

## **Recommendation to Use TIP Authority to Encourage Affordable Housing and Transit**

Karyn Rotker, Senior Staff Attorney, ACLU of Wisconsin  
(May 14, 2012)

SEWRPC's 1970's-era housing study raised concerns about segregation similar to those that are currently being raised in its Housing Study. The prior study also recommended that affordable housing be provided throughout the region. But no effort was made or procedure set up to enforce that recommendation. Consequently, more than three decades later, few communities outside Milwaukee have provided a fair share of (if any) affordable housing, and metropolitan Milwaukee remains among the most segregated regions in the United States.<sup>1</sup>

Discussions have arisen as to what ability SEWRPC has to try to enforce its housing recommendations. There have been numerous assertions by SEWRPC that it has only an "advisory" role and lacks the ability to make binding decisions. However, federal law delegates certain legal obligations to SEWRPC as the Metropolitan Planning Organization (MPO), that SEWRPC can and should use to encourage compliance.

Under Ch. 23 Code of Federal Regulations (CFR) Section 450.324(a), it is explicit that ***"[t]he MPO, in cooperation with the State(s) and any affected public transportation operator(s), shall develop a [Transportation Improvement Program] TIP<sup>2</sup> for the metropolitan planning area."*** (emphasis added). This regulation does not give local or county governments an official or explicit role in developing the TIP. Thus, it is unclear why the MPO (SEWRPC) seems to claim it needs to accept the decisions of local governments or place projects they select on the TIP, as that is not even mentioned in the regulation.

Even more significantly, under 23 CFR Section 450.330(c), "[i]n areas designated as TMAs,<sup>3</sup> all 23 U.S.C. and 49 U.S.C. Chapter 53 funded projects (excluding projects on the National Highway

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<sup>1</sup> Metropolitan Milwaukee is the single most segregated region in the country for African-Americans, and among the most segregated for Latinos. Moreover, in recent years a number of local governments in the region have been sued under the Fair Housing Act for race and disability discrimination related to their refusal to provide affordable and accessible housing.

<sup>2</sup> Under 23 CFR 450.324(c), the "TIP shall include [at least] capital and non-capital surface transportation projects (or phases of projects) within the boundaries of the metropolitan planning area proposed for funding under 23 U.S.C. and 49 U.S.C. Chapter 53 (including transportation enhancements; Federal Lands Highway program projects; safety projects included in the State's Strategic Highway Safety Plan; trails projects; pedestrian walkways; and bicycle facilities)..." Chapter 23 of the U.S. Code (USC) relates to highway projects (a category much broader than the Interstate or "National Highway System"), and Chapter 53 of Chapter 49 relates to public transportation projects. SEWRPC's most recent TIP clearly includes many projects other than the NHS projects. [http://www.sewrpc.org/SEWRPCFiles/Publications/TIP/TIP\\_2011-2014.pdf](http://www.sewrpc.org/SEWRPCFiles/Publications/TIP/TIP_2011-2014.pdf)

<sup>3</sup>Southeastern Wisconsin is so designated.

System (NHS)<sup>4</sup> and projects funded under the Bridge, Interstate Maintenance, and Federal Lands Highway programs) ***shall be selected by the MPO*** in consultation with the State and public transportation operator(s) from the approved TIP and ***in accordance with the priorities in the approved TIP***. Projects on the NHS and projects funded under the Bridge and Interstate Maintenance programs shall be selected by the State in cooperation with the MPO, from the approved TIP.”<sup>5</sup> (emphasis added). This regulation clearly and expressly requires only “consultation” with the State and public transit entities on the designated kinds of projects, and “consultation” is not ceding decision-making authority. To the contrary, the regulation explicitly gives decision-making power (“shall be selected by...”) to the MPO, not to other entities. It also clearly contemplates that the TIP shall set project priorities. And, again, the regulation does not even mention, much less give decision-making power or veto authority, to local or county governments.

Thus federal regulations are explicit that it is the MPO – SEWRPC – that “shall” develop the TIP and “shall” select most federally funded highway and public transportation projects in the region. It is in fact the State and public transportation operators that have the consulting (“advisory”) role under these federal regulations, NOT the MPO.<sup>6</sup> The federal regulations also do not give decision-making authority to local governments.

Therefore, there appears to be no *legal* reason why SEWRPC, as the MPO, could not develop a TIP and planning process that prioritizes projects in communities that meet specified criteria, such as compliance with public transportation elements of the regional plan and/or with affordable housing and job/housing imbalance reduction elements of the housing plan, or gives lower priority to projects in communities that fail to meet these criteria. This may be something that *politically* SEWRPC does not want to do, but that is not a *legal* barrier.

Moreover, the requirement that the MPO comply with civil rights laws would support prioritizing projects that reduce segregation and discrimination and decline to support projects that perpetuate segregation or discrimination. Under 23 CFR Section 450.334(a)(3),(7), the MPO must certify that the TIP is compliant with Title VI of the Civil Rights Act (non-discrimination on the basis of race, color or national origin), and with the Americans with Disabilities Act. Both Title VI and the ADA prohibit not only intentional discrimination, but

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<sup>4</sup>Maps of the National Highway System in Wisconsin are available at: <http://www.fhwa.dot.gov/planning/nhs/maps/wi/index.htm> , and an explanation is here: <http://www.fhwa.dot.gov/planning/nhs/>

<sup>5</sup> While SEWRPC has also asserted that not every project included in the TIP gets built, the purpose of the TIP is to identify and prioritize projects. It is also supposed to only include projects for which financial resources are anticipated to exist. See, generally, 23 CFR Section 450.324. If funding is not available, then the process is to revise the TIP. Id., Section 450.330(a). Again, there is no evident reason that the MPO could not set priorities for doing so.

<sup>6</sup> The exception to this is the NHS projects, and Bridge and Interstate Maintenance programs, which the State selects in cooperation with the MPO (thus only for those projects giving the MPO the advisory role).

actions and methods of program administration that have the *effect* of discriminating against protected groups.<sup>7</sup>

Given the facts of segregation and isolation that are clearly found in the Housing Study, and given the failure of past efforts to rely just on voluntary compliance by local governments, a failure or refusal by the MPO to take steps, that are within its legal authority, to try to ameliorate those barriers would also be a cause for concern, and raise questions as to whether its certifications of civil rights compliance are in fact accurate.

electronic copy:

FHWA Wisconsin Division Office

Lester Finkle, FHWA, National Title VI/Nondiscrimination Program Manager

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<sup>7</sup> 23 CFR Section 450.334(a)(3) references 49 CFR Part 21. And 49 CFR Sec. 21.5(b) – part of the U.S. Department of Transportation Title VI regulations - contains the following prohibitions, among others:

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of person to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program; *may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.*

(3) In determining the site or location of facilities, *a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.*

(emphases added). These regulations do permit the consideration of race to overcome prior barriers. Sec. 21.5(b)(7).

Similar non-discrimination regulations bar taking actions that have the effect of discriminating against persons with disabilities. 49 CFR Section 27.7.

Southeastern Wisconsin Regional Planning Commission Staff Response  
to May 14, 2012, Comments of Karyn Rotker of the ACLU of Wisconsin

Ms. Karyn Rotker's latest comments dated May 14, 2012, continue to address the Southeastern Wisconsin Regional Planning Commission on its responsibility as the Metropolitan Planning Organization (MPO) to prepare a Transportation Improvement Program (TIP) and through the TIP to select projects for implementation based upon her interpretation of U.S. Department of Transportation (USDOT) regulations regarding metropolitan transportation planning and programming, and the role and responsibilities of MPO's. In these latest of her comments on this topic, she does acknowledge that the Federal regulations state that the MPO is to develop the TIP in cooperation with the State and public transportation operators. She further states that the regulations give county and municipal governments no role in developing the TIP. She also states that Federal regulations suggest that the MPO with respect to all USDOT funded projects (other than those with Bridge, Interstate Maintenance, or National Highway System funds) are to be selected for implementation by the MPO from the approved TIP, only with consultation from the State and public transportation operators. She further states that consultation means the MPO is to make all decisions regarding the selection of all projects for implementation (with the exception of the funding categories noted above) with the State and public transportation operators merely in an advisory role, and with county and local governments having no role in this project funding and implementation decision-making.

In response, the Commission staff would note that the TIP, according to Federal regulations (23 CFR 450.324, 450.328, and 450.330), is a listing of arterial street and highway and public transportation projects intended to be implemented with Federal funding over the next four years.

- The projects in the TIP must be determined to be consistent with the regional transportation plan (23 CFR 450.324(g)).
- The projects in the TIP must be determined to be consistent with available funding (23 CFR 450.324(h)). (For example, projects for which funding is considered to not be available may not be included in the TIP.)
- Projects in "the first year of the TIP shall constitute an "agreed to" list of projects for project selection purposes and no further project selection action is required for the implementing agency to proceed with these projects" (23 CFR 450.330(a)). Under the regulations, the only exceptions

to the above are if significantly less Federal funding becomes available—and then the first year of the TIP is to be jointly modified by the MPO, State, and public transportation operators—or if projects need to be advanced from the second, third, or fourth years of the TIP into the first year of the TIP (for example, due to project deferral or delay)—and then the MPO in response to such requests in consultation with the State and public transportation operators may so modify the approved TIP, moving or “selecting” projects from the second through fourth years of the TIP and placing them in the first year (23 CFR Section 450.330(a) and (c)). The above clearly indicates that projects, once included in the first year of the TIP, require no further MPO project selection or MPO approval for an implementing agency to proceed with project implementation.

Ms. Rotker, in her comments, acknowledges that under the Federal regulations the TIP is to be developed by the MPO in cooperation with the State and public transportation operators. Cooperation is clearly defined in the Federal regulations as meaning “work(ing) together to achieve a common goal” (23 CFR 450.104). This makes it clear that the Commission, as MPO, is to work jointly with the State and public transportation operators to develop the TIP, including the projects of the first year of the TIP. There is no dominant role for the MPO identified in the regulations, as Ms. Rotker suggests. And, as noted earlier, there is no further project selection which is required for implementing agencies to proceed with projects in the first year of the TIP.

Ms. Rotker, in her comments, further states that Federal regulations do not give county or municipal governments any role in developing the TIP, and suggests that the Commission should not give county or municipal governments any role in the development of the TIP, including any determination of the first year of the TIP and, thereby, any decisions regarding those projects which should move forward to implementation. This interpretation of Federal regulations is incorrect. The MPO for its designation or redesignation, by definition in the Federal regulations, requires agreement by a super-majority of local elected officials representing at least 75 percent of the population of the metropolitan planning area and also the Governor (23 CFR 450.310(b) and (i)). This makes it clear the actions of the MPO are to reflect the agreement of the overwhelming majority of the local governments served by the MPO. Indeed, the original and long standing definition and description of a MPO in Federal regulations was that it is “the forum for cooperative decision making by principal elected officials of general purpose local government” of the metropolitan planning area. Thus, it is fully appropriate for county and municipal governments to be included with the State and public transportation operators in the cooperative effort—working together as equals—to prepare the TIP including submitting candidate projects, reviewing consistency with the regional transportation plan, reviewing consistency with available funding, and identifying the projects to be included in the first year of the TIP. As noted earlier, this first year of the

TIP is to represent the “agreed to” list of projects for project selection purposes, and no further project selection is needed for any implementing agency to proceed with their projects.

Furthermore, the long standing USDOT policy has been that metropolitan transportation planning, including development of a TIP, is to be a “continuing, cooperative, and comprehensive” process (23 CFR 450.300(a)) (emphasis added). Unilateral decisions by the MPO without the involvement, cooperation, and agreement by local governments, public transportation operators, and the State, as Ms. Rotker suggests that the Commission as MPO implement, are inconsistent with USDOT policy, law, and regulations.

We would further note that the section of USDOT Federal regulations (23 CFR 450.330(c)) which Ms. Rotker cites as giving the MPO the authority to select projects for implementation merely in consultation—and not cooperation—with State and public transportation operators (other than Bridge, Interstate Maintenance, or National Highway System funded projects) does not refer to the development of the TIP, including the first year of the development of the TIP and its attendant selection of projects. Rather, this section of the Federal regulations refers to any necessary future revision of the approved TIP should the State, public transportation operators, or local governments wish to advance a project to the first year of the TIP from the second, third, or fourth years of the TIP, for example to respond to project deferrals or delay, or changes in funding. Thus, the regulations which Ms. Rotker cites as giving the MPO authority to select projects for funding implementation do not do so, but rather the regulations merely provide for the MPO upon the request of the State, public transportation operators, or local government to advance projects from the second through the fourth years of the already approved TIP to the first year of the TIP, and to do so in consultation with State and public transportation operators.

Lastly, it is important to note the following with respect of the TIP:

- Listing a project in the TIP does not require it to move forward to implementation. It permits a project to be eligible for Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funds. Thus, the TIP cannot mandate a project to be implemented. Moreover, since local funds are required to match available Federal funds, as a practical matter, unless the MPO is itself an implementation agency (which SEWRPC is not), only projects put forth by local governments with accompanying local funds can be placed in the TIP.
- The Commission as MPO, and the TIP, cannot mandate the use of Federal funds by the Wisconsin Department of Transportation (WisDOT) on specific projects. The State can simply

choose not to implement those projects, and can instead use those funds on projects outside Southeastern Wisconsin in the remainder of the State.

- The TIP cannot stop a project from being implemented. It may restrict it from using Federal funds. The State can choose to use State funds, and a local government could choose to use local funds, to implement a project.
- A local government, or the State, may not proceed to obtain the Federal funding proposed for a project in a regional transportation improvement program until the regional transportation improvement program—such as for Southeastern Wisconsin—has been approved by the State and incorporated in the State Transportation Improvement Program (23 CFR 450.220 (a)).
- Also, all projects in the TIP by definition serve to implement, and are consistent with the regional transportation plan. Denying or delaying such projects, because the unit or level of government is not implementing some other element of the regional plan—housing, transit, street and highway, or water, for example—would simply result in further lack of implementation of regional plans.

The Commission has for 35 years since its designation as MPO and its first preparation of a TIP, carefully developed an organizational structure for meeting the Federal requirements that the TIP and projects recommended for Federal funding under that program be prepared in cooperation with the State, public transportation operators, and also county and municipal governments within the Region which the MPO serves and represents. That organizational structure consists of four Commission Advisory Committees comprised of over 60 representatives of the State, public transportation operators, and county and municipal governments concerned. The Advisory Committee for the Milwaukee urbanized area is structured on a population proportional basis. The Committees are charged with assisting the Commission in preparing the biennial TIP, which lists the public transit and arterial street and highway improvement projects proposed to be undertaken by the State, county, and local governments within the Region over the next four calendar years. The projects are reviewed by the Advisory Committees concerned for consistency with the regional transportation system plan, and for consistency with existing and likely available funding. The Advisory Committees concerned make their recommendations to the Regional Planning Commission which has responsibility for approval of the recommended program and list of projects. Including a project in the TIP makes the project eligible to receive Federal funding, but does not, and cannot, require the specific project to move forward to implementation, that decision resting with the State, county, or municipal unit and agency of government concerned. Conversely, projects not listed in the TIP are not eligible for Federal funding, but may proceed without such funding on decisions of the

State, county, and municipal units and agencies of government concerned. The Commission's approach to transportation improvement programming and transportation improvement project selection has been a cooperative and collegial one with the units and agencies of government concerned, as envisioned in Federal law and regulation.

Moreover, it is the position of the Commission that the Wisconsin State Statutes which provide for the creation, organization, powers, and duties of regional planning commissions in the State of Wisconsin (Section 66.0309), establish the Southeastern Wisconsin Regional Planning Commission as an advisory regional planning agency. Therefore, it would be inconsistent with State law for the Commission to require local governments or the State to implement specific projects, or for the Commission to prohibit local governments or the State from implementing specific projects. Ms. Rotker's suggestion that the Commission set up procedures to enforce advisory plan recommendations is not reasonable. Laws are enforced, not advisory plan recommendations.

We would respectfully suggest that the efforts directed at having the Commission obtain implementation of regional plans through taking actions inconsistent with its Federally defined role as an MPO, and its State defined role as an advisory regional planning agency, should instead be directed at addressing at the Federal, State, and local levels the obstacles to regional plan implementation, such as:

- The lack of State legislation for dedicated local funding for public transit (This would likely also require local action for implementation. State legislation came very close to enactment in 2009 and again in 2010.),
- The restriction of the use of FTA formula funds to capital funding with only some exceptions,
- The limitation of FHWA funds transferred to public transit, to be used only for capital funding, (The obstacle to transit expansion is operating funding, not capital funding.).

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KRY/dad  
#204177





May 22, 2012

SEWRPC  
Pewaukee WI

TRANSMITTED ELECTRONICALLY ONLY

To SEWRPC and Housing Advisory Committee Members:

I am submitting these comments to reply to SEWRPC's response to my original comments suggesting that the Housing Advisory Committee consider recommending that communities that do not comply with affordable housing and transit recommendations should receive a lower priority for federally-funded road projects in the TIP. Most of my comments are placed in the text itself, but the core points are:

1. The suggested recommendation was not to force communities to build affordable housing or transit; that would not appear to be within SEWRPC's authority. However, it is within SEWRPC's authority to *decline* to include certain projects in the TIP (and thus preclude federal tax funding for those projects), and to set priorities that give preference to projects in communities that comply with these recommendations. This leaves the compliance decision in the hands of local communities, but provides an incentive for them to comply with the other recommendations.
2. Federal law explicitly contemplates changes and evolution in the planning process. Current USDOT policy also explicitly supports linking transportation with other forms of planning, such as planning for land use and affordable housing. Thus efforts to make that linkage in this region appear to be very appropriate and timely.
3. Federal law and regulations that expressly bind the MPO and that explicitly apply to development of the TIP also prohibit using criteria or methods of administration that have a discriminatory effect. Thus, taking more concrete and enforceable steps to address the known segregation in the region would appear to be appropriate and compliant with these requirements.

Respectfully submitted,

/s/ Karyn Rotker

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ACLU of Wisconsin

Southeastern Wisconsin Regional Planning Commission Staff Response  
to May 14, 2012, Comments of Karyn Rotker of the ACLU of Wisconsin

Ms. Karyn Rotker's latest comments dated May 14, 2012, continue to address the Southeastern Wisconsin Regional Planning Commission on its responsibility as the Metropolitan Planning Organization (MPO) to prepare a Transportation Improvement Program (TIP) and through the TIP to select projects for implementation based upon her interpretation of U.S. Department of Transportation (USDOT) regulations regarding metropolitan transportation planning and programming, and the role and responsibilities of MPO's. In these latest of her comments on this topic, she does acknowledge that the Federal regulations state that the MPO is to develop the TIP in cooperation with the State and public transportation operators. She further states that the regulations give county and municipal governments no role in developing the TIP. She also states that Federal regulations suggest that the MPO with respect to all USDOT funded projects (other than those with Bridge, Interstate Maintenance, or National Highway System funds) are to be selected for implementation by the MPO from the approved TIP, only with consultation from the State and public transportation operators. She further states that consultation means the MPO is to make all decisions regarding the selection of all projects for implementation (with the exception of the funding categories noted above) with the State and public transportation operators merely in an advisory role, and with county and local governments having no role in this project funding and implementation decision-making.

- **COMMENT:** As noted in the original comments, the language of the regulations does not include any language mentioning local or county governments in developing the TIP. It discusses only consultation with the state and public transit operators.

In response, the Commission staff would note that the TIP, according to Federal regulations (23 CFR 450.324, 450.328, and 450.330), is a listing of arterial street and highway and public transportation projects intended to be implemented with Federal funding over the next four years.

- The projects in the TIP must be determined to be consistent with the regional transportation plan (23 CFR 450.324(g)).
  - **COMMENT:** This means the TIP cannot include projects that are not in the regional transportation plan. It does not state that it must include all (or any specified or desired) projects in that plan.
- The projects in the TIP must be determined to be consistent with available funding (23 CFR 450.324(h)). (For example, projects for which funding is considered to not be available may not be included in the TIP.)
  - **COMMENT:** However, there are usually, if not always, more projects desired than funding available. Thus, the MPO could set project funding priorities, and the regulations specifically allow the MPO to set priorities.

- Projects in “the first year of the TIP shall constitute an “agreed to” list of projects for project selection purposes and no further project selection action is required for the implementing agency to proceed with these projects” (23 CFR 450.330(a)). Under the regulations, the only exceptions to the above are if significantly less Federal funding becomes available—and then the first year of the TIP is to be jointly modified by the MPO, State, and public transportation operators—or if projects need to be advanced from the second, third, or fourth years of the TIP into the first year of the TIP (for example, due to project deferral or delay)—and then the MPO in response to such requests in consultation with the State and public transportation operators may so modify the approved TIP, moving or “selecting” projects from the second through fourth years of the TIP and placing them in the first year (23 CFR Section 450.330(a) and (c)). The above clearly indicates that projects, once included in the first year of the TIP, require no further MPO project selection or MPO approval for an implementing agency to proceed with project implementation.
  - **COMMENT:** Again, this raises the issue of setting priorities for which projects get included in the TIP, including in the first year of the TIP.

Ms. Rotker, in her comments, acknowledges that under the Federal regulations the TIP is to be developed by the MPO in cooperation with the State and public transportation operators. Cooperation is clearly defined in the Federal regulations as meaning “work(ing) together to achieve a common goal” (23 CFR 450.104). This makes it clear that the Commission, as MPO, is to work jointly with the State and public transportation operators to develop the TIP, including the projects of the first year of the TIP. There is no dominant role for the MPO identified in the regulations, as Ms. Rotker suggests. And, as noted earlier, there is no further project selection which is required for implementing agencies to proceed with projects in the first year of the TIP.

- **COMMENT:**
  - The federal statute defining the MPO’s responsibility – which has greater legal effect than regulations or USDOT policy – states that the process for developing TIPs “shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.” 23 USC § 134(c )(3) (emphasis added). Thus cooperation is not the ultimate requirement of the process, but rather something to be incorporated to the degree appropriate in light of the complexity of the problems to be addressed.
  - In the same definition section cited by SEWRPC above, the federal regulations define the TIP as: “a prioritized listing/program of transportation projects covering a period of four years that is developed and formally adopted by an MPO as part of the metropolitan transportation planning process, consistent with the metropolitan transportation plan, and required for projects to be eligible for funding under title 23 U.S.C. and title 49 U.S.C.

Chapter 53.” 23 CFR § 450.104 (emphases added). This language reaffirms that the MPO has primary legal responsibility for the TIP, and the authority to set TIP priorities.

- The “cooperation” requirement in terms of developing the TIP is, again, limited to cooperation between the MPO, state and public transit operators. The regulation does not reference cooperation with (or acquiescence to) local governments. *See*, 23 CFR § 450.324(a).
- Assuming despite this language the “cooperation” somehow does apply to local governments, it also must go both ways: *i.e.*, if local governments are failing to provide recommended affordable housing (or transit) then they cannot be said to be “cooperating” with regional planning recommendations or with the MPO.
- Further, there is no legal reason there could not be a “common goal” or cooperation towards achieving regional affordable housing and/or public transportation.

Ms. Rotker, in her comments, further states that Federal regulations do not give county or municipal governments any role in developing the TIP, and suggests that the Commission should not give county or municipal governments any role in the development of the TIP, including any determination of the first year of the TIP and, thereby, any decisions regarding those projects which should move forward to implementation. This interpretation of Federal regulations is incorrect. The MPO for its designation or redesignation, by definition in the Federal regulations, requires agreement by a super-majority of local elected officials representing at least 75 percent of the population of the metropolitan planning area and also the Governor (23 CFR 450.310(b) and (i)).

- **COMMENT:**

- The regulation lays out alternatives for formation of an MPO; it is not mandatory that governments representing 75% of the population agree to be part of the MPO. 23 CFR § 450.310(b) states: “(b) MPO designation shall be made by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population (including the largest incorporated city, based on population, as named by the Bureau of the Census) or in accordance with procedures established by applicable State or local law.” (emphasis added).
- The procedures established in state law did not provide proportional or equal representation. For example, Milwaukee County, which has about 45% of the region’s population, has only 14% of the representation on SEWRPC’s governing body, ranking it in the top quartile of the least-representative MPOs in the United States. *See*, Sanchez, Thomas W., “An Inherent Bias? Geographic and Racial-Ethnic Patterns of Metropolitan Planning Organization Boards” (Brookings Institution 2006).
- Moreover, under regulations passed after SEWRPC was created, the MPO could not be “redesignated” without consent of the city of Milwaukee. (23 CFR § 450.310(h): “An existing MPO may be redesignated only by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the existing metropolitan planning area population (including the largest incorporated city, based on population, as named by the Bureau of the Census).”) (emphasis added).
  - SEWRPC as it currently exists has no representation from the city of Milwaukee.

This makes it clear the actions of the MPO are to reflect the agreement of the overwhelming majority of the local governments served by the MPO.

- **COMMENT:** Even were the TIP regulations to be assumed to reflect the goals of local governments (despite the lack of language to that effect in the regulations), the language cited by SEWRPC indicates that the MPO’s actions are to represent governments serving 75% of the population (not the agreement of the majority of local governments served by the MPO). There is a significant difference between 75% of the region’s governments and governments serving 75% of the region’s population.<sup>1</sup>
  - Milwaukee County’s population is approximately 45% of the region’s population, meaning that if not for the lack of proportional representation on SEWRPC’s governing body, no SEWRPC decision would have 75% representation without the support of Milwaukee County.
  - SEWRPC’s failure to address the needs and goals of Milwaukee residents – who also comprise the vast majority of low-income and minority residents in the region – therefore also may fail to serve the requisite proportion of the population.

Indeed, the original and long standing definition and description of a MPO in Federal regulations was that it is “the forum for cooperative decision making by principal elected officials of general purpose local government” of the metropolitan planning area. Thus, it is fully appropriate for county and municipal governments to be included with the State and public transportation operators in the cooperative effort—working together as equals—to prepare the TIP including submitting candidate projects, reviewing consistency with the regional transportation plan, reviewing consistency with available funding, and identifying the projects to be included in the first year of the TIP. As noted earlier, this first year of the TIP is to represent the “agreed to” list of projects for project selection purposes, and no further project selection is needed for any implementing agency to proceed with their projects.

- **COMMENT:**
  - As noted in the original comments and above, it appears to be a *political* decision to include local governments in TIP planning, not a legal requirement of the regulations.
  - See comments about cooperation requirements elsewhere in this response.
  - See comments about federal policy anticipating and encouraging changes to MPO practices elsewhere in this response.

Furthermore, the long standing USDOT policy has been that metropolitan transportation planning, including development of a TIP, is to be a “continuing, cooperative, and comprehensive” process (23 CFR 450.300(a)) (emphasis added). Unilateral decisions by the MPO without the involvement, cooperation, and agreement by local governments, public transportation operators, and the State, as Ms.

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<sup>1</sup> The city of Milwaukee alone has close to 25% of the region’s population, but it clearly does not constitute 25% of the local governments in the region.

Rotker suggests that the Commission as MPO implement, are inconsistent with USDOT policy, law, and regulations.

- **COMMENTS:**

- As noted above, the process for developing TIPs “shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.” 23 USC § 134(c)(3) (emphasis added). Thus cooperation is not the ultimate requirement of the process.
- “Cooperation” also is a process that must flow both ways. Thus local governments that do not comply with affordable housing or transit recommendations are themselves failing to cooperate with the MPO and with regional planning efforts.
- The federal statute, and the regulation quoted by SEWRPC, also state that metropolitan planning is to be a “comprehensive” process, which would support the suggested efforts to achieve a comprehensive integration of housing and road planning.
- The USDOT/HUD/EPA Sustainable Communities Initiative, among other recent USDOT programs and policies, explicitly supports a comprehensive approach, including linking housing policy to transportation planning.<sup>2</sup>

We would further note that the section of USDOT Federal regulations (23 CFR 450.330(c)) which Ms. Rotker cites as giving the MPO the authority to select projects for implementation merely in consultation—and not cooperation—with State and public transportation operators (other than Bridge, Interstate Maintenance, or National Highway System funded projects) does not refer to the development of the TIP, including the first year of the development of the TIP and its attendant selection of projects. Rather, this section of the Federal regulations refers to any necessary future revision of the approved TIP should the State, public transportation operators, or local governments wish to advance a project to the

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<sup>2</sup> “DOT and HUD have created a high-level interagency task force to better coordinate federal transportation and housing investments and identify strategies to give American families:

- More choices for affordable housing near employment opportunities;
- More transportation options, to lower transportation costs, shorten travel times, and improve the environment...

The HUD/DOT task force will:

- Enhance integrated regional housing, transportation, and land use planning and investment. The task force will set a goal to have every major metropolitan area in the country **conduct integrated housing, transportation, and land use planning and investment** in the next four years...” (emphasis added).

*HUD and DOT Partnership: Sustainable Communities* (DOT 32-09), U.S. DOT Office of Public Affairs (March 18, 2009) (<http://www.dot.gov/affairs/dot3209.htm>). See also, e.g., *The Role of FHWA Programs in Livability: State of the Practice Summary* (Requested by USDOT & FHWA)(March 21, 2011) (“Livability in transportation is about integrating the quality, location, and type of transportation facilities and services available with other more comprehensive community plans and programs to help achieve broader community goals. It provides economic benefits to communities, businesses, and consumers. In practice, livable transportation systems accommodate a range of modes (walking, bicycling, transit, and automobiles) by creating mobility choice within more balanced multimodal transportation networks. This in turn helps support more sustainable patterns of development, whether in an urban, suburban, or rural context. Livable transportation systems can provide better access to jobs, community services, affordable housing, and schools, while helping to create safe streets, reduce energy use and emissions, reduce impacts on and enhance the natural and built environment, and support more efficient land use patterns.”)

first year of the TIP from the second, third, or fourth years of the TIP, for example to respond to project deferrals or delay, or changes in funding. Thus, the regulations which Ms. Rotker cites as giving the MPO authority to select projects for funding implementation do not do so, but rather the regulations merely provide for the MPO upon the request of the State, public transportation operators, or local government to advance projects from the second through the fourth years of the already approved TIP to the first year of the TIP, and to do so in consultation with State and public transportation operators.

- **COMMENT:** These regulations allow, but do not require, the MPO to advance projects upon the request of other entities. They do not preclude prioritizing such requests or declining to approve such requests for non-compliant communities.

Lastly, it is important to note the following with respect of the TIP:

- Listing a project in the TIP does not require it to move forward to implementation. It permits a project to be eligible for Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funds. Thus, the TIP cannot mandate a project to be implemented. Moreover, since local funds are required to match available Federal funds, as a practical matter, unless the MPO is itself an implementation agency (which SEWRPC is not), only projects put forth by local governments with accompanying local funds can be placed in the TIP.
  - **COMMENT:** As stated elsewhere, listing a project in the TIP allows it to be built (if there are funds available). Declining to list a project means that federal funds cannot be used to build that project. The regulation does not require the inclusion of specific projects or prevent the MPO from setting priorities that lead to excluding some projects.
- The Commission as MPO, and the TIP, cannot mandate the use of Federal funds by the Wisconsin Department of Transportation (WisDOT) on specific projects. The State can simply choose not to implement those projects, and can instead use those funds on projects outside Southeastern Wisconsin in the remainder of the State.
  - **COMMENT:** The suggested recommendation does not state that SEWRPC can require the inclusion of specific projects. It is to *decline* to include projects in non-compliant communities. SEWRPC does have this legal authority.
- The TIP cannot stop a project from being implemented. It may restrict it from using Federal funds. The State can choose to use State funds, and a local government could choose to use local funds, to implement a project.
  - **COMMENT:** The suggested recommendation was to exclude from the TIP – and from federal funding – projects in non-compliant communities. If those communities nevertheless wanted to use their own non-federal funds to build the road projects, it is agreed SEWRPC could not preclude that (and nothing in the original comments was intended to suggest otherwise). However, linking the use of federal funds to compliance with other recommendations might provide an incentive for communities to comply, which would be appropriate and consistent with USDOT’s Sustainable Communities Initiative, with comprehensive planning, and with non-discrimination regulations.

- **A local** government, or the State, may not proceed to obtain the Federal funding proposed for a project in a regional transportation improvement program until the regional transportation improvement program—such as for Southeastern Wisconsin—has been approved by the State and incorporated in the State Transportation Improvement Program (23 CFR 450.220 (a)).
  - **COMMENT:** See above.
  
- Also, all projects in the TIP by definition serve to implement, and are consistent with the regional transportation plan. Denying or delaying such projects, because the unit or level of government is not implementing some other element of the regional plan—housing, transit, street and highway, or water, for example—would simply result in further lack of implementation of regional plans.
  - **COMMENTS:**
    - As noted in the initial comments, federal law prohibits recipients of federal funds, including SEWRPC, from using criteria or methods of administration that have a discriminatory effect, regardless of whether there is any intentional discrimination. These non-discrimination requirements expressly apply to the development of the TIP.
  
    - Delaying or denying projects could be necessary to ensure that certain communities do not benefit at the expense of other communities or use federal funding in ways that have the effect of discriminating or perpetuating segregation in the region. Continuing to implement only parts of the regional plans – *e.g.*, those focused on road construction – while failing to implement other parts of the plans, such as those focused on affordable housing and transit – will increase discrimination and segregation.
  
    - Refusing to use policies or practices to try to prioritize projects in ways that provide incentives to reduce known racial disparities in the region may also be a criterion or method of administration of SEWRPC programs that has the effect of discriminating against persons of color and/or persons with disabilities.

The Commission has for 35 years since its designation as MPO and its first preparation of a TIP, carefully developed an organizational structure for meeting the Federal requirements that the TIP and projects recommended for Federal funding under that program be prepared in cooperation with the State, public transportation operators, and also county and municipal governments within the Region which the MPO serves and represents. That organizational structure consists of four Commission Advisory Committees comprised of over 60 representatives of the State, public transportation operators, and county and municipal governments concerned. The Advisory Committee for the Milwaukee urbanized area is structured on a population proportional basis. The Committees are charged with assisting the Commission in preparing the biennial TIP, which lists the public transit and arterial street and highway improvement projects proposed to be undertaken by the State, county, and local governments within the Region over



the next four calendar years. The projects are reviewed by the Advisory Committees concerned for consistency with the regional transportation system plan, and for consistency with existing and likely available funding. The Advisory Committees concerned make their recommendations to the Regional Planning Commission which has responsibility for approval of the recommended program and list of projects. Including a project in the TIP makes the project eligible to receive Federal funding, but does not, and cannot, require the specific project to move forward to implementation, that decision resting with the State, county, or municipal unit and agency of government concerned. Conversely, projects not listed in the TIP are not eligible for Federal funding, but may proceed without such funding on decisions of the State, county, and municipal units and agencies of government concerned. The Commission's approach to transportation improvement programming and transportation improvement project selection has been a cooperative and collegial one with the units and agencies of government concerned, as envisioned in Federal law and regulation.

- **COMMENTS:**

- The federal law that created the MPO structure expressly includes, as its official policy, to “encourage the continued improvement and evolution of the metropolitan ... planning processes by metropolitan planning organizations...” 23 USC § 134(a)(2). The fact that planning has been conducted in certain ways in the past does not require it to be conducted in the same ways now or in the future, and the policy of “improvement” and “evolution” of planning indicates that in fact change is contemplated and encouraged by the federal government.
- With due respect to the efforts SEWRPC has made in the past 35 years, there has not been a significant decrease of segregation in the region during that time period. In fact, while the Milwaukee metropolitan region was not, overall, the most segregated region in the United States in 1980, it is now and has been so since at least 2000. Efforts need to be made to improve on and evolve from what has been done in the past in order to address the segregation and disparate transit dependence that the Housing Study and other SEWRPC studies confirm exist. Those efforts may well require, among other changes, altering the way planning is done and the criteria and methods of project selection.
- The recommendation was to exclude from the TIP – and from federal funding – projects in non-compliant communities. If those communities nevertheless wanted to use their own non-federal funds to build projects, it is agreed SEWRPC could not preclude that (and nothing in the original comments said, or was intended to say, otherwise). However, linking the use of federal funds to compliance with other recommendations might provide an incentive for communities to comply.
- It also should be noted that SEWRPC has in the past approved or recommended projects over the strenuous objections of some local governments, including the city of Milwaukee. Thus while SEWRPC at times has made efforts at collegiality, it also has made other decisions when it felt it was necessary to do so.
  - At the present time, in light of the documented segregation and disparities in the region, taking steps to seek to increase equity and reduce discrimination, while it

might not be the preference of some local governments, also would be a reasonable and appropriate response.

Moreover, it is the position of the Commission that the Wisconsin State Statutes which provide for the creation, organization, powers, and duties of regional planning commissions in the State of Wisconsin (Section 66.0309), establish the Southeastern Wisconsin Regional Planning Commission as an advisory regional planning agency. Therefore, it would be inconsistent with State law for the Commission to require local governments or the State to implement specific projects, or for the Commission to prohibit local governments or the State from implementing specific projects. Ms. Rotker's suggestion that the Commission set up procedures to enforce advisory plan recommendations is not reasonable. Laws are enforced, not advisory plan recommendations.

- **COMMENTS:**

- The suggested recommendation was not that SEWRPC require local governments to implement specific projects. It suggested giving lesser priority to projects in communities that fail to comply with other elements of Commission planning. There is no evident legal reason why this could not occur.
  - As noted elsewhere, the law and regulations for TIP preparation contemplate a process of priority setting, and USDOT law and policy is also to emphasize integrated and comprehensive planning. Thus this suggested recommendation would appear to be both reasonable and permissible.
- As discussed above, there are also laws that prohibit federally funded entities – including SEWRPC – from using criteria or engaging in methods of administering their programs that have the effect of discriminating against persons of color or persons with disabilities, regardless of whether that discrimination is intentional.
  - In submitting the TIP, SEWRPC must, as a matter of law, certify its compliance with those requirements. Thus those non-discrimination regulations are also legal requirements that must be enforced, and it would appear to be neither reasonable nor lawful to disregard those requirements.
- If SEWRPC is stating that its role even in the TIP process is only advisory, that also raises the question as to whether such a strictly advisory role is consistent with federal regulations giving the MPO the ultimate legal authority for TIP development.

We would respectfully suggest that the efforts directed at having the Commission obtain implementation of regional plans through taking actions inconsistent with its Federally defined role as an MPO, and its State defined role as an advisory regional planning agency, should instead be directed at addressing at the Federal, State, and local levels the obstacles to regional plan implementation, such as:

- The lack of State legislation for dedicated local funding for public transit (This would likely also require local action for implementation. State legislation came very close to enactment in 2009 and again in 2010.),

- The restriction of the use of FTA formula funds to capital funding with only some exceptions,
- The limitation of FHWA funds transferred to public transit, to be used only for capital funding, (The obstacle to transit expansion is operating funding, not capital funding.).
  - COMMENT:
    - These could and should be additional recommendations. It is not necessary that they exclude the other suggested recommendations.
    - There are significant political, as well as funding, obstacles to transit expansion in the region, which also should be addressed by appropriate policies.
    - Some local and/or county governments have reduced funding for public transportation, and/or have advocated against various forms of transit expansion (as well as against affordable housing). It would seem reasonable to include and address those issues as criteria in determining whether and which road projects are included or prioritized in the TIP.

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