

P.O. Box 4375
Pensacola, FL 32507
October 26, 2006

Via E-Mail to: 9dep@gw.dec.state.ny.us

Mr. Kenneth C. Taft,
NYSDEC
182 East Union
Suite 3
Allegany, NY 14706-1328

Re: Legal Notice Southern Expressway US Rte 219

Dear Mr. Taft:

This letter provides comments on the referenced legal notice published in the October 13, 2006 edition of an Ellicottville New York area newspaper, and the notice on the New York State Department of Environmental Conservation Internet site.

No Valid EIS Exists for the Route 219 Expansion Proposal

The New York State Department of Environmental Conservation must not issue any permits, waivers or other approvals for the U.S. Route 219 Expansion Project, because the Environmental Impact Statement for the project is invalid. Here is why:

NEPA and SEQRA provide for coordinated environmental reviews. When a major federal action is undertaken in New York State, a NEPA EIS may be substituted for a SEQRA EIS, if the NEPA EIS contains all the information required by SEQRA. In the case of the Route 219 project, a NEPA Final EIS and Final Section 4(f) Evaluation for P.I.N. 5101.53 U.S. Route 219, Springville to Salamanca, Erie and Cattaraugus Counties, N.Y. was issued on April 25, 2003.

However, under FHWA NEPA implementing regulation 23 CFR 771.129(b)¹ a Final EIS is considered to be invalid if no steps to advance the project are undertaken within three years of the Final EIS filing. Because no qualifying actions advancing the project were made by April 2006, the NEPA EIS is no longer valid. By virtue of the NEPA and SEQRA coordination rules, this means that there is also currently no valid SEQRA EIS for the Route 219 project.

¹ “A written evaluation of the final EIS will be required before further approvals may be granted if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.”

Under the FHWA regulations, a reevaluation now must be made to determine if the Final EIS is valid, if a new or supplemental EIS must be issued, or if the project must be abandoned.

Although there are actually many reasons the Route 219 Final EIS must be supplemented, one compelling reason is that the Final EIS failed to include historic resources that were discovered after the Draft EIS was prepared. These resources are considered to be significant under NEPA, the National Historic Preservation Act, and Section 4(f) of the Department of Transportation and the Federal-Aid to Highways Acts, and therefore the creation of a supplemental EIS and a revised Section 4 (f) analysis is mandatory.

As you know, historic resources are also significant for SEQRA². Therefore, the existence of even one undisclosed historic resource identified after the NEPA EIS was prepared requires that a supplemental EIS must be prepared, in order to comply with SEQRA.

The invalidity of the EIS means that the NYSDOT is prematurely and inappropriately seeking site-specific wetlands and Section 401 approval. Until proper corridor and siting alternative analyses are conducted, consideration of the NYSDOT application does nothing but create needless work and will lead to legal challenges.

Later in this letter I will more fully explain the some of above comments and provide additional comments on: the SEQRA EIS needs; the wetland and stream disturbance, Section 401 certification, State Pollution Discharge Elimination System and other related permits, waivers or approvals; the SEQRA Historic Preservation Act Determination; and other items.

The EIS Prepared for the Route 219 Expansion is Not Valid Due to Segmentation

High Priority Corridors were created with the passage of the Intermodal Surface Transportation Efficiency Act of 1991, where, in Section 1105, "United States Route 219 Corridor from Buffalo, New York, to the intersection of Interstate Route 80" was identified as a high priority, thereby setting the stage for the preparation of the Route 219 EIS. Scoping for the Route 219 expansion project EIS began in late 1994.

Included as a purpose of the expansion study was the elimination of the "corridor gap" from Springville to Salamanca. One of the strong backers of the proposal was the Continental One organization, which envisioned the "Continental One" freeway connecting Toronto with Miami. Thus, the Buffalo to Pennsylvania I-80 high-priority corridor was only a segment of most supporters' ultimate goal.

A Draft EIS was circulated in 1998, but the U.S. Environmental Protection Agency found it insufficient. One reason was because the Draft EIS failed to explain how a Springville to Salamanca freeway meet the study goal of connecting to I-80 or beyond; the EPA concluded that

² 6 N.Y.C.R.R. § 617.7(c)(1)(v).

the EIS for the project was improperly "segmented." Almost five years later, the EPA declared the Final EIS insufficient, because it failed to address the EPA's request to explain why the Springville to Salamanca segment had independent utility.

In a letter to the EPA, the FHWA's unpublicized response to the segmentation issue explained that the Springville to Salamanca segment had independent utility because Route 219 in Pennsylvania is a four-lane expressway "through Bradford, a major city and center of commerce in northwest Pennsylvania." However, the Bradford Area Chamber of Commerce describes Bradford a bit differently. It says, "Located in the heart of the Allegheny National Forest Region, the Bradford Area is well known for preserving the unhurried aspects and pure simplicity of small-town America. Fresh air, clean water, friendly people, affordable living, and minimal travel to work and play surrounded by some of the nations most beautiful countryside makes our area a unique community with traditional advantages."

It is noteworthy that the Final EIS did not include a full study of any alternatives from Springville to any point short of Salamanca because, as stated in the Final EIS, such an alternative could not be built under current EIS parameters. But, now, almost three and a half years after Final EIS was prepared and members of the public and many reviewing agencies including the EPA and F&WL made comments clearly showing the requirement for dropping the project or the preparation of a new or supplemental EIS, the NYSDOT is applying for a Clean Water Act Section 401 certification from the NYSDEC, which it must have before a CWA Section 404(b)(1) permit may be obtained from the U.S. Army Corps of Engineers. But the application requests approval for an alternative that was not studied in an EIS. Rather, the NYSDOT is requesting a site-specific permit for a three-mile segment of freeway for which no environmental study has been authorized or completed, and one for which it presents no alternatives analysis—a fact that makes it impossible for the Corps to ever issue a Section 404(b)(1) permit.³

Because SEQRA does not allow a segmented EIS (except under very limited exceptions that do not apply here), it is also impossible for the NYSDEC to provide Section 401 certification or any of the other water-related permits or approvals requested by the NYSDOT without violating SEQRA.

For the above reasons, the NYSDEC should immediately deny the NYSDOT application.

Additional cases of illegally segmented analysis that takes place throughout the EIS will be discussed or referenced later in this letter.

³ The 404(b)(1) regulations require alternatives to be considered. Because the regulations carry not only a requirement to include an alternatives analysis but also a presumption that a less damaging alternative exists, the Corps must, by specific application of the regulation deny the permit application. See *Sierra Club v. United States Army Corps of Engineers*, 772 F. 2d 1043, 1051 (2nd Cir. 1985).

Prior Comments Applicable to NYSDOT's Application

Many of my past letters to the NYSDOT, the FHWA, and politicians are applicable to the NYSDOT's application. Although most of the comments relate to NEPA, they are all applicable to the NYSDEC because of its status as a NEPA cooperating agency. Further, because of the many parallels between NEPA and SEQRA, the general principles contained in the comments (even though they are explained in NEPA terms) apply equally to SEQRA..

Listed below are some of those letters along with a brief explanation of areas of special importance to the NYSDEC's SEQRA review and the approvals or permits requested by the NYSDOT.

A copy of each listed letter will be sent to you under separate cover.

February 16, 2005 letter to Gerard Fitzpatrick

The intent of this letter was to show the Cattaraugus County Legislature that support of a Route 219 freeway based upon the Route 219 EIS was counterproductive to the goal of providing safe and efficient transportation in Cattaraugus County while at the same time improving the County's economy. I explained that because of the certainty that the EIS would not receive the necessary CWA permit or withstand agency or judicial review of the adequacy of the EIS the best way to meet the County goals was to demand the current project be dropped and a new one begun.

The letter shows fatal errors throughout the entire history of the project and is therefore relevant to NYSDEC review in its entirety.

A few sections that I would like you to take special notice of include:

The project planning and scoping section beginning on page 6. This section shows that errors made in the very beginning of the process when combined with subsequent errors make it impossible to do anything but begin a new EIS process.

The macro alternatives analysis sections on pages 10 through 14 show the fatal flaws made in the very early stages of draft EIS preparation. Please note that even the NYSDOT's Environmental Analysis Bureau pointed out fatal errors in the CWA and Section (f) portion of the analysis.

The cumulative and indirect impact section beginning on page 14 shows that these types of impacts were not properly addressed in the Draft EIS.

The section showing the failure to minimize farmland impacts is critical to NYSDEC review because of the limitations placed on state agencies to acquire property within agricultural districts. It is also important to the alternatives analysis process because of the undue importance placed on farmland, particularly by elevating a resource (farmland) that requires only minimization over resources that require avoidance, like historic resources, wetlands, flood plains and water bodies.

The section on page 17 describes the failure to consider forest land under NEPA, SEQRA and the NYS Open Space Plan. This section notes that the NYSDEC scoping comment that “the accurate determination of impacted forest lands is critical”⁴ was ignored.

On page 18 the failure to include site specific freeway siting information or analysis is discussed. This information is required and because it is missing, it is impossible to determine if proper resource avoidance, minimization or mitigation have been considered or to review or verify any of the site specific impact information given for the freeway alternative.

The 2002 environmental assessment section on pages 21 to 28 shows why the NYSDOT, years ago, required to prepare at a minimum a supplemental EIS. The historic preservation subsection is important to NYSDEC analysis of historic preservation issues and shows why under NEPA, Section 106 and Section 4(f) new, revised or supplemented documents are required.

The reevaluation failures section on pages 28 to 33 is also critical to NYSDEC review because it shows how the NYSDOT and the FHWA used false and misleading information or statements to evade the legal obligation to prepare at a minimum a supplemental EIS.

Pages 33 to 43 show that public and agency comments were ignored. SEQRA, just like NEPA, demands that these comments be addressed in an EIS and if they are not, that a supplemental EIS be prepared.

The discussion of the 2003 EPA Final EIS on pages 43 to 47 highlights the reasons the EPA found the EIS to be insufficient. The Great Valley Creek relocation section is of critical importance because the EPA highlights it as a “particular concern.” As you know, this relocation requires coordination between the NYSDEC, FEMA, the EPA, the Corps and F&WL because it is a navigable water way and a FEMA designated flood plain. Further, such coordination and avoidance, minimization and minimization alternative analysis must be documented in an EIS (which clearly has not been done).

⁴ *Scoping Report*, NYSDOT, FHWA, DeLeuw Cather and Company, April 1995, page A-5.

June 6, 2003 Final EIS Comment Letter

The FHWA irresponsibly failed to address my substantive comments in its contingent record of decision. Because any valid SEQRA findings statement must address substantive comments made on the Final EIS, it is critical that these comments be addressed in connection with any SEQRA lead or involved agency findings statements, permits, approvals, etc.

May 27, 2003 36 CFR 800.8(c)(2)(iii) Notice Letter

This is similar to the June 28, 2002 36 CFR 800.8(c)(2)(iii) notice letter I sent to the FHWA. Section 106 requires the FHWA to submit these letters to the ACHP and the Section 106 review process cannot be completed until this letter is submitted and the ACHP is given an opportunity to comment. The record shows that, to date, this has not been done.

This letter is critical to your SEQRA Historic Preservation review.

Other Letters

I have written other letters to the NYSDOT and FHWA at appropriate points in the NEPA process. Almost without exception the comments were not addressed in a responsible manner as required by law.⁵

Due to time constraints and because most of the comments are also included in the letters I have already described, I will not outline them here. However, they are part of the record and must be addressed in any valid SEQRA EIS or findings statement issued and must also be considered (along with all other substantive agency or public comments) in any permits, approvals, etc. granted by the NYSDEC.

To help in your review of agency and public comment letters, I think the following are of critical importance and will focus your attention on issues that show that the NYSDOT's application must be denied.

My sister's memorandums relating to the selection of Alternative 15 and Alternative Analysis Memo Number 7. This is of critical importance because it show violations of Executive Orders 11990 and 11988 (wetlands and floodplains), section 404(1)(b) of the CWA, Section 4(f) and 6 N.Y.C.R.R. § 502. As you may be aware, the NYSEAB manual cautions the NYSDOT that a 6 N.Y.C.R.R. § 502.8 variance "is virtually impossible to obtain." The memorandums show conclusively that alternatives exist that not only avoid Great Valley Creek, but also substantially reduce impacts to wetlands, other water bodies, floodplains, historic resources and farmland.

⁵ As I illustrated on page 3 with the FHWA response to the EPA on the segmentation question, it is common for the FHWA to ignore or not address comments responsibly.

Making it illegal to use the alternative chosen by the NYSDOT. In the Final EIS the NYSDOT failed to address many issues and made false and misleading statements and references to new (and undisclosed) information to avoid addressing the real issues.

The June 4, 2003 letter from the EPA gives many reasons that the Draft and Final EIS's fails to comply with NEPA, Section 106, Section (4)(f),⁶ Executive Orders 11990 and 11988 and the CWA. Just the note that the relocation Great Valley Creek is a particular concern indicates violations of all those laws in that single area. The letter notes that a valid Final EIS must contain a detailed rationale for the selection of an alternative under the EPA's 404(b)(1) guidelines, which it is now clear, were not. The letter notes the absence of any cumulative impact analysis in the Draft EIS and an insufficient growth induced cumulative impact analysis in the Final EIS, as well as the absence of an analysis of cumulative impacts to wetlands, water bodies, historic properties and archeological resources and farmland. The lack of this analysis means that the EIS could not comply with NEPA, SEQRA, E.O.'s 11990 and 11988, the CWA, the NHPA, farmland protection laws, Section 4(f) and probably other laws. This letter is also important regarding the segmentation issue. It notes that the NYSDOT failed to show, in either the Draft or Final EIS why a Springville to Salamanca freeway had independent utility or to discuss the impacts of the Salamanca to I-80 section of the high priority corridor. The above items in addition to all the other problems noted in the EPA letter clearly means that, under NEPA and SEQRA, at a minimum a supplemental EIS must be filed.

The February 26, 2006 letter from F&WL to the Corps. This letter like the EPA Final EIS comment letter virtually confirms that F&WL will be unable to adopt the Final EIS (as it must under NEPA). The letter notes that the EIS review was too limited, that site specific analysis was not included, that it has twice in the past questioned whether all wetland impacts have been identified in the report, that cumulative and indirect impacts were not properly considered, and many other things should make it impossible for them to adopt a Final EIS.⁷ These items and all items in the F&WL letter are critical to your SEQRA EIS and permit or other approval reviews.

The September 25, NYSDOT letter to consulting parties is all the confirmation needed to require a SEQRA supplemental EIS under 6 N.Y.C.R.R. § 617.7(c)(1)(v). Although, as shown in the various letters that I have referenced many other historic resources have also been omitted from the EIS.

⁶ Because the FHWA "must complete its Section 106 determinations before it can comply with Section 4 (f)." *Corridor H Alternatives v. Slater*, 166 F. 3d 368, 371 (D.C. Cir. 1999).

⁷ Question 30 from *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* 46 Fed. Reg. 18026 (1981).

SEQRA Historic Preservation Act (SHPA) Determination

The notice states that the NYSDEC must consult further with the NYS Office of Parks, Recreation and Historic Preservation. Because I am a Section 106 consulting party for purposes of the Route 219 expansion project, please note that I want to participate in the consultation to the full extent allowed by law.

Although consultation with me on the avoidance of all historic resources is required under Section 106, to date, I have been denied the right to participate. Continued denial of my right to participate is a violation of Section 106 and the Section 106 process will not be complete until consultation with me (and the other consulting parties) takes place and is fully documented in an EIS.

Also, it is necessary to consult with all NEPA cooperating agencies and SEQRA involved agencies that have a duty to consider historic preservation. At a minimum it appears that the following agencies must participate in Section 106 consultation, but to date, have not— the Bureau of Indian Affairs, FEMA, the Corps, F&WL.

Your notice states “A temporary access road 4,675 feet in length will be installed in Cattaraugus Creek gorge following an existing hiking path along the edge of Cattaraugus Creek, from the bottom of Scoby Hill Road to the proposed location of new arch-type freeway bridges across the gorge. The new bridges will span the gorge upstream of the existing Route 219 bridge, without abutments in Cattaraugus Creek. All temporary fills in Cattaraugus Creek will be removed after construction of the bridges.”

Please note that the Scoby Hill Power plant and park area are listed on the National Register of Historic Places. Clearly the access road will impact this resource. However, this historic resource was not mentioned in Draft EIS, not reviewed by OPRHP, and not subject to a Section 4(f) analysis. Additionally, it is likely that at least one other historic property exists in this area. A copy of the standing structure report will be sent to you under separate cover. Agencies and the public must be made aware of these resources, the potential effects and the avoidance, minimization and proposed mitigation measures in a new or supplemental draft EIS.

Other Critical Issues

Because Great Valley, New York is a National Flood Insurance Program community, and because significant flood plains (mostly in the area of Great Valley Creek relocation and tributaries of Great Valley Creek just east of the relocation area, but in one or two other areas as well) would be, under the NYSDOT proposal, filled in or relocated, federal, state and local flood plain rules must be considered. Participation in the NFIP places state and local governments in partnership with FEMA and mandates state and local governments to impose and enforce certain rules. If the rules are violated, the community can be penalized and even removed from the program. Removal from the program would make it impossible to obtain flood insurance,

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and without flood insurance most mortgage loans would be in default and new mortgage loans would become unavailable. Compliance with NFIP rules requires coordination with FEMA, the applicable NYS agency and the local flood plain administrator, to review the project, prepare new flood plain maps, etc. This would also be applicable for any other flood plains impacted in NFIP communities. Because Salamanca is also a NFIP community, it is likely the relocation of Great Valley Creek may have an impact on floodplains in Salamanca. See 42 USC 4001, The National Flood Insurance Act of 1968; and FEMA's implementing regulations for more information.

I have been informed that several areas of Cattaraugus Creek contain cobblestone beetle habitat. Further I have been informed that NYSDEC has recently denied a gravel skimming permit in the same area as the proposed Route 219 bridge span because of an extremely rare species in the gravel beds - cobblestone beetle. This is an issue that was not addressed in the EIS's prepared for this project.

Finally, the notice did not mention that the NYSDOT's application included an application for a State Pollutant Discharge Elimination System point source permit. If such a permit is being applied for, I request an opportunity to comment on that also.

If you would like further explanation of these comments I may be contacted by mail at address, by e-mail (my preferred method of contact) at BillNorton@atlanticbb.net or by telephone at (716) 244-6750.

Sincerely,



William M. Norton