



# NAEP Webinar on Environmental Justice: Assessing Social and Health Impacts on Vulnerable Populations

Assessing Indirect Effects on EJ Populations

February 18, 2021

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# History of Urban Freeway Construction

- Minority and low-income communities bore the brunt of urban freeway construction in 50's, 60's, 70's
- pre-NEPA
- Urban freeway reconstruction now has a much different regulatory framework
  - National Environmental Policy Act
  - Executive Order 12898 on Environmental Justice
  - Title VI of the Civil Rights Act

# Challenge of Assessing Indirect Effects on EJ populations

- Executive Order 12898 has increased emphasis on public involvement and made federal agencies more proactive in their outreach to get input on
  - the proposed action
  - impacts, and putting those identified impacts into context
- Impact analysis more subjective; more sensitive to time and place than other impact analyses (“disproportionate”, “appreciably more severe”)
- Indirect and cumulative effects can also be subjective (“reasonably foreseeable”)
- Indirect effects on EJ populations is at the intersection of two subjective analyses.
  - What is an indirect effect on an EJ population?
  - Addressing impacts that are not part of the proposed action
  - How far to take the analysis?

# Caveats

- I do not have all the answers
- Council on Environmental Quality regulation changes from July 2020 have not yet resulted in agency updates to their guidance/orders.
  - And given the administration change.....they may not
  - Perhaps additional changes to CEQ regulations

# What's an indirect effect on an EJ population?

- Anything anyone says is an indirect effect ought to be looked at
- The federal agency's order on EJ is a good place to start for a possible range of potential effects
- “An action that does not appear to have significant direct impacts may have indirect or cumulative impacts that are significant.”  
([https://www.environment.fhwa.dot.gov/ecb/glossary\\_disc.aspx](https://www.environment.fhwa.dot.gov/ecb/glossary_disc.aspx))

# An example: Zoo Interchange Lawsuit

- \$2.6B reconstruction of several miles of urban freeway in Milwaukee, WI
- 8 residential displacements
- NEPA lawsuit; but EJ issues
  - Milwaukee Inner-City Congregations Allied for Hope and Black Health Coalition v Gottlieb
  - plaintiff can bring a lawsuit under NEPA challenging the adequacy of the environmental justice analysis
- In response to a pre-trial motion, the court said DOT and FHWA failed to assess cumulative impact on low-income and minority residents in Milwaukee from the disparity in highway vs transit funding

Case: 3:12-cv-00556 Document #: 1 Filed: 08/06/12 Page 1 of 25

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN

MILWAUKEE INNER-CITY  
CONGREGATIONS ALLIED FOR  
HOPE (MICAH) and BLACK  
HEALTH COALITION OF  
WISCONSIN,

Plaintiffs,

Case No: 12-cv-556

vs.

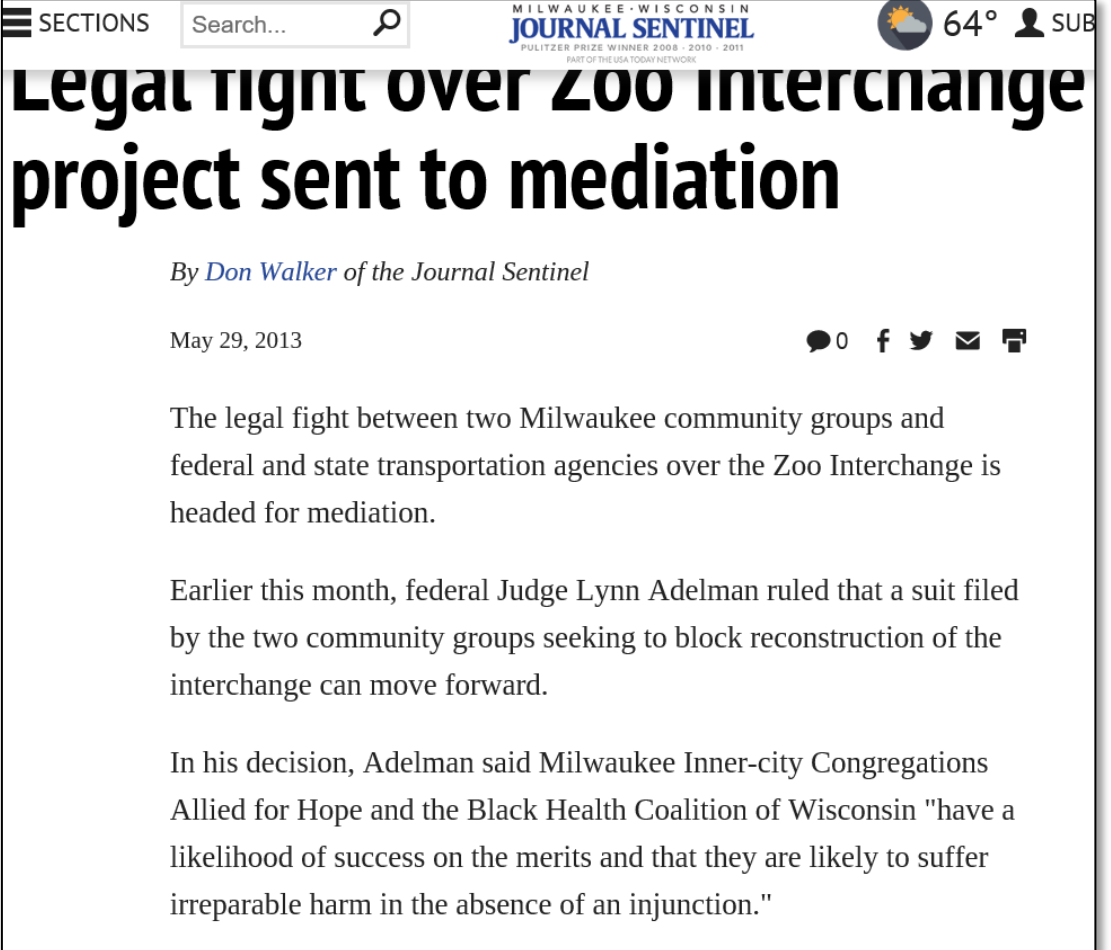
MARK GOTTLIEB, in his official  
capacity as Secretary of the Wisconsin  
Department of Transportation; WISCONSIN  
DEPARTMENT OF TRANSPORTATION;  
VICTOR MENDEZ, in his official capacity as  
Administrator of the Federal Highway  
Administration; GEORGE POIRIER, in his  
official capacity as Division Administrator of  
the Wisconsin Division Office of the FHWA;  
FEDERAL HIGHWAY ADMINISTRATION;  
RAY LAHOOD, in his official capacity as  
Secretary of the U.S. Department of  
Transportation; and U.S. DEPARTMENT OF  
TRANSPORTATION,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

## Zoo Interchange lawsuit, cont.'d

- “The FEIS violates NEPA by failing to identify.....the social, economic, employment, urban and racial effects, of failing to preserve, improve and expand transit, and of the disparate treatment of highway and transit development in the region, especially in light of the known racial disparities and the documented need for transit to develop at the same rate as highways to achieve civil rights compliance”
- Court did not issue a decision on merits of the case



The screenshot shows a news article from the Milwaukee Journal Sentinel. The article title is "Legal fight over Zoo Interchange project sent to mediation". The author is Don Walker. The date is May 29, 2013. The article text discusses a legal dispute between community groups and transportation agencies over the Zoo Interchange project, mentioning a court ruling by Judge Lynn Adelman.

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# Legal fight over Zoo Interchange project sent to mediation

By *Don Walker* of the Journal Sentinel

May 29, 2013

0 f t e

The legal fight between two Milwaukee community groups and federal and state transportation agencies over the Zoo Interchange is headed for mediation.

Earlier this month, federal Judge Lynn Adelman ruled that a suit filed by the two community groups seeking to block reconstruction of the interchange can move forward.

In his decision, Adelman said Milwaukee Inner-city Congregations Allied for Hope and the Black Health Coalition of Wisconsin "have a likelihood of success on the merits and that they are likely to suffer irreparable harm in the absence of an injunction."

# What About Impacts That Are Not Part of the Proposed Action?

- Reviewing previous actions is a normal part of NEPA cumulative effect analysis
- More recently project sponsors are being asked to not only acknowledge previous impacts but to mitigate them.
- What about issues that don't appear reasonably foreseeable?
  - Better look at them, even if just to explain why not part of indirect or cumulative analysis
  - There can be indirect or cumulative effects on EJ populations even if few direct effects
- Federal Highway Administration guidance notes that cumulative effects don't have to be mitigated
  - But in the current context of social and racial equity, impacts of original freeway construction coming to the fore



# Other Examples of Urban Freeway Reconstruction Projects

- MnDOT's planned reconstruction of I-94 in St. Paul, MN
  - 2-year effort to assess what the community wants to see from the project before freeway alternatives are developed
  - Early in the NEPA process (NEPA path, Livability path)
- I-526 West Charleston, SC
  - May address issues related to how real estate was acquired for original freeway construction
  - SCDOT may help develop low-income housing
  - Draft EIS recently published
- Central I-70 in Denver, CO
  - Home-based noise mitigation, energy upgrades, affordable housing grants, fresh food funding
  - ROD issued in 2017; construction underway

# How Much Analysis is Enough?

- If the project's stakeholders agree the analysis is thorough that's a great signal that you've done enough
  - Not usually that straightforward!
- Courts often defer to the federal agency on technical issues
- Acknowledge all view points, give them substantive thought, don't need to beat the issue to death. More pages does not equal better analysis
- Look at court decisions
  - NAEP publishes annual summary of US Court of Appeals decisions related to NEPA
  - AASHTO Center for Env Excellence ([environmental.transportation.org](http://environmental.transportation.org)) summary of NEPA decisions

# Equity

- NEPA doesn't require remedial action to address past impacts
  - Austin v Alabama DOT (2016)
- Policymakers may choose to address past impacts for other reasons
- NEPA practitioners are more often being asked to look at societal issues
  - How is equity addressed in a NEPA document?
  - Are mitigation measures for societal impacts best addressed in same NEPA document as the proposed action? Timing could be different; separate NEPA documents may be appropriate
- We should not stovepipe project-related impacts from other issues that stakeholders want to address

## Practical take-aways

- Nothing is off limits in your assessment of indirect effects on EJ populations
  - Don't stovepipe transportation-related issues from other societal needs
- When people raise non-transportation issues, listen to them. Document them. Those issues are the keys to effectively capturing the context of indirect and cumulative effects.
- Mitigation for impacts outside the proposed action may not need to be in the same NEPA document as the proposed action

Thank you

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Reinventing tomorrow.



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