must evaluate multi-modal alternatives to address transportation capacity needs.<sup>67</sup> This is particularly true when, as in many communities, there is a disparity in use of and access to single occupancy vehicles. In Wisconsin, for example, the state DOT itself identified the following policies to provide mobility and transportation choice:

- Support public, specialized and human services transit;
- Increase intercity travel options by improving intercity passenger rail service;
- Improve intercity bus service and connections;
- Support development of fixed-guideway transit services;
- Encourage transportation demand management strategies;
- Facilitate intermodal passenger connections;
- Work to ensure the availability of adequate funding for existing transit systems;
- Work with partners to improve transit service coordination, eliminate inefficiencies, and improve transit planning; and
- Support existing and expanded urban (including suburban) and rural regional transit systems with new governance structures, funding sources and increased coordination.<sup>68</sup>

FHWA also must require the agencies to ensure that mitigation projects, especially those mitigation projects and policies proposed or preferred by environmental justice communities, are more than words on paper and are in fact implemented.

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<sup>65</sup> FHWA Guidance on Environmental Justice and NEPA *supra*.

<sup>66</sup> FHWA Environmental Justice Reference Guide, *supra* at 35.

<sup>67</sup> *Highway J Citizens Group v. USDOT*, 656 F.Supp.2d 868, 892 (E.D. Wis. 2009), *citing Simmons v. Army Corps*, 120 F.3d 664, 668-70 (7<sup>th</sup> Cir. 1997).

<sup>68</sup> Wisconsin Department of Transportation, Connections 2030 p. 2, available at <https://wisconsindot.gov/Documents/projects/multimodal/conn2030/2030-8.pdf>.

## VIII. Conclusion

For the reasons we set forth in these comments, we urge the U.S. Department of Transportation to implement policies and practices, and develop formal regulations, to meet the goals of environmental justice, health, and controlling climate change.

Respectfully submitted,

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