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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HIGHWAY J CITIZENS GROUP, *et al.*, Plaintiffs,	)	Civil No. 05-00212
	)	Judge Lynn S. Adelman
v.	)	
U.S. DEPARTMENT OF TRANSPORTATION, *et al.*, Defendants.	)	

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION
OF THE DECISION AND ORDER OF SEPTEMBER 14, 2009

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INTRODUCTION

Plaintiffs Highway J Citizens Group, U.A. ("Citizens"), an unincorporated association, and the Waukesha County Environmental Action League, Inc. ("WEAL"), a Wisconsin non-profit corporation, filed this lawsuit to challenge the upgrade of a 2-lane County J/Highway 164 between I-94 and WIS 60 in Waukesha and Washington Counties. See, Complaint for Injunctive and Declaratory Relief (Feb. 22, 2005) (Docket "Doc." 1); see also, Amended Complaint for Injunctive and Declaratory Relief (Oct. 20, 2008) (Doc. 103). They assert that the March 6, 2002 Federal Highway Administration ("FHWA") Record of Decision ("ROD") which authorized the use of federal monies for the Wisconsin Department of Transportation ("WisDOT") Highway 164 Project was contrary to law.[1] Id. Additionally, they contended that the decision of Defendant U.S. Army Corps of Engineers ("ACOE") to issue Clean Water Act ("CWA"), 33 U.S.C. § 1344 (Section 404) Permit No. MVP-2004-157290-DJP to the WisDOT and the ACOE's decision to issue CWA Section 404 Permit No. MVP-2004-161651-DJP to WisDOT were unlawful. Id.

The parties filed cross motions for summary judgment, and the Court granted, in part, WEAL's motion for summary judgment. Decision and Order of Sept. 14, 2009 ("Order"). State and Federal Defendants now seek reconsideration of this decision.

STANDARD OF REVIEW OF A MOTION FOR RECONSIDERATION

To succeed on a motion for reconsideration, a movant must show that the court "patently misunderstood a party, or has made a decision outside the adversarial issues presented to the

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[1] National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.; Federal Aid Highway Act ("FAHA"), 23 U.S.C. § 109(h), § 128.

Court by the parties, or has made an error not of reasoning but of apprehension." Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir. 1990). A motion for reconsideration should not be used to restate previous arguments which were already considered by the court. Oto v. Metro Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000). A reconsideration motion should not be used to raise new arguments the parties could have raised earlier, but rather the motion should be used to correct "manifest errors or law or fact." Caisse Nationale de Credit Agricole v. CBI Industries, Inc., 90 F.3d 1264, 1269-70 (7th Cir. 1996). "To prevail . . . , the movant must present either newly discovered evidence or establish a manifest error of law or fact." See Oto, 224 F.3d at 606 (citing, LB Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263, 1267 (7th Cir. 1995)). A "manifest error" is the "wholesale disregard, misapplication, or failure to recognized controlling precedent." Id. (quoting, Sedrak v. Callahan, 987 F.Supp. 1063, 1069 (N.D. Ill. 1997)). Applying these principles, a court should grant a well founded motion for reconsideration.

ARGUMENT

II. DEFENDANTS DID NOT VIOLATE NEPA.

A. Overview of Claims

Plaintiff WEAL requested judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 of the March 6, 2002 ROD which authorized the use of federal monies for the Highway 164 Project. Amended Complaint (Doc. 103). WEAL contended that the approval of this project violated NEPA (id. at Counts 1-5).[2/] Under NEPA Count 1, WEAL

[2/] No representative of WEAL participated in the NEPA process. Consequently, WEAL is pursing this claim on behalf of Highway J Citizens Group, which acknowledges that its claims are barred by the doctrine of res judicata or claim preclusion. Pl. Resp. at 1, 7-20 (Doc. 136).

asserted that Defendants did not adequately consider the environmental impacts of the Project. Id. at ¶¶ 78-80. Under NEPA Count 2, WEAL alleged that Defendants "used outdated and inaccurate data on wetlands impacts. . . ." Id. at ¶¶ 81-83. Under NEPA Count 3, WEAL stated that Defendants failed to adequately consider the "improved 2-lane highway" and the "expanded Old Highway 164" alternatives. Id. at ¶¶ 84-87. Under NEPA Count 4, WEAL claimed that Defendants failed to adequately respond to public comments. Id. at ¶¶ 88-92. Finally, under NEPA Count 5, WEAL asserted that Defendants were required to prepare a supplemental environmental impact statement ("SEIS"). Id. at ¶¶ 93-98. After considering the parties' cross motions for summary judgment, the Court ruled in WEAL's favor on NEPA Counts 1 and 3, and in Defendants' favor on NEPA Count 5.[3/] Order at 25-33 (NEPA Count 1), 33-37 (NEPA Count 3), 37-40 (NEPA Count 5). Given these determinations, Defendants now seek reconsideration of the Court's rulings on NEPA Counts 1 and 3.

B. Defendants' Adequately Considered Environmental Effects.

WEAL alleged that Defendants violated NEPA because they had not adequately considered the direct, indirect, and cumulative effects of the Project in the final environmental

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[3/] NEPA Count 2 (wetlands) was abandoned by Plaintiff WEAL, and it was not addressed in Plaintiffs' briefs. See generally Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment (Doc. 116) ("Pl. Mem."); see also Memorandum of Law in Opposition to Defendants' Cross Motion for Summary Judgment (Doc. 136) ("Pl. Resp."). Given this, Count 2 should be dismissed with prejudice. Fairley v. Andrews, ____ F. 3d ____, No. 07-3343, 2009 WL 2525564, at *5 (7th Cir., Aug. 20, 2009). NEPA Count 4 (comments) was not pursued by Plaintiff WEAL. See generally, Pl. Mem (Doc. 116); Pl. Resp. (Doc. 136). WEAL (Faye Amerson or another WEAL representative) did not to participate in the STH 164 Project Advisory Committee ("PAC"), WEAL did not attend the public hearing on the project, and WEAL did not provide comments on the draft environmental impact statement ("DEIS"). See generally Administrative Record ("AR"). Given this, Count 4 should be dismissed with prejudice.

impact statement ("FEIS"). See Amended Complaint at ¶¶ 78-80; Pl. Mem. (Doc. 116) at 8-15; Pl. Resp. (Doc. 136) at 12-20. The Court agreed, finding deficiencies in the FEIS' indirect and cumulative effects analysis. Order at 25-33 (Count 1). For the following reasons, this ruling should be reconsidered and reversed.

1. The FEIS' analysis of indirect effects complied with NEPA.

The Court rejected the sufficiency of the effects analysis and stated that the FEIS' conclusion that "a future 4-lane highway will not substantially influence the type, intensity, or location of development over what is already planned for and expected to occur with or without improvements to County J/WIS 164" was "extremely counterintuitive." Order at 25-28. The Court opined:

> One need not be an expert to reasonably suspect that if Highway 164 were not expanded development in the region would be constricted. Presumably, congestion on a two-lane Highway 164 would discourage development in the area, whereas expansion of the highway to four lanes would cause development to continue unabated [footnote omitted]. Thus . . . , the EIS cannot simply assume that development will occur at the same pace whether or not defendants yield to the demand for more roads [citation omitted]. The expansion appears to be an event that would itself contribute the growth in the region . . . .

Id. at 27-28. Citing to only at five pages of the FEIS (FEIS 4-3 to 4-8), the Court concluded that the "EIS does not include even one sentence explaining how defendants reached the conclusion that expanding Highway 164 would not substantially influence growth." Id. at 26. Because these conclusions are not based on Plaintiffs' arguments,[4/] and they were not raised at oral argument

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[4/] WEAL clearly raised these arguments to challenge Defendants' effects analysis: (1) the survey methodology was flawed (Pl. Mem. at 9-11; Pl. Resp. at 12, 15); (2) the conclusion that expansion of the roadway from two to four lanes would not cause "induced traffic" was incorrect (Pl. Mem. at 11-12; Pl. Resp. at 13-15); and (3) the degradation of air quality caused by the expansion of the roadway to four lanes was not adequately considered (Pl. Resp. at 15).

(Transcript of July 8, 2009 Hearing ("TR") at 34-35), Defendants now seek reconsideration of the Court's conclusions.

a. The FEIS considered growth and development in the study area.

The Court concluded that the FEIS did not consider the environment effects of growth and development in the study area, and rejected Defendants experts' conclusion that "a future 4-lane highway will not substantially influence the type, intensity, or location of development over what is already planned for and expected to occur with out without improvements to County J/WIS 164." Order at 25-28. Defendants assert to the contrary – the FEIS did fully consider the environmental effects of the anticipated growth and development in the study area.[5/]

In Chapter 3 of the FEIS (this was not referenced by the Court), Defendants addressed the affected environment, and considered the rapid growth and development in the study area including land use and related characteristics (FEIS at 3-1), socioeconomic characteristics (id. at 3-11), environmental and related resources (id. at 3-11), noise (id. at 3-20), air quality (id. at 3-21), hazardous materials (id. at 3-22), soil and mineral resources (id. at 3-22), cultural resources (id. at 3-23), and recreation resources/public use lands (id. at 3-24). Defendants also evaluated zoning in Waukesha County (id. at 3-4); transportation service (mass transit, air and rail service, and highways (id.); residential development (id.); commercial and industrial development (id. at 3-6); and institutional and public services (fire, ambulance, and police protection; schools; etc.)(id. at 3-8) and other factors (see generally FEIS Section 3). In Chapter 3, Defendants also

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[5/] See Defendants' Exhibit ("Def. Ex.") 1034 (Doc. 20 (April 1, 2005) (Def. Ex. 2009-5) (compilation of pages in AR related to the analysis of the environmental effects and a description of the analysis process conducted by Brad Heimlich, licensed professional engineer, CH2M HILL, Milwaukee, Wisconsin); see also FEIS at A-1.

noted that the Agencies considered these regional and local land use plans in their analysis of indirect effects:

* Regional Land Use Plan for Southeastern Wisconsin: 2020 (SEWRPC Planning Report 45 (Dec. 1997)(FEIS at 3-1).

* A Regional Natural Areas and Critical Species Habitat Protection and Management Plan for Southeastern Wisconsin: SEWRPC Planning Report No. 42 (Sept. 1997)(id. at 3-1).

* A Development Plan for Waukesha County: SEWRPC Community Assistance Planning Report No. 209 (Aug. 1996)(id. at 3-1).

* A Land Use Plan for the Town and Village of Pewaukee: 2000: SEWRPC Community Assistance Planning Report No. 76 (Dec. 1982)(id. at 3-2).

* A Land Use Plan for the Village of Sussex: 2010: SEWRPC Community Assistance Planning Report No. 216 (Dec. 1997)(id. at 3-2).

* Town of Richfield Land Use Planning (Town of Richfield STH 164 Land Use and Transportation Plan (Draft) (1996)(id. at 3-3).

Based on Chapter 3's analysis and the totality of the analysis in the Administrative Record, in Chapter 4 of the FEIS, Defendants acknowledged that while a highway can influence land use, the authority for land use planning is vested in the local governments and not in WisDOT. FEIS at 4-2. The Agency stated:

> County J/WIS 164 has the potential to affect and to be affected by land uses. Transportation improvement projects address existing and future traffic and safety problems that may result from growth and land use changes beyond the authority of WisDOT. While WisDOT supports land use planning in the study area, the authority for such control rests with local units of government. WisDOT's authority is limited to that which occurs within the highway right-of-way. While a highway can influence land use, historically WisDOT has had no jurisdiction in controlling land use [emphasis added]. (FEIS at 4-2).

Defendants stated that "the land use plans in both counties were developed assuming County J/Highway 164 would be expanded into a 4-lane facility." FEIS at 4-2. Consequently, the

proposed highway improvement (2-lane roadway to be upgraded to a 4-lane roadway) "would not cause substantial changes to existing or planned land use." Id.

Overall, Defendants reported that the data and reports considered in the FEIS for the proposed Project indicated this pattern of rapid growth and development in the study area (1990-2020):

* Urban land use in Waukesha County increased 87% between 1963 and 1990 (it was anticipated that urban land uses would increase 72% in the future under future "build-out conditions")(FEIS at 3-2).

* Urban land use in Pewaukee was 72% (1990)(Pewaukee's 1982 plan projected only 47% urban land use in 1990 (id.).

* Urban residential land use in Waukesha County would increase between 1990 and 2020 by 64% (high density), 75% (medium density), 6% (low density), and 30% (suburban density)(id. at 3-4).

* Urban residential land use in Washington County would increase between 1990 and 2020 by 80% (high density), 121% (medium density), 6% (low density), and 41% (suburban density)(id. at 3-5).

* Commercial development in Waukesha County between 1990 and 2020 would increase by 43% in Waukesha County, and it would increase between 1990 and 2020 by 10% in Washington County (id. at 3-6).

* Industrial development in Waukesha County between 1990 and 2020 would increase by 82% in Waukesha County, and it would increase between 1990 and 2020 by 107% in Washington County (id.).

* Population growth rates in the study area between 1990 and 2000 ranged from 11.3% growth (Town of Polk) and 75.2 % (Village of Sussex) with the overall growth rate in Waukesha County of 18.4% and in Washington County of 23.3% (id. at 3-9).

* In Waukesha County, traffic is already at 13,000 (Average Daily Traffic ("ADT")(threshold for roadway improvement from 2-lanes to 4-lanes)) or is expected to be at this traffic volume by 2025 (id. at 4-1).

* In Washington County, traffic is not expected to reach the volume of

> 13,000 ADT until after 2025 (interim improvements to the 2-lane roadway are planned in lieu of a 4-lane roadway)(id.).

Given this overall pattern of on-going rapid growth and development, Defendants considered the environmental impacts of the proposed Project. See Environmental Consequences" in FEIS Section 4 (id. at 4-1 to 4-59).

Defendants' analysis indicated that the indirect effects attributable to the proposed Project would be an increase in the conversion of agricultural land to other uses; an increase in the demand for urban services; a shift in the type of development from residential to commercial; an increase in the intensity of residential, commercial, and industrial development; an increase in development along local roads which connect to the County J/Highway 164 corridor; aesthetic changes (less green space, more pavement, more advertising, etc.); limitations on pedestrian and bicycle travel; increases in storm runoff; and increases in air and noise pollution. FEIS at 4-3 to 4-8. Overall, Defendants' experts concluded:

> Based on the information provided by the local governments having the authority and responsibility for making land use decisions in the County J/WIS 164 study area, it is concluded that a future 4-lane highway will not substantially influence the type, intensity, or location of development over what is already planned for and expected to occur with or without improvements to County J/WIS 164. The local governments also indicated there are several tools in place today or that could be implemented in the future to protect and preserve natural resources, historic sites, farmland, recreational land, and open space such that indirect and cumulative impacts to these resources are minimized to the extent practicable.

Id. at 4-8 (emphasis added).

The Court's determination that the foregoing conclusions were not based on the analysis in the FEIS (Order at 26) should be reconsidered. As the FEIS explained, local governments' plans (1982-1997) were based on the assumption that the 2-lane roadway would be expanded to a 4-lane

roadway because this highway improvement was already needed given the rapid growth and development that had already occurred (1980s-1990s). FEIS at 4-2. Additionally, the FEIS stated that although highways have an impact on growth and development (FEIS at 4-2), rapid growth and development in the study area (1980s-1990s) occurred even though there was a congested 2-lane roadway (id. at 3-1 to 3-9, 4-1). In toto, Defendants' experts concluded that given the existing pattern of rapid growth and development in the study area, the expansion of the 2-lane roadway to a 4-lane roadway would not "substantially influence the type, intensity, or location of development over what is already planned for and expected to occur with or without improvements to County J/WIS 164."[6] FEIS at 4-8.

b. The conclusions of Defendants' experts should be upheld.

The Court rejected the conclusions reached by Defendants' experts and determined that if the 2-lane roadway was not expanded to 4-lanes that the development in the area would be constricted, that congestion on the 2-lane roadway would discourage development in the area, and that expanding the roadway from 2 lanes to 4 lanes would have a "substantial" influence on growth and development in the study area.[7] Order at 25-28. The Court based its conclusions on a book published by Architect Andres Duany, Duany, Plater-Zyberk & Co., Miami, Florida (Andres Duany. Suburban Nation: the Rise of Sprawl and the Decline of the American Dream. 2000 (Def.

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[6] WEAL argued that the expansion of the roadway from 2-lanes to 4-lanes would "substantially affect land use patterns" in the study area. Pl. Mem. at 11. Plaintiff did not cite any factual basis for their argument beyond what WEAL characterized as "common sense." Id.

[7] WEAL did not allege that the indirect effects analysis was flawed for these reasons. Pl. Mem. at 8-12; Pl. Resp. at 12-15. This argument was also not raised during the July 8, 2009 oral argument. TR at 34-35. Consequently, Defendants have not had the opportunity to refute this argument.

Ex. 2009-1a, 2009-1b)). Order at 27. This book was not included in the Administrative Record, and it was not referenced by WEAL. Pl. Mem. at 8-12; Pl. Resp. at 12-15.

In the Order, the Court opined that the "expansion [2-lane to 4-lane highway] appears to be an event that would itself contribute to growth in the region . . . ." Order at 27-28. Defendants' experts agreed. FEIS at 4-1 to 4-8, 9-9.[8/] The expansion of the highway would contribute to increased growth and development in the study area. Id.

Characterizing the conclusion of Defendants' experts that the improvement of the 2-lane roadway to a 4-lane roadway would not have a "substantial impact" on the existing pattern of rapid growth and development in the study area as a finding of "no effect on future growth," the Court relied on N. Carolina Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp., 151 F. Supp. 2d 661, 696-97 (M.D. N.C. 2001). Order at 27. In that case, the plaintiff challenged the indirect effects analysis because of the defendants' conclusion "that development would occur to the same extent" with or without the construction of the new roadway. Id. That conclusion is not the conclusion that Defendants' experts reached in the FEIS for the Project.

In the FEIS, Defendants concluded that with the change from a 2-lane roadway to a 4-lane roadway that there would be these indirect effects in the study area: an increase in the conversion of agricultural land to other uses; an increase in the demand for urban services; a shift in the type of development from residential to commercial; an increase in the intensity of residential,

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[8/] Defendants concluded that "it is too simplistic to reduce the complicated issue of sprawl to the construction of 4-lane highways." FEIS at 9-9. "Doing so ignores the role the following factors have in facilitating sprawl: easy access to electric, gas, and onsite sewage disposal in rural areas; relatively low-cost fuel for personal automobile transportation; the decentralization of employment opportunities away from the historic employment centers; and changes and problems in the agricultural center." Id.

commercial, and industrial development; an increase in development along local roads which connect to the County J/Highway 164 corridor; aesthetic changes (less green space, more pavement, more advertising, etc.); limitations on pedestrian and bicycle travel; increases in storm runoff; and increases in air and noise pollution (FEIS at 4-3 to 4-8). These effects would be on top of the on-going pattern of rapid growth and development in the study area. Defendants' experts concluded that this trend would continue in the same direction that it was already heading after the 2-lane roadway was replaced with a 4-lane roadway. Id. at 4-1 to 4-8.

The Court and Defendants' experts disagree on whether to characterize the impact of the highway improvement (2-lane roadway to a 4-lane roadway)[9/] as a "substantial" impact on the on-going rapid growth and development in the study area (Order at 25-28) or as something less– not a substantial impact on the on-going rapid growth and development in the study area (FEIS at 4-8). See also AR at Def. Ex. 1034 (Doc. 20). It is well established that the standard of review under the APA is highly deferential. A deferential approach is especially appropriate where the challenged decision implicates substantial agency expertise. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989). "When specialists express conflicting views, an agency must

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9/ The Court stated that "it is apparent that one of the potential indirect effects of the Highway 164 expansion, and one of the cumulative impacts of this and other highway projects in the region, will damage air quality." Order at 41. "Thus, on remand defendants must incorporate air quality into their discussion of indirect and cumulative impacts." Id. The Court did not consider in its analysis the fact that "the Clean Air Act requires State Implementation Plans (SIPs) that explain how states will achieve air quality conformity by reducing emissions of nitrogen oxides and volatile organic chemicals." FEIS at 9-10. "The approval SIP for the 2020 Regional Transportation System Plan is based on the proposed transportation improvements listed in that plan (including widening County J/WIS 164). . . ." Id. The 2020 Regional Transportation System Plan also considered the air quality impacts of the other highway projects in a seven-county metropolitan planning area. Id.

have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Id. Given these legal principles, Defendants' analysis of indirect effects was in compliance with NEPA.

2. The FEIS' analysis of cumulative effects complied with NEPA.

The Court rejected Defendants' cumulative effects analysis and stated:

> The fundamental flaw is that the EIS simply assumes (with no supporting analysis) that the area will continue to urbanize whether not new highways are built. Having assumed that the area will continue to urbanize with or without new roads, the EIS acknowledges that this project and others will continue to harm resources, but it essentially advises that, given the existing trend towards urbanization, the environmental harm will come to pass no matter what decision that agency makes. This discussion does little to assist informed decisionmaking or informed public participation because it does not discuss whether, or to the extent which, the agency's decision is likely to contribute to the problems associated with urbanization and suburban sprawl.

Order at 29-30 (emphasis added). The Court found that "[a]lthough the EIS notes that the trend towards urbanization will likely impact the region's resources, it makes no attempt to determine the causes of urbanization itself." Id. at 31. Relying on publications by Dr. H.V. Savitch, University of Louisville[10/] and by Douglas S. Kelbaugh, Limitless, L.L.C., Dubai, UAE, the Court stated that the cumulative effects analysis for the Project "falters by starting the cause-and-effect pathway at urbanization."[11/] Id. at n.12. The Court ruled that "defendants must study and, to the extent possible, quantify the contribution of past, present and reasonably foreseeable future

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10/ Gregory D. Squires. Urban Sprawl: Causes, Consequences & Policy Responses. 2002 (Def. Ex. 2009-2a; 2009-2b) (Chapter 6 by Dr. Savitch).

11/ Douglas S. Kelbaugh, Repairing the American Metropolis. 2002 (Def. Ex. 2009-4a; 2009-4b).

transportation projects to urbanization and its associated effects." Id. at 32-33."[12/]

Defendants dispute the Court's conclusion that NEPA required the consideration of urbanization and suburban sprawl in the cumulative effects analysis of the Highway 164 Project (FEIS at 4-8 to 4-13). Defendants seek reconsideration of this legal finding.

It is well established that NEPA requires consideration of cumulative effects in the EIS. 40 C.F.R. § 1508.7; see also Sierra Club v. Kleppe, 427 U.S. 346, 413-14 (1976); Def. Ex. 2009-3 (Council on Environmental Quality ("CEQ"). Guidance (June 24, 2005)). This analysis should include the expected impact on the environment of the proposed project, if implemented, in conjunction with "past, present, and reasonably foreseeable future actions." Id.; see also Dep't of Transp. v. Public Citizen, 541 U.S. 752, 769-70 (2004); League of Wilderness Defenders v. U.S. Forest Serv., 549 F.3d 1211, 1216-18 (9th Cir. 2008).

In the instant case, the Court determined that NEPA required an analysis of socioeconomic and cultural factors in post-World War II American life-- the rise of suburbs and the urbanization of rural America. Order at 28-33. Given the applicable legal authorities including the CEQ regulations and guidance, Defendants were not required under NEPA to separately consider urbanization or suburban sprawl in the FEIS. Consequently, Defendants' cumulative effects analysis should be upheld because it was in compliance with NEPA.

[12/] WEAL did not allege that the cumulative effects analysis was flawed because it failed to address the causes of urbanization or that such analysis was required. Pl. Mem. at 12-15; Pl. Resp. at 15-19. This argument was not raised during the July 8, 2009 oral argument. Consequently, Defendants have not had the opportunity to refute this argument.

3. The FEIS' analysis of alternatives complied with NEPA.

In support of the motion for summary judgment, WEAL argued that the combination of an improved 2-lane roadway (center two-way turn-lanes with reduced speed limit) on the existing alignment plus the use of the off-alignment County Y Alternative ("TWLT/County Y Alternative") to divert traffic from Highway 164 should have been chosen instead of the FEIS' Preferred Alternative (expansion of the existing 2-lane roadway to four lanes along the Highway 164 corridor in Waukesha and Washington Counties). Pl. Mem. at 15-19; Pl. Resp. at 7-12. In opposition, Defendants stated that WEAL's alternative was not selected for detailed analysis because this alternative did not meet the "purpose of and need for the project." Def. Mem. at 24-26 (Doc. 124, 129); Def. Resp. at 13-15 (Doc. 143). WEAL asserted that even if it did not meet the purpose of and need for the project that Defendants were still required to consider this alternative in detail in the FEIS. Pl. Resp. at 7-12.

After consideration of the parties' arguments, the Court ruled that Defendants were required to analyze the County Y Alternative to determine "whether it is possible to provide this capacity through an alternative that is less environmentally destructive than expanding the highway to four lanes."[14/] Order at 33-37 (quoted language at 37). The Court stated that "the EIS does not demonstrate that defendants conducted a reasonable inquiry into whether the County Y alternative would have satisfied the project's purposes." Order at 35. The Court opined that

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[14/] The allegation that the FEIS should have considered County Y Alternative because it "would have been less environmentally destructive than the expansion of Highway 164," should have been rejected. Doc. 56-4; Doc. 109-1. WEAL relies on a letter submitted to the U.S. Army Corps of Engineers by Cedarburg Science dated August 20, 2004 (COE 403). Pl. Mem. at 16-17, Pl. Resp. at 7. WEAL also relies on a comment letter provided by the Wilderness Society dated June 13, 2005 (COE 1200-01). Id. These comments were submitted long after the 2002 Highway 164 Project ROD was approved by FHWA.

"defendants simply glanced at the map and then formed an off-the-cuff opinion.[14/] Id. Defendants urge reconsideration of this finding given the applicable NEPA law.

Under NEPA, the responsibility for defining a proposal's purpose and need lies with the agency conducting the environmental analysis. City of Carmel-by-the-Sea v. Dep't of Transp., 123 F.3d 1142, 1154-59, 1164-65 (9th Cir. 1997); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-96 (D.C. Cir. 1991). The CEQ regulations specify that the agency's statement of purpose and need "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. If challenged, the agency's statement of purpose and need is subject to judicial review under the APA "arbitrary and capricious standard." City of Carmel-by-the-Sea, 123 F.3d at 1154-59, 1164-65. The agency's statement of purpose and need will be upheld "so long as the objectives that the agency chooses are reasonable," and so long as the agency "define[s] goals for its action that fall somewhere within the range of reasonable choices." Citizens Against Burlington, 938 F.2d at 196.

[14/] This suggestion is not consistent with the FEIS which states:

> WisDOT has considered the alternatives suggested by the public during the public information meetings and interest group meetings. With the exception of the 2-lane improvement alternative, most of the alternatives offered by the public were not adjacent to County J/WIS 164. The alternatives either avoided part of the study corridor, such as the Lake Park Subdivision/Fairfield Condominiums (Alternatives 2F, 2G, and 2H), or avoided the County J/WIS 164 corridor entirely (Power Corridor Alternative and County Y Corridor Alternative). The off-alignment alternatives were eliminated from detailed consideration because they would not draw enough traffic from the existing highway to preclude the need for four lanes or they had a greater level of impacts than the improvements along County J/WIS 164 (see pages 2-7 to 2-18).

FEIS at 9-13.

Given these legal principles, WEAL's challenge to the purpose and need statement for the Highway 164 Project should be rejected."[15/] The Administrative Record indicates that the Highway 164 Project was designed to increase the capacity of 2-lane County J/WIS 164, to address existing roadway deficiencies and safety concerns, and to preserve a corridor for future highway expansion. FEIS at 1-1 through 1-20. The FEIS stated that the project is needed:

* To improve safety by reducing conflicts between through and local traffic and providing a facility that meets current design standards for a principal arterial highway.

* To provide a recommended plan that can be used by local governments as a blueprint to guide future land use and development decisions, and to preserve land for future transportation improvements.

* To improve local and through traffic access to development and community services adjacent to County J/WIS 164 as well as to destinations outside the corridor.

* To improve operational efficiency commensurate with the highway's function as a principal arterial and primary north-south route in northern Waukesha County and southern Washington County.

* To accommodate traffic demand generated by existing and planned development along the County J/WIS 164 corridor as well as in the surrounding region.

Id. at 1-2 through 1-3. These objectives are reasonable and the purpose and need statement for the Highway 164 Project should be upheld under the APA arbitrary and capricious standard.

Additionally, NEPA requires the agency to prepare a description of the alternatives which were considered by the agency, including the "alternative of no action." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9(b); 40 C.F.R. § 1502.14(d). "Consideration of reasonable alternatives is

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[15/] In the pleadings, WEAL did not challenge the "purpose and need" statement for this Project. See Amended Complaint (Doc. 103) at ¶¶ 78-98. In briefing, WEAL argued that this purpose and need statement was too narrowly drawn, but it did not suggest that County Y met the FEIS' statement of purpose and need. Pl. Mem. at 19 (Doc. 116); Pl. Resp. at 11-12.

necessary to ensure that the agency has before it and takes into account all possible approaches to, and potential environmental impacts of, a particular project." N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 978 (9th Cir. 2006). It is well established that any alternative which does not meet the purpose of and the need for the project is per se unreasonable and it may excluded from consideration. Carmel-by-the-Sea, 123 F.3d at 1158; in accord, City of Alexandria v. Slater, 198 F.3d 862, 869 (D.C. Cir. 1999). The Seventh Circuit noted:

> Logic and law dictate that every time an agency prepares an environmental impact statement it must answer three questions in order. First, what is the purpose of the proposed project (major federal action)? Second, given that purpose, what are the reasonable alternatives to the project? And third, to what extent should the agency explore each particular reasonable alternative. [citations omitted].

Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 668 (7th Cir. 1997).

The FEIS considered Citizen's preferred alternatives of "reducing the speed limit to a maximum of 45 m.p.h (70 km/h), improving the existing two-lane highway by adding turning lanes, and widening/improving the old WIS 164/County Y/US 41 and 45 corridor to help to balance traffic flow through the community." FEIS at 8-2 to 8-3. Defendants concluded that the County Y Alternative would not divert enough traffic from the Highway 164/County J Corridor so this proposed alternative was not analyzed further. Id. at Chapter 8; Chapter 2.

Citizens rejected these conclusions (FEIS at Chapter 8), and WEAL argues that the County Y Alternative should have been subjected to detailed environmental analysis. Pl. Resp. at 7-12 (Doc. 136). This argument is now moot. The County Y alternative related solely to the Highway 164/Highway J issues in Waukesha County– south of County Q (boundary between Waukesha and Washington Counties). The record reflects that the Highway 164 Project has already been built nearly to the intersection of Highway 164 and County Q. The dispute over whether the 4-

lane highway should have been built on an off-alignment alternative (County Y or any other) is now moot. Given this, the Court's Order re: alternatives should be reversed.

III. DEFENDANTS DID NOT VIOLATE FEDERAL HIGHWAY LAW.

A. Overview of Claims

Plaintiff WEAL requested APA judicial review of the March 6, 2002 FHWA ROD alleging that the approval of federal monies for the Highway 164 Project violated "Federal highway law and regulations." Amended Complaint at ¶¶ 99-103 (Doc. 103). Under Count 6, WEAL referenced 23 U.S.C. § 109(h), and alleged that Defendants inadequately considered the "adverse effects of hazardous air pollution." Id. at ¶¶ 99-101. Under Count 7, WEAL alleged that Defendants violated federal law because WisDOT used the "open forum" type of public hearing. Id. at ¶¶ 102-03; Pl. Mem. at 23-27; Pl. Resp. at 21-23. After consideration of the parties' cross motions for summary judgment, the Court ruled in Defendants' favor on Count 6 and in WEAL's favor on Count 7. Given these determinations, Defendants now seek reconsideration of the Court's ruling on Count 7.

B. WisDOT's Public Hearing Complied with All Legal Requirements.

1. Overview

On May 30, 2001, WisDOT held an "open forum" public hearing from 1 p.m. to 8 p.m. at St. Columba Church (McLaughlin Hall) which was attended by 320 people. FEIS at 9-1. At this hearing, the attendees were able to discuss the Project with the other attendees, and with WisDOT and its consultant. Id. The attendees had the option of providing written comments or oral presentations which were transcribed by the court reporters. Id. At this public hearing, the public was allowed to share their views with each other and with WisDOT. Affidavit of Jay

Waldschmidt (Mar. 29, 2005) at ¶¶ 8-9 (Def. Ex. 1037 (Doc. 20) (e-filed as Def. Ex. 2009-6)).

Mr. Waldschmit, professional engineer (WisDOT), who attended this meeting stated:

> I personally observed that there were numerous Wisconsin Department of Transportation representatives and consultant staff available during the entire hearing period to whom members of the public could state their views both in an individual or group format. Further, since this was all done in one room, people were within hearing distance of any person speaking one-on-one to the court reporters present. Indeed, I was present and heard persons providing comments to officials, consultants or court reporters.

Id. at ¶ 9. Jeffrey M. Gonyo, Citizens, disputes Mr. Waldschmidt's testimony about the meeting because he could not hear all of the attendees' comments while he sat at Citizens' table during the hearing. Compare Doc. 167 (Gonyo) to Waldschmit (Doc. 20 (Def. Ex. 2009-6)).

Relying on Mr. Gonyo's testimony,[16] WEAL contends that federal law mandated that WisDOT conduct a town hall style public meeting instead of the "open forum" public hearing. Amended Complaint at ¶ 102-03; Pl. Mem. at 23-27; Pl. Resp. at 21-23. Plaintiffs cite to Section 128 of the 1998 Act[17] which states in relevant part:

> (a) Any State transportation department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.

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[16] No representative of WEAL attended the public hearing. FHWA 01729-02222. Consequently, WEAL is pursing this claim on behalf of Highway J Citizens Group, which acknowledges that its claim is barred by the doctrine of res judicata or claim preclusion. Pl. Resp. at 1, 21-23 (Doc. 136).

[17] The Transportation Equity Act for the 21st Century ("TEA-21"), Pub.L. No. 105-178, § 121(a)(2)(A)(I), 112 Stat. 107(1998) is no longer in effect. It was superceded on August 10, 2005 by the Safe, Accountable, Flexible, Efficient Transportation Equity Act ("SAFETEA-LU"), Pub.L. 109-54, 199 Stat. 1144 (2005).

23 U.S.C. § 128(a).[18]

WEAL asserted that the WisDOT May 20, 2001 public hearing, an open house, did not comply with Section 128, and acknowledged that the only court that had considered this issue had rejected WEAL's argument. Pl. Mem. at 25-27, citing, Sierra Club v. U.S. Dep't of Transp., 310 F. Supp. 2d 1168, 1205-09 (D. Nev. 2004). Relying on the reasoning in Sierra Club, Defendants asserted that WisDOT's public hearing comported with Section 128, and with applicable FHWA regulations. Def. Mem. at 13-14 (Doc. 124, 129); Def. Resp. at 22-23 (Doc. 143).

The Court agreed with WEAL finding that FHWA's interpretation of Section 128 was "unreasonable." Order at 44-46. The Court stated that "[a]lthough the term "public hearing" is not unambiguous in all respects, this much is clear: a public hearing must allow citizens the opportunity to express their views in front of agency representatives and other citizens." Id. at 44-45. The Court determined that "the only reasonable interpretation is that a 'public hearing' requires, at the least, an opportunity for citizens to make their views generally known to the agency and the community." Id. at 45. The Court held that the "open house held by WisDOT did not afford such opportunity."[19] Id. Relying on a portion of the legislative history of the Federal

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[18] The 1998 Act also provides that the State highway department's "certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered." Id. Additionally, the 1998 Act states that "[w]hen hearings have been held under subsection (a), the State transportation department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification and report." 23 U.S.C. § 128(b).

[19] The basis for this factual finding is not stated in the Order. See generally Order at 45-46. It is apparently based on the Supplemental Affidavit of Jeffrey M. Gonyo (April 11, 2005) (Doc. 23-1) without consideration of the Affidavit of Jay Waldschmidt (Mar. 29, 2005) (Def. Ex. 1037)(Doc. 20)(Def. Ex. 2009-6). The Court also cites to the FEIS (9-1 to 9-2). Order at 42. The Court found that "the format that WisDOT used did not permit members of the public to

Aid Highway Act of 1970 which was not cited by either party, the Court concluded that a "town hall type meeting" was required. Order at 46. Defendants seek reconsideration of these determinations because the Court's characterization of the hearing is not consistent with the Administrative Record, and the Court's reliance on an excerpt from the legislative history of the Federal Aid Highway Act of 1970 is not legally sufficient to overturn FHWA's interpretation of Section 128.

2. Legislative History of Section 128

Under the Federal Aid Highway Act of 1958, Congress specified that "[a]ny State highway department which submits plans for a Federal-aid highway project . . . shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such location."[20/] The House Committee on Public Works stated that the purpose of the 1958 Act was to reconcile the approximately 40 separate laws related highways which had been passed since the first Federal-Aid Road Act was approved on July 11, 1916.[21/]

Under the Federal Aid Highway Act of 1968, Congress modified Section 128(a) of the

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publically express their views directly to WisDOT representatives or to other members of the public." Id. This finding is not consistent with the FEIS, or with the testimony of Mr. Waldschmidt. Given this, Defendants seeks reconsideration of this factual finding.

[20/] Act of August 27, 1958, Pub. L. 85-767, 72 Stat. 885, 902, formerly codified at 28 U.S.C. § 128(a) (Def. Ex. 2009-7).

[21/] H.R. Rep. No. 85-1938, at 2 (1958) (Def. Ex. 2009-8); see also id. at 7, 63, Section-by Section Comparison of H.R. 12776 with Prior Law with Explanatory Comments (Def. Ex. 2009-9).

1958 Act.[22] Section 128(a) was amended to state that "[a]ny State highway department which submits plans for a Federal-aid highway project . . . shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as have been promulgated by the community." 82 Stat. at 828. This change was suggested by the Senate Committee on Public Works which stated that the committee recommended that the public hearings address "additional factors which will require greater involvement by other State and local government officials and agencies and by private individuals and groups."[23] In the deliberations prior to the passage of the Federal Aid Highway Act of 1970 (Def. Ex. 2009-13),[24] Congress considered whether the public hearing provision of the 1968 Act should be modified to mandate that the State highway departments conduct two public hearings, and to use the town hall type of public meeting for the public hearings.[25] The House Public Works Committee [H.R. 19504] stated that "two public hearings are now required in most cases under Federal-aid highway procedures." Comm. Rep. at 6. The committee stated that the public hearing provision of the House bill was meant to be a "town hall' type meeting in which people are free to express their views." Id. at 6. The

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[22] Act of August 23, 1968, Pub. L. 90-495, 82 Stat. 815, 828, formerly codified at 28 U.S.C. § 128(a) (Def. Ex. 2009-10).

[23] S. Rep. No. 90-1340, at 10-11, 39 (1968) (Def. Ex. 2009-11); see also H.R. Rep. No. 90-1799, at 37 (1968) (Def. Ex. 2009-12).

[24] Act of December 31, 1970, Pub. L. 91-605, 84 Stat. 1713, 1834, formerly codified at 28 U.S.C. § 135(a) (Def. Ex. 2009-13).

[25] H. R. Rep. No. 91-1554, at 6-7 (1970), as reprinted in 1970 U.S.C.C.A.N. 5392, 5395-97 (Def. Ex. 2009-14a & 2009-14b).

committee opined that the proposed town hall type of meeting "was not intended to be a quasi-judicial or adversary legal type hearing." Id.

The Subcommittee on Roads of the Senate Committee on Public Works held hearings on the Senate bill (S. 4418) (Def. Ex. 2009-18). During the hearings, Senator Ted Kennedy (D. Mass.) stated that "[i]t has been my experience, Mr. Chairman, that the public hearings required by the law are being held but that the information obtained receives little or no consideration." Comm. Rep. at 543.[26] He recommended that the State highway department be required to provide a transcript of the public hearing to the Secretary of Transportation. Id.

In deliberations on the Senate bill (S. 4418), the Subcommittee on Roads considered the Statement of the FHWA Administrator (id. at 697),[27] and FHWA's Policy and Procedure Memorandum 20-8 (id. at 776-81). The FHWA memorandum stated that a "State may satisfy the requirements for a public hearing by (1) holding a public hearing, or (2) by publishing two notices of opportunity for public hearing and holding a public hearing if any written requests for such a hearing are received. Id. at 778. The memorandum stated that "[p]ublic hearing procedures authorized and required by State law may be followed in lieu of any particular hearing requirement." Id. at 779. The FHWA memorandum specified that "the State highway department shall provide for the making of a verbatim written transcript of the oral proceedings at each public hearing." Id. at 780.

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[26] Federal Aid Highway Act of 1970 and Miscellaneous Bills, Hearings Before the S. Subcomm. on Roads of the S. Comm. on Public Works, 91st Cong. (1970) (Statement of Sen. Kennedy) (Def. Ex. 2009-15).

[27] Federal Aid Highway Act of 1970 and Miscellaneous Bills, Hearings Before the S. Subcomm. on Roads of the S. Comm. on Public Works, 91st Cong. (1970) (Statement of F.C. Turner, FHWA Administrator) (Def. Ex. 2009-15).

The Senate Public Works Committee held hearings. S. Rep. No. 91-1254 (1970) (Def. Ex. 2009-16). The committee stated that it continued "to be concerned about the opportunity for expression afforded citizens in communities in which highway projects are planned and executed." Id. at 5. The major factor identified as a problem was the "time lag between public hearing and the beginning of construction." Id.

After the passage of the bills by the respective chambers, the assigned conference committee considered the legislation. H.R. No. 91-1780 (1970) (Conf. Rep.) (Def. Ex. 2009-17). Under a Senate amendment, it was proposed that the "two-hearing procedure, established by regulation after enactment of the Federal-Aid Highway Act of 1968, would be enacted into law." Id. at 56. The amendment also specified that "[r]esponsibility for conducting the hearings would rest with State and local officials designated by the Governor or the duly constituted State authority." Id. The conference committee stated that this proposed change in the law was rejected in conference, and that a new sentence was added to the Act "requiring the certification of public hearings be accompanied by a report indicating the consideration given to the economic, social, environmental, and other effects of the plan for highway location, or design, and various alternatives which were raised during the hearing or which were otherwise considered." Id. at 56-57.

Ultimately, the Federal Aid Highway Act of 1970 made no change in the public hearings provisions of the Federal Aid Highway Act of 1968 except to add a new sentence and to renumber Section 128 as Section 135.[28/] The new sentence stated that the State highway department's

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[28/] Act of December 31, 1970, Pub. L. 91-605, 84 Stat. 1713, 1834, formerly codified at 28 U.S.C. § 135(a) (Def. Ex. 2009-13).

"certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered." Id.

3. Congress did not mandate the use of a town hall meeting.

Even assuming that the Federal Aid Highway Act of 1970 was still in effect, a review of the entire legislative history of the Act as it may relate Section 128 of the current Act does not support the Court's conclusion that the 1970 Act mandated that the State highway departments must use the town hall meeting format for all public hearings. The legislative history of the Act indicates Congress' intent to defer to State law in lieu of mandating any particular format for public hearings. Def. Ex. 2009-18. In fact, the provisions discussed by the House Public Works Committee (two public hearings in a town hall meeting format) were not adopted by Congress (Section 135 of the 1970 Act). Compare Def. Ex. 2009-14 (House Public Works Committee Report) to Def. Ex. 2009-13 (Section 135). Given this, the Court's conclusion that the legislative history of the 1970 Act supports a finding that the May 30, 2001 WisDOT hearing did not comply with Section 128 of TEA-21 should be reversed.

4. The May 30, 2001 WisDOT hearing complied with state law.[29]

The legislative history of the 1970 Act shows that Congress intended each State highway department to conduct public hearings in compliance with the applicable State law. Def. Ex. 2009-15. Consequently, WisDOT was required to conduct the May 30, 2001 public hearing in

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[29] Neither Citizens nor WEAL pled any state law claims, and neither sought to invoke this Court's supplemental jurisdiction (28 U.S.C. § 1367) over State law claims. See generally Amended Complaint.

conformity with the applicable Wisconsin law.

Currently, Wisconsin law specifies that "[a]n agency shall hold a public hearing at the date, time and place designated in the notice of hearing." See Wis. Stat. 227.18(1), 227-01(3), 227.01(3)(a), 227.01(3)(b), 227.01(3)(c); see also Wis. Admin. Code at PSC 2.02(8), PSC 2.02 (14); Trans. 400.04(22); WFSB 1.04(2)(e), 1.04(2)(f); Ins. 5.03(3), 503(4); DWD 75.03(8); HA 3.02(8). Wisconsin law specifies that at the public hearing the person conducting the hearing is required to do the following:

* Explain the purpose of the hearing and describe how testimony will be received. (Wis. Stat. 227.18(1)(a)).
* Present a summary of the factual information (id. at (1)(b)).
* Afford each interested person or representative the opportunity to present facts, opinion, or arguments orally or in writing (id. at (1) (c)).
* Keep a record of the hearing in the manner the agency considers desirable or feasible (id. at (1)(d)).

Additionally, the person who conducts the hearing may limit oral representations "if the hearing would be unduly lengthened by repetitious testimony," question or allow others to question those present at the hearing, administer an oath or affirmation to those testifying, and continue or postpone a hearing. Wis. Stat. 227.18(2)(a-d). These State law requirements do not mandate that a public hearing follow the town meeting format. Wisconsin law authorizes various hearing formats including the open forum used for the May 30, 2001 public hearing on the Highway 164 Project.

5. Defendants complied with Federal highway law.

The legislative history and language of Section 128/135 over time (1958 to the present) show that Congress did not require that a State transportation department conduct a town hall meeting to fulfill any federal requirement to hold a public hearing under the 1970 Act, the 1998

Act (TEA-21), or the 2005 Act (SAFETEA-LU). Allowing the State transportation department to select the appropriate form of a public hearing under the applicable State law is consistent with the federal law applicable to the Federal Aid Highway program administered by FHWA. Consequently, Defendants have shown that Congress did not mandate that a State conduct a town hall meeting to fulfill the federal public hearing requirement. For this reason, the Court's ruling on Count 7 should be reconsidered and reversed.

IV. DEFENDANTS DID NOT VIOLATE THE CWA.

The Court found that the Defendants violated the Clean Water Act solely because "the EIS's discussion of reasonable alternatives [County Y] was deficient." Order at 47. Because as explained above the Court should reconsider its decision, and find that the FEIS' analysis of alternatives complied with NEPA, the Court should likewise find that the Defendants did not violate the Clean Water Act.

CONCLUSION

Based on the foregoing, Defendants seeks reconsideration of the Decision and Order of September 14, 2009. It is requested that the findings of violations of NEPA, Federal highway law, and CWA be reversed. Should the Court deem it appropriate not to reverse the Decision and Order as Defendants request, Defendants seek a separate briefing schedule to address the remedy phase of this litigation and oral argument.

Dated: September 24, 2009

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HIGHWAY J CITIZENS GROUP, *et al.*, Plaintiffs,	)	Civil No. 05-00212
v.	)	**CERTIFICATE OF SERVICE**
U.S. DEPARTMENT OF TRANSPORTATION, *et al.*, Defendants.	)	

I certify that I have this day electronically filed the foregoing document through the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record by separate e-mails:

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