14391 Perdido Key Dr.
Unit A
Pensacola, FL 32507
February 16, 2005

Certified Mail Receipt No. 7099 3400 0000 0585 6251
Return Receipt Requested

Gerard Fitzpatrick
Chairman
Cattaraugus County Legislature
6624 Maples Rd
P.O. Box 490
Ellicottville, NY 14731

Re: The Route 219 Boondoggle - Another Black Eye for Western New York

Dear Mr. Fitzpatrick:

A little over a year I was amazed to read that the Cattaraugus County Legislature approved a memorializing resolution requesting the U.S. Environmental Protection Agency to accept the record of decision favoring a freeway alternative for U.S. Route 219 from Springville to Salamanca.[1] Last May I was again amazed when I read that the Legislature is considering hiring a planner to "address some immediate needs" including the "monumental" Route 219 project.[2] Then just about a month later, the Salamanca Press reported that the entire 21-member legislature sponsored and "unanimously approved a resolution requesting Congress to include funding for Route 219 in the next federal transportation program."[3]

More than a year and a half ago the EPA decisively declared the Route 219 Final EIS to be insufficient and explained the many reasons why the freeway alternative cannot be given a Clean Water Act permit—an absolute prerequisite to any federal funding. Clearly the Route 219 project is not "immediate," and it is only "monumental" in its context as a boondoggle. The complete futility and absurdity of the County's actions are amazing, and they result in making everyone in Western New York look utterly foolish. They also make it easy to understand why, in a study released in June by Forbes magazine using a 143-criteria system, New York ranked dead last among the states in a list of the best places to do business. The inability of politicians and bureaucrats to understand or follow the rules does nothing to get projects done, and will do nothing to help get New York out of last place.

---

[1] As reported in the October 24, 2003 on-line edition of the *Salamanca Press*.
[2] As reported in the May 17, 2004 on-line edition of the *Salamanca Press*.
[3] As reported in the June 26, 2004 on-line edition of the *Salamanca Press*.

In November 2002 U.S. Transportation Secretary Norman Y. Mineta noted the average time to process environmental documents for major highway projects was four and a half years, which is way too long according to President George W. Bush, the U.S. Congress and Secretary Mineta. Not following well established rules and principals of environmental streamlining is widely acknowledged as the main reason projects take so long and cost too much money.

Route 219 is not the only project where the highway agencies have failed Western New York by not following well-established environmental laws or streamlining principals. In the recent past we have seen the Peace Bridge project shut down due to many serious problems and the Buffalo Inner Harbor project delayed for failures in the historic preservation review process. The Peace Bridge project is now being redone, with critics already saying that the same mistakes are being made all over again. The Buffalo Inner Harbor suffered the same fate. After a court stopped the project for its failure to comply with environmental laws, the project has stagnated for over four years. Finally, there was the South Towns Connector, considered part of the Continental One trade corridor. It finally died in 2000, more than eleven years after it was proposed and several years after it became clear that it was unnecessary.

However, it is clear that Route 219 is the true showpiece for the inability of the New York State Department of Transportation and the Federal Highway Administration to get a job done. Scoping for the Route 219 EIS began in November 1994—more than a decade ago—and took more than twice the average time it takes to process environmental documents for a major highway project. Now, after a plethora of excuses, no record of decision (ROD) is in sight. Unless, of course you count the "ROD" that the newspapers reported you and others were so happy to see, and the "ROD" Thomas Livak called "the milestone we've been waiting for."[4]

Amazingly, this "ROD" that so thrilled the County is the very same one that Assistant U.S. Attorney Mary K. Roach, as legal representative for the FHWA, made a special effort to inform me is not a ROD.[5] Certainly if the September 4, 2003 "ROD" was actually the final document in the Route 219 EIS process[6] and did not omit numerous key elements that NEPA regulations, FHWA policy and procedure and the courts require in a valid ROD, Ms. Roach would not have found it necessary to inform me that the FHWA would assert in court that the "ROD" is not a final decision.

The public has been told for years that a Final EIS or ROD is just around the corner. When the project was being discussed in 1994, we were told to expect a ROD by 1997, probably a reasonable estimate for a project of only 28 miles in a rural area. But project reports kept postponing the date until the Draft EIS was finally circulated in May in 1998.[7] Then the story

---

[4] As reported in the September 11, 2003 on-line edition of the *Olean Times Herald*.
[5] In a letter dated September 10, 2003.
[6] Which is what a ROD is by definition. See for example, *Preservation Coalition of Erie County v. Federal Transit Administration*, 012204 FED2, 02-6280, 2nd Cir. January 22, 2004, "Record of Decision ("ROD") — the final document in the administrative process — "
[7] Because the Notice of Availability was published in the on June 6, 1998, the FHWA was

was to expect a Final EIS by the end of the year. After that deadline passed, the Salamanca Press reported in June 1999 that Gary Gottlieb of the NYSDOT said the Final EIS would be issued in about a month. But, just three months later Mr. Gottlieb "suddenly"[8] discovered that the National Historic Preservation Act Section 106 review was deficient and complained of "a lot of little conditions" that "could either take two days of two years" to resolve.

Soon after that, on December 6, 1999, Peter Nixon of the NYSDOT told the Buffalo News that the Final EIS was 99.5% complete, but several lingering issues were expected to delay the issuance of a Final EIS by another month or two. But about two weeks later Mr. Gottlieb discovered more reasons to delay the Final EIS, telling the Buffalo News that they were already behind schedule, but that a Final EIS should be done and agreed upon before July 2000.

After still more predictions failed to materialize, on March 15, 2001, the Buffalo News reported that the NYSDOT assured completion of the Final EIS before June 5, 2001. Four months after that deadline was missed, the Olean Times-Herald reported NYSDOT Commissioner Joseph Broadman as saying it may take two or three months longer, but "we're on schedule to getting construction under way in the fall of 2003."

In the first week of February 2002, Mr. Gottlieb, in a sworn statement to the U.S. District Court Western District of New York, said that no decisions regarding alternatives or whether a supplemental Draft EIS would be filed had been made. Douglas Conlan of the FHWA generally said the same thing, but he also said that a Final EIS may never be issued and that this uncertainty will continue for the "foreseeable future."

But, just days later, in a February 15, 2002, Southern Tier West transportation planning board meeting, Mr. Nixon told the board to expect a Final EIS that fall, and that the construction of a freeway was scheduled for September 2003. Douglas Tokarczyk of the NYSDOT made similar comments that were reported by the Bradford Era on February 23, 2002.

The disparities between the sworn statements of Messrs.Gottlieb and Conlan and what they or their agencies were telling the Legislature and the public leads one to believe that the highway agency bureaucrats are practiced double talkers. Whether acting as shills or victims of the highway agencies, the Legislature's begging the EPA to ignore the Nation's environmental laws serves only to gave Western New York another black eye. Diligence and hard work are required to make Western New York a better place to live, the antithesis of the qualities shown in the Route 219 expansion project.

Although I do not know about the individual actions of most members of the Legislature or the Route 219 Committee, I do know that throughout the process, you, Mr. Fitzpatrick, have

---

required to certify to the EPA that the Draft EIS was circulated in May 1998.

[8] Where "suddenly" is obviously a relative term, since Mr. Gottlieb's "vision" occurred almost a year and a half after the NYS Office of Parks, Recreation and Historic Preservation informed the NYSDOT of the serious problems with the Section 106 review.

failed to show diligence or hard work. In various public statements you belittled those who raised questions or concerns about the project, showing you understand little about NEPA or what it takes to be an effective leader.

For example, in August 1998, the Salamanca Press reported that you said the Draft EIS was "very complete" and "included input by everyone interested." We now know how very wrong you were. Five years after the Draft EIS was issued, a greatly expanded Final EIS was declared insufficient by the EPA. A key reason the EIS's are insufficient is that they do not include "input" by everyone interested. Critically, they did not even include "input" by everyone required by law to participate in the preparation of the EIS's or required to provide comments on the EIS's.

The Seneca Nation of Indians, for example, was excluded from discussions until freeway corridor 15 was selected. After the SNI was notified and invited to participate, they asked that freeway corridors terminating in west Salamanca be examined. That request was not honored, despite the fact that the 1995 Freeway Alternatives Analysis Report clearly showed a route terminating in west Salamanca to be the best route.[9] My father, James Norton, raised historic preservation issues that, under Section 106 of the National Historic Preservation Act, required that he be invited to participate in the Section 106 review, but he was never invited. Also, the National Park service informed the highway agencies, in scoping and in a comment letter to the Draft EIS, of the requirement that it comment on the impacts the North Country Scenic Trail, a requirement that has yet to be met. Even the EPA and the U.S. Army Corps of Engineers made requests and comments that were ignored, and the Federal Emergency Management Agency, the expert agency which must be involved in order to comply with Executive Order 11988, was not even informed of the project.

In August 1998 you also said, "I wonder where the naysayers have been for all this time? Now when we're finally, after years and years of effort, on the verge of the 219 project we see a few whose individual self interest seems to be more important than the big picture." That statement is of course completely untrue. Ironically, only the special interests got a real voice in the project. Others were allowed to provide opinions, but they were never given serious consideration. In fact it was the special interests that selected the freeway route. For example, then Great Valley Town Supervisor, Charles Krause and a few others, in a behind-closed-doors-meeting recommended changing the freeway route from corridor 15, the one the public had been told since 1995 was the only feasible and prudent corridor, to corridor 26, a corridor rejected in both the 1995 Freeway Alternatives Analysis Report and corridor selection methodology shown in the Draft EIS due to its excessive farmland and wetland impacts. This change was covered up in the EIS's and is one that the highway agencies are still attempting to justify with post hoc rationalizations.

---

[9] After the error in the FAAR stating that the SNI had agreed to a east Salamanca intersection is corrected.

This late-in-the-process change surprised many in Great Valley[10], not just because so few knew about it, but also because it so clearly violated the openly established principles documented in a 1994 Great Valley position paper. The changed route not only showed total disregard for public safety issues and a significant increase in wetland impacts in the Great Valley segment of the freeway over the least damaging and previously determined feasible and prudent alternative, but also resulted in unnecessary and severe increases in impacts to historic properties, floodplains, water bodies and farmland.

For more than 30 years the courts have said that, at the very least, NEPA is an environmental full disclosure law. In 1989 the U.S. Supreme Court held that NEPA dictates a set of procedures that requires agencies to disseminate all relevant environmental information. The Second Circuit Court of Appeals held that the primary function of the EIS is to insure fully informed and well-reasoned decisions, and in order to fulfill that role the EIS must set forth sufficient information for the general public to make an informed evaluation.[11] The Federal District Court for the Western District of New York noted that a significant role of the EIS is to provide "a springboard for public comment."[12]

Thus, those you called "naysayers" were doing exactly what they were supposed to do. They reviewed the document and pointed out serious or fatal errors, last-minute behind-closed-door changes, and questioned or challenged other items.

Unbelievably, in the June 2002 hearing in Ellicottville, you made a statement similar to your "naysayer" statement. Many of the comments made at that hearing and at the Springville hearing were factual, well researched and correct. They pointed out fatal errors, unlawful biases and the unconscionable waste time and money the failed project had cost, yet you termed them as "bitter." Clearly they were not. Just like the "naysayers" of 1998, these "bitter" people did exactly what NEPA intended they do: perform a key role in the NEPA process that focused the EPA's review and provided the EPA with much of the information needed to write their punishing Final EIS comment letter.

Those knowledgeable in the successful application of NEPA stress that adhering to process, especially the meaningful public involvement requirements, is the *only* way a project like the Route 219 expansion review can succeed without costly delays. Others, like you, even after observing years and years of repeated failures in Western New York, just do not seem to get it, not even when the President, the Congress and the Transportation Secretary take the time to painstakingly spell it out.

---

[10] As evidenced by comments at the July 1998 public hearings and comments reported in local newspapers in July and August 1998.
[11] *Sierra Club v. Corps of Engineers*, 701 F.2d 1011 (2nd Cir. 1983).
[12] *Preservation Coalition of Erie County v. Federal Transit Administration*, 129 F. Supp 2d 551 (WDNY March 31, 2000).

In the remainder of this letter I will expand upon previous comments and discuss a few of the more obvious errors made by the NYSDOT and FHWA. After you have finished reading this letter and conducting your follow-up due diligence, it should be clear that the Route 219 project has been doomed to failure from almost the very beginning. You should also understand that the highway agencies and their favorite consultants have been making the same errors over and over again. Near the end of this letter I have listed some specific things that I would like you to consider to accomplish what is needed and right for Western New York.

## Project Planning and Scoping

NEPA requires that "There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action."[13] The Council on Environmental Quality[14] has published guidance to help the FHWA properly and efficiently conduct the scoping process. CEQ guidance[15] stresses the importance of providing factual information about environmental impacts and their legal protections. Further, so that late-in-the-process misunderstandings and delays will be avoided, the CEQ cautions about making commitments that cannot be kept under the law.

Right from the start the NYSDOT and the FHWA failed to follow CEQ guidance and made commitments to farmers they could not keep. In sharp contrast to laws that require certain impacts to be *avoided* (e.g., historic sites, wetlands, water bodies and floodplains), the law requires only that impacts to farmland be *minimized*. The language in the law is as clear as the concept behind it: farmlands are fungible, whereas historic properties, wetlands, water bodies and floodplains are not. The misguided promises and illegal special treatment given to certain farmers has resulted in a project plagued by misunderstanding and delay—just as the two-decades old CEQ guidance warned about.[16]

Planning and scoping is also used to identify agencies that must be invited to participate in the preparation of the EIS or to provide comments on it. For a number of reasons, agencies with expertise or jurisdiction by law are required to be involved early in the process.[17] In

---

[13] 40 CFR 1501.7.

[14] Created under NEPA, the CEQ ensures that federal agencies meet their NEPA obligations. A key function of the CEQ is to approve agency NEPA procedures and issue guidance to address systemic problems. http://www.fhwa.dot.gov/environment/ceq_info.htm.

[15] *Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping*, April 30, 1981.

[16] Amazingly, despite all the self-congratulatory language in the EIS's and self-serving statements from the specially treated farmers and others, the EIS's fail to show the required compliance with farmland protection laws. All that is shown is that impacts to the land of certain farmers was avoided. These errors are further explained on page 15 of this letter.

[17] This is required under NEPA and CEQ and FHWA regulations and policy and procedure. See

addition to providing comment as required by NEPA, these agencies help ensure that correct information on the treatment of various environmental impacts is clear to everyone at the onset and that the EIS contains everything they need to adopt it for any permit or approval they must issue. The failure to invite many agencies with expertise or jurisdiction by law made NEPA compliance impossible in the Route 219 expansion project.

## Failure to Involve the National Park Service

Because both the Route 219 build alternatives affect the North Country National Scenic Trail, the National Park Service is required to provide comments on the impacts in a draft EIS that will accompany the EIS through the environmental review process[18]. Despite having early and full knowledge of the potential impacts to this important resource, the highway agencies failed to follow the law and did not involve the NPS in the project.

Fulfilling its responsibility under NEPA, the Foothills Trail Club notified the highway agencies during the scoping process that alternatives being discussed would affect the North Country National Scenic Trail. Other scoping participants said that hiking trails should be improved during the proposed highway expansion project. However, preparation of the Draft EIS began immediately after scoping without any notification to the NPS.

## Failure to Involve the Federal Emergency Management Agency

During planning and scoping it became known that the build alternatives would impact floodplains. President Jimmy Carter's May 24, 1977 issuance of Executive Order 11988, Floodplain Management, outlines the many reasons floodplain protection is so important and sets forth the requirement that floodplains must be avoided whereever there is a practicable alternative. As the expert federal agency for floodplain matters, the Federal Emergency Management Agency was required to be invited to participate in EIS preparation and is the agency that must provide draft EIS comments under NEPA[19], yet FEMA was not invited to participate in or comment on the Route 219 Draft EIS.

---

for example see *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* 46 Fed. Reg. 18026 (1981), Question 13 b, "Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determned early in the EIS process."

[18] 42 U.S.C. 4332(c).

[19] 42 U.S.C. 4332(c) and 23 CFR 771.111(d). Also, see Table 2 of the March 19, 1992 FHWA memorandum *Information: Revised Guidance on Cooperating Agencies*.

Failure to Involve the Bureau of Indian Affairs

The Bureau of Indian Affairs is another agency that FHWA guidance says must be invited to participate as a cooperating agency, because it has jurisdiction by law when land may be transferred from Indian Reservations. The Draft EIS shows that the BIA was not invited to participate.

Failure to Involve the Seneca Nation of Indians

Although Tribes are not required to become a cooperating agency, 40 CFR 1508.5 makes the common sense point that when an action takes place or will affect a reservation, the Tribe can be asked to become a cooperating agency. The Draft EIS shows that this was not done, and that the SNI was not even consulted until just before the Draft EIS was issued.[20]

Failure to Plan for Historic Preservation Issues

To comply with Section 106 of the National Historic Preservation Act[21] the State Historic Preservation Officer[22] must participate in the scoping process[23]. Further, local governments, Indian Tribes and certain other organizations and individuals must also be invited to participate.

The scoping reports and the agency contact documentation in the EIS's show that the SHPO was not invited to and did not attend the scoping meetings. In a meeting held on October 4, 1999 Dr. Robert Kuhn, the individual at SHPO primarily responsible for the Route 219 review, told me that the SHPO had not attended the scoping meetings.

The Draft EIS shows that no local governments were informed about the Section 106 review or asked to participate. I have confirmed that the Cattaraugus County Legislature, the Cattaraugus County Planning Department, the Cattaraugus County Route 219 Committee, the Township of Great Valley and the Great Valley Planning Board were not informed of the Section 106 process or invited to participate. The Draft EIS shows that no local governments were invited. A letter from the SNI contained in the Draft EIS confirms that the SNI was not invited to participate in the Section 106 process during the planning period.[24]

---

[20] See, for example, Draft EIS Letter No. 81, dated February 20, 1998 from Cleo John. This detailed letter leaves no doubt that the SNI had never been properly informed, let alone properly involved, in the project.

[21] When Section 106 compliance is coordinated with NEPA as the FHWA elected to do in the Route 219 EIS.

[22] The SHPO for the Route 219 project is the NYS Office of Parks, Recreation and Historic Preservation.

[23] 36 CFR 800.4(a)

[24] Draft EIS Letter No. 81.

Because the highway agencies chose to conduct NHPA compliance in coordination with NEPA, all the federal agencies with jurisdiction by law must also participate in the Section 106 review. To date, none of them have.

These failures are far from trivial and cannot be compensated for at the end of the project. The courts have long recognized that the procedural requirements of NEPA must be followed scrupulously.[25] One court explained this concept by saying, "...because NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. The procedures required by NEPA, 42 U.S.C. § 4339(C), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging, pro-forma compliance will not do."[26] In the concurring opinion to the 1972 U.S. Second Circuit Court of Appeals[27] *Monroe County Conservation Council v Volpe*[28] decision the judge said, "I am persuaded that some state and federal highway officials are inclined to look down on conservationists and environmentalists as trouble makers. The only way to change this attitude is to require full and strict compliance with applicable valid statutes and administrative regulations."

NEPA's requirement of compliance "to the fullest extent possible,"[29] the CEQ's mandate to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values"[30] and court mandates of "full and strict compliance" leave no doubt that the serious procedural errors made in planning and scoping doomed the Route 219 EIS process to failure.

## The Draft EIS

Draft EIS preparation began soon after scoping, and just as soon, the errors made in planning and scoping compounded and new errors began to proliferate.

### Alternatives Analysis - The Requirements

---

[25] *Town of Huntington v. Marsh*, 884 F 2d 648, 653 (2nd Cir.1989), citing *Conservation Society of Southern Vermont Inc. V. Secretary of Transportation*, 508 F 2d 927 (2d Cir. 1974), vacated on other grounds and remanded, 423 US 809 (1975).
[26] Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974).
[27] The circuit that includes New York.
[28] *Monroe County Conservation Council v. Volpe*, supra, at 703.
[29] 42 U.S.C. 4332.
[30] 40 CFR 1501.2.

NEPA requires that to the fullest extent possible EIS's shall include a detailed statement on alternatives to the proposed action.[31] CEQ regulations call the alternatives analysis process "the heart of NEPA"[32] and require agencies to rigorously explore and objectively evaluate all reasonable alternatives.[33] The U.S. Second Court of Appeals has called the alternatives analysis "the linchpin of the entire impact statement."[34] The failure to examine a reasonable alternative renders an EIS inadequate[35].

Alternative consideration in highway projects has been called two dimensional. First a choice is made between building the highway or relying on existing routes or alternative means of transportation, then a choice among various alternative routes and designs is made.[36]

## Failure to Consider Route 16

It is obvious to Western New Yorker's that a U.S. Route 16 freeway would be an alternative to a Route 219 freeway, so obvious in fact that Route 16 freeway has been repeatedly discussed, analyzed and proposed as an alternative to a Route 219 freeway.[37]

The Draft EIS acknowledges that a Route 16 corridor is an alternative to Route 219, but failed to give it any consideration in the alternatives analysis process. Prior to analyzing alternatives, the Draft EIS dismisses the study of Route 16 with false information. On page 2-2 of the Draft EIS it says "the 16-219 Corridor Study Final Report, dated September, 1977 recommended that U.S. Route 219 be designated as the primary corridor." However, the report itself does not say that. The report clearly says that both Route 16 and Route 219 are primary corridors.

The answer to question 2a. of the CEQ's *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* says, "Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes ... a particular alternative. Reasonable alternatives include those that are practical

---

[31] 42 U.S.C. § 4331(c)(iii)
[32] 40 CFR 1502.14.
[33] 40 CFR 1502.14(a).
[34] *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697-698 (2d Cir. 1972).
[35] See for example, *Brooks v. Coleman*, 518 F.2d 17, 18 (9th Cir.1975).
[36] *Appalachian Mountain Club v. Brinegar*, No. 74-208 (D.N.H. March 25, 1975).
[37] In the context of the Route 219 expansion proposal, other viable alternatives incorporating the Route 16 corridor could, for example, include a Route 16 upgrade by itself or in connection with a Route 219 upgrade or a Route 16 freeway with a Route 219 upgrade.

or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."[38]

Although I cannot prove that the false information was intentionally used to dismiss a Route 16 analysis, it seems plausible that it was. The 16-219 Corridor Study itself is clear: both corridors were determined not only viable corridors, but primary Western New York north-south transportation corridors. Further, in the November 17, 1994 Liaison Committee Meeting summary it is correctly stated that the Route 219 was "a" primary corridor, which is much different than the statement made in the Draft EIS that it was "the" primary corridor.

A particularly disturbing aspect of the inclusion of false information about Route 16 and the unexplained decision to not consider Route 16 as an alternative *to* the proposed action, is the participation of Robert J. Russell (Regional Director of the NYSDOT at the time the Draft EIS was issued) and Gary V. Gottlieb, Director of the NYSDOT High Priority Projects Group (the NYSDOT person most directly responsible for the preparation and review of the Draft EIS) as members of the Cattaraugus County Route 219 Committee. As an advocate of a Route 219 freeway, the Route 219 Committee is in competition with the Route 16 Association, a group advocating an expansion of Route 16. Certainly in cases where highway agencies illegally dismiss such an obvious and reasonable alternative with the use false information and when principal highway agency decision makers participated on a committee opposed to the dismissed alternative, it is more than fair that involved agencies and the public question ethics as well as the judgment of these decision makers. This of course makes the omission of any reasoned discussion of the decision not to study Route 16 as an alternative that much more serious a violation of NEPA principals.

Just as the highway agencies failed to observe the CEQ's warnings about making spurious promises to certain farmers, they failed to observe CEQ's warnings about selecting alternatives based on what project proponents want. A Route 16 freeway is an extraordinarily obvious and reasonable alternative to a Route 219 freeway, as prior studies and Route 219 EIS documents state. However, the best proof of this is the fact that almost every hour of every day car and truck drivers make the choice between taking Route 16 or 219 when driving through Western New York. The failure to write even a single sentence about Route 16 in the alternatives analysis section (the heart of NEPA and the linchpin of the entire statement) makes the Draft EIS inadequate.

## Section 4 (f) Errors in the Freeway Corridor Selection Process

In federal-aid highway projects, resources protected by Section 4 (f) of the Department of Transportation Act (e.g., public parks and historic sites) are of extraordinary importance. In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) the United States Supreme Court has said that, simply put, Section 4 (f) provides a "plain and explicit bar" to the use of a

[38] 46 FR 18026 (1981).

Section 4 (f) resource in all but the most unusual circumstances. In *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2nd Cir. 1972), the court put the *Overton Park* holding in other words by saying that a road must not take a Section 4 (f) resource unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so. Further, if Section 4(f) resources cannot be avoided, Section 4 (f) use must be minimized.[39] The evaluation of the use of Section 4 (f) resources must be "evaluated early in the development of the action when alternatives to the proposed action are under study."[40]

In recognition of the extraordinary importance of avoiding impacts to Section 4 (f) resources, the FHWA has issued several policy, procedure and guidance documents on Section 4 (f) compliance. FHWA policy recognizes a critical first step in analyzing alternatives is to identify "feasible and prudent"[41] alternatives disregarding whether they impact Section 4 (f) resources.[42] If alternatives are eliminated solely because they may impact a Section 4 (f) resource, it cannot later be proven that impacts to Section 4 (f) resources have been minimized. Because this critical FHWA policy directive was not followed in the Route 219 freeway corridor selection process, it is impossible to conclude that the requirements of Section 4 (f) have been satisfied.

Both the August 1995 Freeway Alternatives Analysis Report and the freeway alternatives analysis method used in the Draft EIS, in direct opposition to FHWA guidance, determined alternatives to be not feasible and prudent based solely on impacts to selected Section 4 (f) resources. In making this error, not only did the highway agencies fail to follow a quarter century old U.S. Supreme Court holding and a six-year-old FHWA policy directive, but they also failed to follow the contemporaneous advice of the then head of the NYSDOT Environmental Analysis Bureau.

In a Corridor Analysis - Agency Meeting held on February 22, 1995 where the consulting firm Environment and Ecology, Inc. gave a "... detailed presentation on the methodology and resulting respective preference of the 28 corridors based on an environmental analysis." Gary R. McVoy, Director, of the EAB noted that the methodology did not include a cultural resource component and said that it should. He also said that the corridors impacting state forest land should not be eliminated based only on Section 4 (f) or the need of legislative approval.

---

[39] 23 CFR 771.135 (a)(ii).
[40] 23 CFR 771.135(b).
[41] An alternative is not feasible if it cannot be constructed in accordance with sound engineering principles and practices. An alternative is not prudent if it creates truly unique problems or does not meet the project purpose and need.
[42] FHWA memorandum dated November 15, 1989, Subject: *Alternatives Selection Process for Projects Involving Section 4 (f) of the DOT Act*, From: Director, Office of Environmental Policy, Washington, D.C. 20590.

Dr. McVoy's comments hit on two clear reasons the corridor analysis methodology could not work. First, by noting that a cultural resource component should be included, Dr. McVoy recognized that historic sites are also Section 4 (f) resources and are given the same protection as public recreation sites.[43] The second reason was the recognition that Section 4 (f) could not be complied with if corridors were eliminated solely because they impacted certain Section 4 (f) resources. Dr. McVoy thereby provided the same procedural advice as the FHWA guidance.

By choosing to ignore established law and policy and the direct advice of the EAB when conducting the Draft EIS freeway alternative corridor analysis, the highway agencies early in the process foreclosed the possibility of complying with Section 4 (f) in the Route 219 expansion project, thereby also foreclosing the possibility of successfully completing the project.

## Clean Water Act Errors in the Freeway Corridor Selection Process

The EAB was not the only expert agency that the highway agencies chose to ignore. Minutes of the Agency Coordination Meeting held on August 30, 1995 document that the meeting was "... requested by the EPA and the U.S. Army Corps of Engineers to discuss the methods used for the Corridor Analysis." Item C. of the minutes says "EPA expressed concern that the requirements for Section 404 permitting may be as rigorous as a Section 4 (f) Evaluation. However, E&E explained Section 4 (f) requires proof that no prudent and feasible alternative exits which avoids the 4 (f) property, while Section 404 allows the options of minimization and mitigation if avoidance is not possible."

E&E's statement is incomplete and misleading, and the EPA appeared to know this. As explained in item D. of the minutes, the "EPA stated they appreciated this short presentation and have a better understanding of the effort put into the Corridor Analysis, however a more thorough explanation of the analysis should be included in the EIS. The brief report titled Freeway Alternatives Analysis Report dated August did not fully explain the analysis and would not be acceptable as documentation if simply made an appendix to the EIS."

Not only was the EPA's research request ignored,[44] but the comments the EPA made in the August 30, 1995 meeting were completely misrepresented in the Draft EIS. On page 7-12 the

---

[43] See for example *Preservation Coalition of Erie County v. Federal Transit Administration*, (WDNY), supra, at 565, where the court noted that "Although *Overton Park* involved a public park, § 4 (f) applies with equal force to historic sites and there is no indication in the case law that such sites are accorded lesser protection under statute," and *Maryland Wildlife Federation v. Dole*, 747 F.2d 229, 236 (4th Cir. 1984), holding that all Section 4 (f) resources receive the same degree of protection.

[44] The analysis contained in the Draft and Final EIS's was much less rigorous than that contained in the FAAR and contained no discussion of the CWA or explanations of the interactions of the environmental laws, and, of course, failed to comply with Section 4 (f). This, of course, means that the EIS's fail to be adequate for the purposes of the EPA or the Corps.

Draft EIS says "A meeting was held on August 30, 1995 with the EPA to review the methodology used in determining the selection of alternative #15 as the best general location for a freeway. The methodology was generally accepted by the EPA who recommended that a detailed description of the selection process be included in the DEIS." That is much different from what the EPA actually said and a clear attempt to cover up a serious disagreement with an expert agency, and a clear violation of the full disclosure requirements of NEPA.

This failure to follow the EPA's directive made it impossible for the EPA or the Corps to adopt the Draft EIS for CWA purposes. Because no federal funds may be spent until a CWA permit is granted, this is yet another error that was fatal to the project—one made more than nine years ago—one that there is absolutely no excuse for.

## Cumulative and Indirect Impacts

Another fatal error in the Draft EIS was the total omission of the critically important cumulative and indirect impact analysis. CEQ regulations require cumulative[45] and indirect[46] impacts to be considered in EIS's. Recent FHWA guidance notes this, saying, "Federal indirect and cumulative impact requirements of the National Environmental Policy Act (NEPA) process were established in 1978 with the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act...."[47]

EPA EIS review guidance says "The combined, incremental effects of human activity, referred to as cumulative impacts, pose a serious threat to the environment. While they may be insignificant by themselves, cumulative impacts accumulate over time, from one or more sources, and can result in the degradation of important resources. Because federal projects cause

---

[45] 40 CFR 1508.7. "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

[46] 40 CFR 1508.8 (b). Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

[47] Memorandum dated January 31, 2003 subject Interim Guidance: Questions and Answers Regarding Indirect and Cumulative Impact Considerations in the NEPA Process, page 1.

or are affected by cumulative impacts, this type of impact must be assessed in documents, prepared under the National Environmental Policy Act (NEPA)."[48]

The Draft EIS claimed the freeway alternative met project purpose and need, in part, because of all the development that it would cause. However, it failed to even mention what environmental impacts the projected development would cause. Obviously, you cannot have one without the other. Further, the Draft EIS failed to mention past and current EIS's or other planned development activities.

Failure to Show Farmland Impacts are Minimized

Another important and easily understood Draft EIS error is the failure to show that farmland impacts were minimized. It is important to mention this because of the asserted Herculean efforts that went into the protection of farmland and all the self-congratulatory statements made by EIS preparers, project proponents and certain farmers, that farmland impacts were successfully minimized. However, it is clear they were not. Not only that, but the NYSDOT, the FHWA and their consultants showed they do not even know what farmland is. Further, they showed the inability to follow instructions and properly fill out the farmland protection forms.

The federal test of farmland minimization is an objective one. Farmland minimization is shown by properly filling out Form AD-1006 and obtaining a score indicating adequate minimization. Obviously, if the form is not properly completed, farmland impact minimization cannot be shown. In the Draft EIS, it is extraordinarily obvious that Form's AD-1006 in the Draft EIS were not completed properly.

The first step in the farmland protection process is the identification of lands qualifying for protection. These are prime or unique farmlands and farmlands of statewide importance. Prime or unique farmlands are determined by soil type, and farmlands of statewide importance are defined by the state. Next, project impacts (direct, indirect and cumulative) to active farmlands are then quantified.

The instructions to Form AD-1006 say "In completing part III include ALL acres in the project site to be converted, farmland and non-farmland. In part III B (total acres to be converted indirectly) include: • All acres that are not being directly converted, but that would no longer be capable of being farmed, because the conversion would restrict access to them • All acres planned to receive services from an infrastructure project (e.g.: highways, utilities), as indicated in the project justification, and that are likely to be directly converted as a result of the availability of the new infrastructure services."

---

[48] *Consideration of Cumulative Impacts in EPA Review of NEPA Documents, EPA 315-R-99-002/May 1999*, page 1.

Instead of following the instructions, the NYSDOT and the FHWA made up their own rules and included only acres "measured in right of way". Obviously, making this error precluded any possibility of determining if farmland impacts are minimized. However, a few more errors will be noted to illustrate just how completely the NYSDOT and FHWA botched this simple process.

Form AD-1006 instructions say "Part IIIC should equal the sum of parts IIIA & IIIB - all acres to be converted. If the project plans include more than one design alternative, each alternative should be considered as an alternative site." However, the NYSDOT and the FHWA did not do this. For the Erie County Form AD-1006, IIIA for site A (the upgrade alternative) is 13.0, IIIB is 0 and IIIC (what should be IIIA plus IIIB) is 54.8. For site B (the freeway alternative) IIIA is 90.6, IIIB is 4.0 and IIIC is 198.4. Clearly, 13 plus 0 = 13, not 54.8, and 90.6 plus 4.0 = 94.6, not 198.4.

For the Cattaraugus County form, IIIA for site A (the upgrade alternative) is 173.0, IIIB is 0.1 and IIIC is 821.4. For site B (the freeway alternative) IIIA is 304.8, IIIB is 6.5 and IIIC is 2,052.4. Clearly, 173.0 plus 0.1 = 173.4, not 821.4, and 304.8 plus 6.5 = 311.3, not 2,052.4.

Part V of Form-1006 represents about 38% (100 out of 260) of the possible point score on the form and is supposed to indicate relative value of farmland to be converted based upon the "Land Evaluation System" used. For the Cattaraugus County form, the land evaluation system used was "Chatauqua County".

Part VI, site B, line 3. is not correct. This section must include land that has been farmed for more than five of the last ten years. For this purpose, farming means any management for a scheduled harvest or timber activity. It is clear that timber activity has not been considered. For example, on the Norton farm, about 170 acres of land of statewide importance, within an agricultural district and actively managed and used for timber activity was not considered. Also, it is clear from the Section 4 (f) section of the Draft EIS that this is true for several other farms as well.

Part VI. For Site B, line 8. is not correct. Forest land is clearly not included, but it must be. It is likely that other land is omitted also, but there is not enough information in the report to determine this. NEPA requires that this information be available.

In general, it was difficult to review the Form's AD-1006 contained in Appendix O. In no case were the numbers on the forms included in the report because the report used acres and the appendix used hectares as the measurement unit. Further, even after units on the forms were converted to hectares, it was difficult or impossible to locate the source of the information in the Appendix.

Only basic reading and math skills are needed to correctly fill out Part III of Form AD-1006. Yet, in the Route 219 EIS, the subcontracted consulting firm of Ecology and Environment, Inc. could not, and no one at the primary consulting firm or at the highway

agencies caught the errors when Appendix O was reviewed. The failure to show that farmland impacts were minimized as required by law clearly makes all who were responsible for the preparation or review of farmland impacts and those who declared the Draft EIS to be "thorough and complete" or praised the preparers for doing such a good job protecting farmland look gullible and uninformed.

## Failure to Consider Forest Land

Another embarrassment to all involved in the preparation or review of the EIS's is the fact that the failure to consider forest land impacts was not limited to the fatal errors made in the Form's AD-1006. Forest land impacts are simply not considered in the Draft EIS.[49] How this could happen in a Draft EIS that you, a long-time forest industry insider, called "thorough and complete" is incomprehensible to me.

About 56% of the land directly taken by the freeway alternative is forest land.[50] As you must know, forests contribute significantly to the economy of Western New York and forests are of extreme importance to the environment of NYS. Under NEPA and SEQRA forest land impacts must be disclosed and the environmental consequences discussed. In scoping, the DEC reminded everyone of this when they said that "the accurate determination of impacted forest lands is critical".[51]

If you need a reminder of how important forest land is to NYS and why it must be protected, I would suggest you read the *2002 New York State Open Space Conservation Plan*.[52] The plan provides a blueprint for NYS's land conservation and environmental protection plans. Goals of the plan include the protection of forests in order to protect habitat for the diversity of plant and animal species and their ecosystems and the traditional pastimes of hunting, trapping, fishing and viewing wildlife, to maintain the critical natural resource-based wood products industries and to preserve open space for the protection and enhancement of air quality.

Destroying and fragmenting forest land by cutting a 150 yard wide[53] swath right down the middle of Cattaraugus County without disclosure, discussion or avoidance, minimization or mitigation efforts cannot be done—neither NEPA nor SEQRA will allow it.

---

[49] See Chapter 5 of the Draft or Final EIS.
[50] Final EIS, Appendix O, page 5-2.
[51] *Scoping Report.* NYSDOT, FHWA, DeLeuw Cather and Company, April 1995, page A-5.
[52] The plan and additional information can be found at http://www.dec.state.ny.us/website/opensp/index.html.
[53] The Draft EIS says that the average freeway width is 150 meters which is about the same as 150 yards.

The Missing Heart

Because it is critical that you understand this, I will repeat and expand upon the general alternatives analysis concepts presented at the beginning of this section. NEPA requires that to the fullest extent possible EIS's shall include a detailed statement on alternatives to the proposed action.[54] CEQ regulations call the alternatives analysis process "the heart of NEPA"[55] and require agencies to rigorously explore and objectively evaluate all reasonable alternatives.[56] The Second Circuit Court of Appeals has called the alternatives analysis "the linchpin of the entire impact statement."[57]

Alternative consideration in highway projects has been called two dimensional. First a choice is made between building the highway or relying on existing routes or alternative means of transportation, then a choice among various alternative routes and designs is made.[58]

40 CFR 1502.14 requires that the alternatives analysis "Based on the information and analysis presented in the sections on the Affected Environment (Section 1502.15) and the Environmental consequences (Section 1502.16)...should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." In doing this agencies shall "Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated" and "Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits."

This makes it clear that the information contained in the "Assessment Memos" and incorporated by reference is required to be included in the EIS. By hiding this information, by failing to include the discussions and information required by 40 CFR 1502.15 and 40 CFR 1502.16 for the corridor selection analysis as the EPA told the highway agencies in 1995 that they must, and by excluding any analysis or discussion of alternatives to the proposed action (e.g., the Route 16 corridor) the highway agencies failed to include the vast majority of the "heart" in the Route 219 Draft EIS.

Because site-specific details of the alternatives analyzed for the upgrade and the freeway alternatives were not available in the Draft EIS it was impossible for reviewing agencies and the public to understand and consider meaningfully the factors involved as the courts require.[59] If this detail had been included it would have shown the failures to comply with Section 106,

---

[54] 42 U.S.C. § 4331(c)(iii).
[55] 40 CFR 1502.14.
[56] 40 CFR 1502.14(a).
[57] *Monroe County Conservation Council, Inc. v. Volpe*, supra, at 697-698.
[58] *Appalachian Mountain Club v. Brinegar*, No. 74-208 (D.N.H. March 25, 1975).
[59] See, for example, *Sierra Club v. United States Army Corps of Engineers*, 772 F.2d 1043, 1054 (2d Cir. 1985).

Section 4 (f), Executive Orders and the CWA. It also would have been easy to see that they were not evaluated objectively or consistently—both clear requirements of an adequate EIS.

Accordingly, the Route 219 EIS delivered, without a heart, in May 1998, was dead on arrival.

## 1998 to 2002 - Denial, Cover-up and Waste

Substantive questions about the adequacy of the Draft EIS were raised in public and agency comment before, during and after the July 1998 hearings. These things included the failure to follow the advice of safety experts in siting the freeway alternative, the failure to analyze the Route 16 corridor, the failure to properly identify and avoid historic sites, wetlands, water bodies, forest land, farm land, wildlife habitat, and the failure to consider cumulative and indirect impacts. At the conclusion of the Draft EIS comment period, there could be no serious doubt that the preparation of a new or supplemental draft EIS was required. However, instead of facing up to this reality, the NYSDOT, the FHWA and their consultants put their own interests ahead of the public's and spent four years trying to deny or cover up the errors they made.

Scores of silly, wasteful, futile or unethical bureaucratic actions occurred during this period; however, these were overshadowed by the abrogation of responsibility of federal, state and local politicians that allowed the highway agencies and their consultants to waste millions of dollars and years of irreplaceable time in their efforts to cover up their failures. A significant and inexcusable error made by the County will be used to illustrate this.

In public hearings, interviews and a resolution, you and others proclaimed that the Draft EIS was "thorough and complete." Most of these proclamations came soon after the County's Chief Planner wrapped up his participation in a two and one-half year NYS study of cumulative impact analysis by writing a 50 page memorandum dated July 10, 1998 and titled *A Scenario on Using Incentives to Encourage Cumulative Impact Analysis in New York State, Planning Subcommittee Final Report*.[60] The memorandum "presents a 'scenario' or illustration of one possible implementation strategy" for a new statewide rule. A scenario that "Instead of making a recommendation...discusses the many interrelated facets" of this policy issue, a "heuristic pathway, to a starting point for cumulative impact policy formation."

Logically, it would seem that any policy (whether formulated while wandering down a heuristic pathway or sitting at a desk) to encourage cumulative impact analysis would include a "thorough and complete" review of EIS's by county planning boards, committees, or legislatures to make sure they contain this required analysis. Certainly calling a EIS that contained no discussion or analysis of cumulative or indirect impacts "thorough and complete" (as you, Dr.

---

[60] The memorandum was dated July 10, 1998 and public hearings were held on July 14, 15 and 16, 1998.

Martin and the Legislature did) provides no incentive for anyone to do what is required to properly consider these impacts.

In 1999 Cattaraugus County missed another chance to examine the Draft EIS for inclusion of the required cumulative and indirect impact analysis when an article titled "What are Cumulative Impacts?" appeared in the Autumn issue of *The Cattaraugus County Advantage*. Dr. Martin's article began by saying "What are cumulative impacts? Have you ever seen one? How extensive are these elusive creatures? Will they hurt us or help us? To find out, let's do a quick thinking exercise."

Dr. Martin then uses "The Coffee Analogy" to explain cumulative impacts and ends that part of the article saying, "This exercise helps us to realize that it is better to stop, or prevent, a problem before it occurs. It is also less costly".

On that point, Dr. Martin is right. If the County had not been extraordinarily sloppy in its review of the Route 219 Draft EIS and had done a "thinking exercise" it could have identified this critical problem and demanded that the NYSDOT and the FHWA prepare an EIS that was truly "thorough and complete." If you, Dr. Martin, the Planning Department, the Planning Board, the Route 219 Committee or the Legislature had attempted to answer the following questions about the Draft EIS: "Where are the cumulative impacts disclosed? I see them all around us, why do the highway agencies not see them? How extensive are they? Will they hurt us or help us?", then the waste of years of time and millions of dollars could have been avoided.

Later the County lost another opportunity to recognize the failure of the Route 219 Draft EIS to include a cumulative and indirect impact analysis. Planning Board minutes and newspaper articles document how helpless and frustrated County representatives felt when they did not get what they thought were adequate answers to their questions from the Federal Energy Regulatory Commission concerning indirect impacts of the Millennium Pipeline on important SNI cultural resources. Yet they never even asked the NYSDOT or the FHWA why these very same impacts were not included in the Route 219 Draft EIS. Here again, if the questions "What are cumulative impacts? Have you ever seen one? How extensive are these elusive creatures? Will they hurt us or help us?" had been asked, it should have been easy to see that the direct and indirect impacts of the Millennium Pipeline on SNI cultural resources as well as its impact on other environmental resources are cumulative impacts that should have been disclosed in the Route 219 Draft EIS.

Of course, Cattaraugus County alone is not to blame for the fatal failure to not include a cumulative or indirect impact analysis in the Draft EIS. The analysis of indirect and cumulative impacts has been an absolute requirement for an adequate EIS for decades. Therefore, it is unquestionable that the self-proclaimed NEPA experts at the NYSDOT, the FHWA and the consulting firms made a mistake that no actual NEPA expert would. This failure is even more amazing considering that I made special efforts to notify the NYSDOT and the FHWA of the fatal omission of a cumulative and indirect impact analysis in the Draft EIS. This was done in July 1999 letter, in a November 1999 meeting and in several subsequent letters.

## The 2002 Environmental Assessment, Reevaluation and Revised Section 4 (f)

The NYSDOT and the FHWA purportedly issued the Environmental Assessment/ Re-valuation / Revised Section 4 (f) Evaluation for several reasons, among them: to solicit information not considered in the draft EIS, to fulfill the requirements of 23 CFR 771.135 (m) to prepare a separate Section 4 (f) evaluation for several newly identified Section 4 (f) resources and to solicit comments about the Section 106 process and "Programmatic Agreement."

However, none of those were necessary. Under the rules, the only thing the FHWA needed to do was to give notice that a new or supplemental EIS needed to be prepared or else drop the project. Because all the information needed to decide on one of those options had been available for years, the preparation of the Environmental Assessment/ Re-valuation / Revised Section 4 (f) Evaluation and the holding of hearings, was completely unnecessary.

### Some Background Information

CEQ regulations require the preparation of supplemental EIS's when an agency finds that significant impacts or information were omitted from the original documents.[61] In 1989 the U.S. Supreme Court held that an agency must prepare a supplemental EIS whenever there remains major federal action to occur and when new information becomes available that will affect the quality of the human environment in a significant manner or to a significant extent not already considered.[62] The court then said that the decision to prepare a supplement is similar to the decision whether to prepare an EIS in the first instance. Courts have said that EIS's are to be prepared when it is known that a major federal action *might* affect negatively and significantly a *single* environmental factor, even if other environmental factors are affected beneficially or not at all.[63]

Certainly, the highway agencies and their consultants knew or should have known that significant information and many impacts not included or considered in the Draft EIS had been identified. They had been informed of some of those problems even before the Draft EIS was issued, and were informed of many more during the four years succeeding the circulation of the Draft EIS.

---

[61] 40 CFR 1509.2, provides, in applicable part, that "(c) Agencies: (1) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so. (3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists."
[62] *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360 (1989).
[63] *Save Our Ten Acres v. Kregar*, 472 F.2d 463, 467 (5th Cir. 1973).

Historic Preservation Issues Alone Clearly Required a New or Supplemental Draft EIS

In its pre-draft review comments the SHPO told the highway agencies that they were not defining historic properties properly, that not enough information was available to properly identify historic properties and that impacts to many National Register eligible properties were not disclosed. The SHPO in letters dated in 1997 and 1998 noted serious deficiencies in the historic property identification process. Later, while attempting to reverse the SHPO's opinion that the Norton family farm was National Register eligible and suffered adverse effects not disclosed in the Draft EIS, a number of other National Register eligible properties were identified. Like the Norton farm, not only were these not disclosed in the Draft EIS but, obviously, the required early-in-the-process attempts to develop alternatives to avoid, minimize or mitigate impacts were never done.

There is no question that the omission of the National Register eligible properties and the failure to analyze alternatives that would avoid, minimize and mitigate impacts to the properties constituted new information that required the preparation of a new or supplemental draft EIS. Properties on or eligible for inclusion on the National Register of Historic Properties are significant; Congress has said so by passing environmental laws that require NRE properties to be considered, including NEPA, the NHPA and Section 4 (f) of the Department of Transportation Act.

NEPA declares the preservation of "important historic, cultural, and natural aspects of our national heritage" as a central objective.[64] Accordingly potential NRE properties and a discussion of direct, indirect and cumulative impact to them and alternatives and efforts to avoid those impacts must be included in EIS's. NRE properties must be disclosed in a draft EIS, because only the draft EIS serves what the U.S. Supreme Court in *Robertson v. Methow Valley Citizen Council* called perhaps the most significant purpose of NEPA of providing "a springboard for public comment."[65]

The NHPA established a comprehensive program to preserve the historical and cultural foundations of the Nation as a living part of community life.[66] The point of the Section 106 review is to ensure that Federal agencies fully consider historic preservation issues and the views of the public during project planning.[67] This must be done in planning because it is crucial that agencies initiate the Section 106 process at a point where alternatives have not yet been foreclosed.[68] ACHP Section 106 implementing regulations set the notice standard. "Notice, with sufficient information to allow meaningful comments, must be provided to the public so that the

---

[64] 42 U.S.C. § 4331(b)(4).
[65] 490 U.S. 332, 349 (1989).
[66] *Protecting Historic Properties, A Citizen's Guide to Section 106 Review*, Advisory Council on Historic Preservation (2002). http://www.achp.gov/pubs-citizensguide.html.
[67] 36 CFR 800.1.
[68] Id.

public can express its views during the various stages and decision making points of the process."[69]

Federally funded projects impacting National Register or National Register eligible sites are subject to two parallel review processes: the EIS process under NEPA and the Section 106 process required by the NHPA.[70] The Section 106 regulations give agencies the opportunity to coordinate the Section 106 review with the NEPA review. When agencies elect to do this, like the FHWA did in the Route 219 NEPA review, the public notice must be made during the scoping process or in a separate process conforming to the normal Section 106 review procedures.[71] During draft EIS preparation the public must be involved in the identification of alternatives and proposed measures that might avoid, minimize or mitigate any adverse effect, and the results of those consultations must be described in the draft EIS.[72] If the NEPA coordination procedures are not followed, the Section 106 review must be conducted in accordance with the normal Section 106 process.

As you know, the standard of notice has yet to be met in the Route 219 NEPA review and there was no public involvement in the identification of alternatives or in consultations on proposed measures to avoid historic resources. The silly comments you made regarding historic preservation issues at the public hearing on Environmental Assessment/ Re-valuation / Revised Section 4 (f) Evaluation convincingly show your notice, if any, concerning the Section 106 process was not adequate to allow you to provide meaningful comment. Further, the record shows that the first time the highway agencies mentioned public involvement in the Section 106 process was when they announced they had prepared the Environmental Assessment/ Re-valuation / Revised Section 4 (f) Evaluation. Certainly, that announcement did not provide the information to allow the public to make meaningful comments. Of course even if it did, it could not resurrect the four-year-old Draft EIS. That is because FHWA public involvement regulations require that applicable and proper notice must be given in scoping, in a draft EIS and in draft EIS.[73] Additionally, as mentioned previously, a required part of the Section 106 is notice to local governments and an invitation to become a consulting party. You also know that this step, required at the beginning of the review, has yet to be done.

These facts about the Section 106 review leave no doubt that a new draft EIS is required under the Section 106 regulations. Further, these facts show that the preparation of the Environmental Assessment/ Re-valuation / Revised Section 4 (f) Evaluation did nothing to make up for the fact that the public was not provided timely or adequate notice of the Section 106 review. Even if the notice that preceded the hearings had been adequate, it is self evident that it

---

[69] 36 CFR 800.2(d)(2).
[70] *Preservation Coalition of Erie County v. Federal Transit Administration*, 129 F.Supp.2d 551, 555 (WDNY March 31, 2000).
[71] 36 CFR 800.8.
[72] 36 CFR 800.8(c)(1).
[73] 23 CFR 711.

was not given in time for the public to participate or comment on the review in the draft EIS as the Section 106 regulations require.

In addition to the NEPA and Section 106, Section 4 (f) also requires the preparation of a new or supplemental draft EIS when National Register eligible properties are discovered after the circulation of a draft EIS. The Section 4 (f) regulations require this—it is that simple.[74]

Section 4 (f) impacts not disclosed in a draft EIS also force the preparation of new or supplemental EIS under the provisions of DOT Order 5610.1C. That order says that "Any action having more than a minimal effect on lands protected under section 4 (f) of the DOT Act will normally require the preparation of an environmental statement". Exceptions to the requirement to prepare a EIS are included in the Section 4 (f) regulations and do not apply here.

DOT Order 5610.1C is also important to your understanding of the situation regarding the application of 23 CFR 771.129, the regulation the FHWA cited to claim the need for the Environmental Assessment. The Order says that "The draft may be presumed valid for a period of three years. If the proposed final EIS is not submitted to the approving official within three years from the date of the draft EIS circulation, a written reevaluation of the draft shall be prepared by the responsible Federal official to determine whether the consideration of alternatives, impacts, existing environment and mitigation measures set forth in the draft EIS remain applicable, accurate and valid. If there have been changes in these factors which would be significant in the consideration of the proposed action, a supplement to the draft EIS or a new draft statement shall be prepared and circulated." This means that in May 2001 the Route 219 Draft EIS was presumed to be invalid and that a new or supplemental draft EIS was necessary unless the FHWA could prove that "the consideration of alternatives, impacts, existing environment and mitigation measures set forth in the draft EIS remain applicable, accurate and valid." It seems perfectly clear to me that by detailing all the historic sites not shown in the Draft EIS and the alternatives considered to avoid or mitigate them, that the highway agencies took expensive and extraordinary steps to prepare the Environmental Assessment/ Re-valuation / Revised Section 4 (f) Evaluation to prove that a new or supplemental draft EIS was required under the provisions of DOT Order 5610.1C. Perhaps you can explain why they took this unnecessary step, at a time when NYS is deeply in debt.

In case you are not yet convinced that the preparation of a new or supplemental EIS is required, please be aware that the courts that will hear any federal challenge to the Route 219 environmental review have repeatedly held that major federal actions impacting historic properties requiring consideration under NEPA, Section 106 and Section 4 (f), require the preparation of an EIS. More than three decades ago the Second Circuit Court of Appeals, in *Monroe County Conservation*, held that impacts to a Section 4 (f) resource required avoidance alternatives to be considered in an EIS.[75] The court noted that DOT Order 5610.1 mandated the preparation of an EIS because it held that Section 4(f) resources were significant. The court also

---

[74] See all of 23 CFR 771.135 and particularly 23 CFR 771.135 (m) and (n).
[75] *Monroe County Conservation Council, Inc. v. Volpe*, supra, at 698.

noted that apart from the DOT Order it had no trouble finding the use of a Section 4 (f) resource in a federal-aid highway project was as a major federal action significantly affecting the quality of the human environment thereby requiring disclosure and the consideration of avoidance alternatives to be conducted in an EIS.

A quarter century ago, the Second Circuit in *WATCH v. Harris,* affirmed the district court's decision that once new information concerning the potential National Register eligibility of several structures, a federal agency contemplating a major federal action subject to NEPA must make a new threshold determination, and "if...as a result of a threshold determination...it is determined that Register eligible properties would be affected, then a detailed environmental impact statement would be required."[76]

Almost five years ago, the U.S. District Court for the Western District of New York, in *Preservation Coalition of Erie County v. Federal Transit Administration*, required the preparation of a supplemental draft EIS when potentially National Register eligible archeological remains were discovered after a final EIS had been prepared and project construction had begun.[77]

Just this year, the Second Circuit, in a case that considered the awarding of fees to the Preservation Coalition of Erie County, found that the requirement to prepare a supplemental EIS when a potentially National Register eligible archeological site was discovered is required under both NEPA and the NHPA when the NHPA review was coordinated with the NEPA review.[78]

It is again important to note that the potential existence of even one National Register eligible property was enough for courts to require the preparation of a supplemental EIS, and that the Environmental Assessment/ Re-valuation / Revised Section 4 (f) Evaluation provides indisputable evidence that many National Register eligible properties all requiring various considerations under NEPA, Section 106 and Section 4 (f) were not given the proper treatment in the Draft EIS.

<u>Other Significant Impacts, New Information or Project Changes Not Considered</u>

The Draft EIS failed to properly disclose, describe, consider or analyze impacts to many other important resources. I will not describe those here, but if you would like to learn about them to really see how bad this situation is or to understand other things that will need to be considered if a new Route 219 expansion project is ever begun, please read the transcripts of the public hearings and the written comments on the Draft EIS and the Environmental Assessment/ Re-valuation/ Revised Section 4 (f) Evaluation.

---

[76] *WATCH v. Harris,* 603 F.2d 310 (2nd Cir. 1979), cert. denied, 444 U.S. 995 (1979).
[77] 29 F. Supp. 2d 551 (W.D. N.Y. March 31, 2000).
[78] *Preservation Council of Erie County v. Federal Transit Authority*, Doc. Nos. 02-6198 and 02-6280, 2d Cir. January 22, 2004.

The "Revised" Section 4 (f) Evaluation

The last point I want to make about the Environmental Assessment/ Re-valuation/ Revised Section 4 (f) Evaluation is in regard to the "revised Section 4 (f) evaluation". There are far too many fatal flaws in the evaluation to discuss them all here.[79] However, because the illegal project segmentation that was conducted throughout the Section 4 (f) evaluation made a mockery of the entire process, it is a point I want to be sure you understand.

Segmentation is the illegal process of breaking a project down into small pieces. Highway agencies often used segmentation when attempting to hide the severity of adverse environmental impacts, the lack of objectivity in the alternatives analysis process, or the fact that all reasonable (the NEPA standard) or all feasible and prudent (the Section 4 (f) standard) alternatives are not being considered. However, the courts long ago recognized segmentation as a scourge of NEPA and Section 4 (f) and prohibited it. Unfortunately, some unscrupulous highway agencies, like the NYSDOT and the FHWA-New York Division, still view segmentation as the a means to circumvent NEPA and Section 4 (f) compliance.

In 1971, the Fifth Circuit said that: "Section 4 (f) does not authorize the Secretary to separate a 'project' into 'segments'..", to allow that would "...make a joke of the 'feasible and prudent alternatives" standard," and "...we not only decline to give such an approach our imprimatur, we specifically declared it unlawful."[80]

In *Committee to Stop Route 7 v. Volpe*[81], the court found that the analysis of a three mile segment of a proposed 31-mile highway could not meet NEPA's requirement of adequate consideration of alternatives. The court said, "Alternatives to not building an expressway are not brought into focus when consideration is given to just one segment. Moreover, placement of one segment tends to narrow the range of choices for placement of the remainder of the entire highway, thereby precluding adequate consideration of alternative routes."

The FHWA prohibits segmentation by regulation, policy and procedure and guidance. FHWA regulation 23 CFR 771.111, titled "Early coordination, public involvement, and project development" provides, in paragraph (f), that, "In order to ensure meaningful evaluation of

---

[79] Including the critical fact that there is no provision in Section 4 (f) for a "revised" evaluation. 23 CFR 771.135 (m). The regulations and FHWA policy and procedure clearly call for a "separate" Section 4 (f) evaluation and provide specific provisions as to content and distribution which the "revised" evaluation clearly did not meet. See 23 CFR 771 and T6640.8A.

[80] *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept*., 446 F.2d 1013, 1023 (5th Cir. 1971). Note that in footnote 20., the court cited the Second Circuit decision in *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97, cert. Denied, 400 U.S. 949, (1970) as an example of other courts that have held piecemeal compliance to be unlawful.

[81] C.A. No. 15,054 (D. Conn. July 7, 1972).

alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall: (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope; (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements."

A 1993 FHWA guidance memo discussing the development of logical project termini says, "A problem of 'segmentation' may also occur where a transportation need extends throughout an entire corridor but environmental issues and transportation need are inappropriately discussed for only a segment of the corridor." The memo then directs the reader to 23 CFR 7111.111(f) for the three general principles to avoid segmentation.[82]

It is not necessary for highway agencies to read the regulations or court cases to know that segmentation is not acceptable; all they need to do is read a FHWA instruction manual for preparing the Section 4 (f) evaluation.[83] Technical Advisory T6640.8A includes not only the explanation of how important it is to avoid Section 4 (f) resources and that both location and design alternatives to avoid each Section 4 (f) property must be identified and evaluated, but further, says that, "Where an alternative would use land from more than one Section 4 (f) property, the analysis needs to evaluate alternatives which avoid <u>each</u> and <u>all</u> properties (23 CFR 771.135(i)." (Emphasis in the original.) Further, because the instructions were not followed when preparing the Draft Section 4 (f) evaluation, my attorney and I made considerable and diligent efforts to notify the agencies of their errors. We did this in three letters and in one meeting in 1999 and several more letters and memorandum in 2001 and 2002 before the "revised" reevaluation was issued.

Despite clear FHWA guidance and instructions on the proper preparation of Section 4 (f) evaluations, and the fact that court decisions, regulations, policy and procedure, and instruction manuals were pointed out and explained to the evaluation preparers, the "revised" Section 4 (f) evaluation included the same errors as the draft as well as many new ones. In fact, the segmentation in the "revised" Section 4 (f) evaluation is even more blatant than in the draft because the revised version does not even include all the Section 4 (f) resources that had been identified since the draft had been prepared.

As pointed out in 23 CFR 7111.111(f)(2), in order to justify the so-called alternatives "considered" in the "revised" Section 4 (f) evaluation you must be able to believe that, for

---

[82] Transportation Decisionmaking, *The Development of Logical Project Termini*, November 5, 1993. See, http://environment.fhwa.dot.gov/projdev/tdmtermini.htm, last updated March 10, 2004.

[83] *Technical Advisory, Guidance for Preparing and Processing Environmental and Section 4 (f) Documents, T6640.8A*, October 30, 1987.

example, the tiny segment of the proposed freeway that goes through the Norton family farm is justifiable as a stand alone freeway.

Mr. Fitzpatrick, you now have all the information you need to understand why decisions made in 1994 and 1995 made the successful completion of the Route 219 NEPA process impossible. Those decisions included (1) not following the mandate of Section 4 (f) 23 CFR 771.135 to identify and evaluate all Section 4 (f) resources early in the development of the action when alternatives are under study, (2) not following the instructions given in 1971 by the U.S. Supreme Court in *Overton Park* to give historic sites paramount importance and that Section 4 (f) establishes a "plain and explicit bar to the use of funds for construction of highways" through Section 4 (f) resources with "only the most unusual situations...exempted,"[84] (3) not following the instructions given by the Second Circuit in *Monroe County Conservation*, putting the *Overton Park* criteria in other words meant that, a road must not take Section 4 (f) resource "unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so,"[85] (4) not following the instructions of the head of the NYSDOT EAB when he told the NYSDOT that the corridor evaluation process failed to give proper consideration to historic sites[86], and (5) ignoring the comments of the EPA that the freeway corridor alternatives analysis must do a much better job of documenting and explaining the selection process especially where the substantive requirements of Section 4 (f) and the CWA were concerned,[87] made the successful completion of the Route 219 expansion project impossible. Further, I hope that you now understand why the preparation of the "revised" Section 4 (f) evaluation was a reckless and irresponsible act that could accomplish nothing but to waste time and money.

## The 2003 Final Environmental Impact Statement

Because I have shown that the Draft EIS is inadequate, it is not necessary to also show that the Final EIS is inadequate. Therefore, I will not detail most of the many new errors made in the Final EIS. There are, however, two areas were fatal errors were made that you should be made aware of. First, the reevaluation required by FHWA regulations is inadequate for many reasons, and second, the Final EIS fails to comply with NEPA commenting provisions.

### Reevaluation Failures

FHWA regulations provide that a written evaluation of a draft EIS shall be prepared when an acceptable final EIS has not been prepared within three years from the date of the draft EIS

---

[84] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971).
[85] *Monroe County Conservation Council, Inc. v. Volpe*, supra, at 700.
[86] Minutes of the Corridor Analysis - Agency Meeting held on February 22, 1995..
[87] Minutes of the Agency Coordination Meeting held on August 30, 1995.

circulation.[88] Because the Route 219 Draft EIS was circulated in late May 1998 FHWA regulations required the highway agencies to begin working on the reevaluation in May 2001.[89]

When the reevaluation reveals significant adverse impacts not identified in the draft EIS a new or supplemental draft EIS must be prepared and circulated.[90] If it is uncertain that a new or supplemental EIS is required, appropriate environmental studies or an Environmental Assessment may be prepared to assist in the determination; however if while preparing the EA it becomes obvious that there was a significant impact, preparation of the EA should stop and a Notice of Intent to prepare a new or supplemental EIS should be prepared and development of the draft EIS should begin.[91]

As noted on page 21, the U.S. Supreme Court in 1989 held that agencies must prepare a supplemental EIS whenever there remains major federal action to occur and when new information becomes available that will affect the quality of the human environment in a significant manner or to a significant extent not already considered, and further noted that the decision to prepare a supplement is similar to the decision whether to prepare an EIS in the first instance. CEQ regulations require the preparation of an EIS when a proposed action will or may have a significant effect on the human environment. It is only when a proposed action will not have a significant effect on the human environment that an EIS is not required.[92] Courts have said that EIS's are to be prepared when it is known that a major federal action *might* affect negatively and significantly a *single* environmental factor, even if other environmental factors are affected beneficially or not at all.[93] In 1997, the Second Circuit said that "When the determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared."[94]

When preparing a draft EIS reevaluation, FHWA policy and procedure require that the entire project be revisited and that all current environmental requirements be considered when assessing any changes that have occurred and their effect on the adequacy of the draft EIS.[95] This is to include an analysis of the purpose and need for the project and of alternatives for the project. For each alternative a discussion of any social, economic, and environmental impacts whose significance is uncertain must be discussed in a level of analysis sufficient to adequately identify the impacts and address known and foreseeable public and agency concern. The reevaluation

---

[88] 23 CFR 771.129.
[89] The Notice of Availability announcing the May 2001 Draft EIS circulation was published in the Federal Register on June 6, 2001.
[90] 23 CFR 771.130 and *Project Development and Documentation Overview*, FHWA, August 21, 1992.
[91] *Project Development and Documentation Overview*, FHWA, August 21, 1992.
[92] 40 CFR 1508.13.
[93] *Save Our Ten Acres v. Kregar*, 472 F.2d 463, 467 (5th Cir. 1973).
[94] *National Audubon Society v Hoffman*, 132 F.3d 7, 13 (2nd Cir. 1997).
[95] *Technical Advisory Guidance for Preparing and Processing Environmental and Section 4 (f) Documents T 6640.8A* October 30, 1987, Chapter XI. Reevaluations.

"...must demonstrate that the information presented in the Draft EIS is an accurate analysis of the anticipated project impacts."[96]

The courts have long held that an agency must scrupulously follow the regulations and procedures promulgated by the agency itself. For example, in 1969 the Second Circuit cited the U.S. Supreme Court's Accardi Doctrine and said "where agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved."[97] Based on this alone, it is clear that the reevaluation fails to prove that a new or supplemental EIS is not required. Because it also fails to comply with NEPA, CEQ regulations and guidelines and court decisions it fails to meet the Second Circuit's requirement that an EA contain reasoned elaboration to support a determination of no significant impact and that such a determination must be convincingly documented.[98]

It only requires a quick review of the index to the Draft EIS and public and agency comments to the Draft EIS and the Environmental Assessment/ Re-valuation/ Revised Section 4 (f) Evaluation to be convinced that the "Administrative Determination on DEIS Supplementation" or reevaluation, fails to conform with regulations and policy and procedure. It contains no mention of most impacts that were analyzed in the Draft EIS and almost none of the impacts identified in public and agency comments. The reevaluation begins on page xi of the Final EIS and ends on page xviii, a total of eight pages. One half of the first page is used to describe the reevaluation process, five and one-half pages address historic preservation issues and one page includes only a brief conclusion statement. This allows one page to revisit all other impacts and issues discussed in the Draft EIS, to analyze environmental law changes (new or amended laws and regulations, new or revised policy and procedure, court decisions, etc.), and to address all known and foreseeable public and agency concerns.

Because the reevaluation failed to follow law and policy and procedure, it is invalid on its face. Nothing more is needed to prove it is not a reasoned elaboration or convincingly documented determination that a Draft EIS is not required. However, some specific problems with the reevaluation are worth noting because they provide additional, easily understood examples of what a poor job the EIS preparers have done.

On page xi it says that farmland impacts are reduced and also cites the "fact" that the farmland conversion rating was below 160. As you learned in The Draft EIS section of this letter, it is easy for anyone with basic reading skills and the ability to add two numbers together, that the farmland impact forms show nothing of the kind because the forms are not filled out correctly. Further, this section ignores the many accurate and substantive agency and public comments saying that farmland impacts were not properly analyzed in the Draft EIS.

---

[96] *Project Development and Documentation Overview*, FHWA, August, 21 1992, http://environment.fhwa.dot.gov/projdev/docupdp.htm (last modified on March 10, 2004).
[97] *Smith v. Resor*, 406 F.2d 141, 145 (2nd Cir. 1969).
[98] *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 35 (2nd Cir. 1983).

On page xi, it is mentioned that relocations will increase by seven residential units. The significance of this is dismissed by claiming that this represents only 0.13% of the residential units in the immediate Route 219 project area. That claim does absolutely nothing to address the fact that residential relocations increased by 12.5%—the change that must be addressed. FHWA policy and procedure say that with the estimate of households the draft EIS should include family characteristics (e.g., minorities, income levels, tenure, the elderly and large families), impacts on community disruption (e.g., separation from community facilities and separation of residential units) and other information to measure the true impact of the action.[99] None of these critical things are discussed in the Draft EIS or in the reevaluation, nor are public or agency comments addressed. For the Town of Great Valley this is of special importance because the Town is split in two by the proposed freeway and a multitude of concerns expressed in comments from the Town and its citizens were given no consideration in the Draft EIS or the reevaluation.

Pages xii to xvii are used to assert that errors in the Draft EIS covering property size, National Register eligibility status and alternatives analyzed, along with the complete omission of any mention of many National Register eligible properties from the Draft EIS are not significant. First, this analysis is completely unnecessary. These changes are significant—there is no question about that—this determination was made decades before Route 219 scoping began.[100] Second, to contend that this "analysis" is reasoned and in good faith (as required by the courts) would be futile. Most of the statements and information are inaccurate and it is not an analysis at all, just an assemblage of irrelevant statements. Further, the section provides conclusive evidence directly contrary to that conclusion.

Any reasoned good faith analysis prepared by someone understanding Section 106 would conclude that a new or supplemental draft Route 219 EIS must be prepared. The NHPA requires all Section 106 impacts to be disclosed and fully analyzed in a draft EIS when an agency has elected to coordinate the Section 106 review with the NEPA review. That is it, it is that clear and simple, and there is nothing complicated about it. Section 106 implementing regulation 36 CFR 800.8 clearly says that. Therefore, saying in the reevaluation that 36 CFR 800.8 does not require the preparation of an EIS is absolutely false.

When coordinating the NHPA with NEPA in a "major Federal action significantly affecting the quality of the human environment" the identification of historic sites must be conducted during the preparation of a draft EIS and the public and consulting parties must be involved in the development of alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects on the undertaking on historic properties. This involvement must be described in the draft EIS. Accordingly, if a National Register eligible site is identified after a draft EIS has been circulated, a new or supplemental EIS must be prepared.

---

[99] DOT Order 5610.1C

[100] As I discussed in The 2002 Environmental Assessment, Reevaluation and Revised Section 4 (f) section of this letter these are significant changes that must under NEPA, Section 106 and Section 4(f) be disclosed and analyzed in a draft EIS.

As previously discussed, the Second Court of Appeals in January 2004 made it clear that 36 CFR 800.8 also requires a new or supplemental EIS if potential historic sites are discovered after a final EIS or a ROD has been prepared.[101]

While it is true that the last sentence of 36 CFR 800.8(a)(1) does say that the finding of adverse effect does not necessarily require an EIS, the language preceding that sentence makes it clear that it has no applicability to the Route 219 project. The last sentence of 36 CFR 800.8(a)(1) is included in the regulation to make it clear that because the NHPA applies any Federal or federally assisted undertaking, thus it is broader in scope than NEPA which only applies to major federal actions significantly affecting the human environment, and therefore NHPA compliance may not require an EIS. The EIS preparers have, therefore, shown a complete lack of good faith or reason in their "analysis" of Section 106 requirements.

The third paragraph on page xii is also utter nonsense. Section 106 and Section 4 (f) have separate requirements and each must be fully complied with. The provisions of Section 4 (f) supersede those of Section 106 when it comes to the identification of sites on or eligible for the National Register. Section 106 requires that a good faith effort be made to identify historic sites, but Section 4 (f) requires that all historic sites be identified. Section 106 applies to adverse affects to a site while Section 4 (f) applies to the use of a site. These are very similar criteria, but it is possible that a site suffering adverse affect under Section 106 may not be used under Section 4 (f). This makes it possible that when it comes to avoidance, minimization and mitigation sites that suffer adverse affect under Section 106 may be subject only to the procedural avoidance, minimization and mitigation requirements of Section 106 and not the substantive avoidance, minimization and mitigation requirements of Section 4(f). These distinctions are obviously unknown to the highway agencies and were never disclosed, as required, in the Draft EIS, thereby failing a key NEPA requirement of providing the public with accurate relevant information that allows them to make meaningful comment.

The remaining paragraphs are incomprehensible, error filled and have absolutely no relevance to making a simple determination of significance. In public comments the SHPO told the highway agencies that the property definitions and distinctions made in the Draft EIS were wrong and misleading. The Keeper of the National Register told the FHWA that they were using incorrect definitions to determine property boundaries. Neither Section 106 or Section 4 (f) make distinctions between the avoidance of properties on the National Register or those eligible for inclusion on the National Register. The fact that the highway agencies make a big deal about the distinction is remarkable, and the idea that boundary determinations are not exact is of no relevance either. If the FHWA had done its job the boundary determinations along with all other relevant information would have been included in the Draft EIS where it is required to be. Then agencies and the public could have reviewed and commented on boundaries, qualifying criteria adverse affect or use as the laws require. By admitting that this critical information was not in

[101] Page 25 of this letter.

the Draft EIS the highway agencies once again provide convincing documentation that a new EIS is required.

The determination fails to consider the many reasons the SHPO and I noted in public comment letters that the Section 106 process had many fatal errors. Also, the determination failed to mention that both the SHPO and the Keeper of the National Register, the ultimate administrative authority over determination of National Register eligibility, told the FHWA that its determinations of boundaries was incorrect. Further, even the statement that the "Advisory Council has issued guidance for considering boundaries" is wrong. It is the National Park Service that issues guidelines on National Register eligibility issues (including boundary determination guidelines). The ACHP has nothing to do issuing guidance or determination concerning National Register eligibility. By including this irrelevant information, the highway agencies only succeeded in again proving how little they understand this subject.

I will not detail the remaining flagrant errors concerning historic preservation contained in the reevaluation, because as I have shown, the highway agencies, in just a few pages have convincingly documented they understand next to nothing about how historic sites must be considered under NEPA, Section 106 and Section 4 (f), and that a new or supplemental EIS is required. If you would like to know more about the process or what errors were made in the NEPA documents let me know and I will tell give you a list of comment letters you can request from the NYSDOT.

The discussion of Secondary and Cumulative Impact Changes on page xvii is as irrelevant as most of the nonsense about historic preservation issues. Not only is the "analysis" employed meaningless as an effort to document no significant change, two statements actually contradict the determination and prove that a new or supplemental Draft EIS is required. Remember that it is necessary to prove impacts are not significant, and if it is not clear, a new or supplemental EIS is required.

The first sentence of the first paragraph states "There are two changes occurring since DEIS issuance that may have an indirect impact on development as outlined on pages 14 to 22 of the EA/R/Revised 4 (f)." Also, the first sentence of the second paragraph says "There are seven interchanges proposed with the DEIS freeway alignment, each of which may cause development nearby". Because the determination must convincingly conclude that no significant impacts were not disclosed in the Draft EIS, these admissions provide convincing documentation of the need for a new or supplemental draft EIS.

## Public and Agency Comment Failures

CEQ regulations require that agencies, after preparing a draft EIS and before preparing a final EIS, obtain comments. Comments must be requested of any federal agency having jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards, and from the public and

others.[102] The regulations require federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved submit comments.[103] Agencies preparing a final EIS are required to assess and consider comments both individually and collectively and to respond to the comments in the final EIS. 40 CFR 1503.4, Response to comments, says:

> (a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:
>
> (1) Modify alternatives including the proposed action.
>
> (2) Develop and evaluate alternatives not previously given serious consideration by the agency.
>
> (3) Supplement, improve, or modify its analyses.
>
> (4) Make factual corrections.
>
> (5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.
>
> (b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.
>
> (c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (Section 1502.19). The entire document with a new cover sheet shall be filed as the final statement (Section 1506.9).

The comment and response provisions play a central role in NEPA by helping to assure that decision makers have all relevant information before making decisions and that agencies cannot sweep stubborn problems or serious criticisms under the rug. "'NEPA's public comment procedures are at the heart of the NEPA review process' and reflect 'the paramount

---

[102] 40 CFR 1503.1.
[103] 40 CFR 1503.2.

Congressional desire to internalize opposing viewpoints into the decision making process to ensure that an agency is cognizant of all the environmental tradeoffs that are implicit in a decision.'"[104] In responding to public comments an agency cannot ignore relevant information, or fail to correct errors in the assumptions underlying the analysis in a draft EIS.[105]

Chapter 6 of the Final EIS purports to include an analysis of comments on the Draft EIS. However, it ignores or improperly responds to hundreds of substantive public and agency comments.

Substantive Comments Submitted at the Request of the Highway Agencies were Ignored

CEQ regulations require that to "the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by ...the National Historic Preservation Act"[106]. To do this agencies are required to request "comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected."[107]

Because the NHPA issues were not dealt with in scoping, and the Draft EIS failed to provide the information required by Section 106 or to include any notice concerning the rights of the public or organizations to participate in the Section 106 review, I did not discover that my father was illegally precluded from the Section 106 review process[108] or that I had a right to active participation in the Section 106 process until March 1999. Soon after that, I became a consulting party and was requested by the FHWA and the NYSDOT to comment on the Section 106 and related deficiencies of the Draft EIS and the purported integrated analyses and related surveys and studies required by the NHPA. After that request was made, my attorney and I worked diligently to provide the highway agencies with our comments, as did my sister and James and Eva Woodmancy, who also became consulting parties in early 1999.

My attorney and I sent more than 150 pages of detailed, accurate, fully referenced information showing errors in process, interpretation of law, analysis and fact. CEQ regulation, 40 CFR 1502.25, very clearly requires these comments be included or summarized and adequately responded to in the Final EIS.

---

[104] *Half Moon Bay Fishermans' Marketing Association v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) quoting *California v. Block*, 690 F.2d 753, 770-771 (9th Cir. 1982).
[105] *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011 (2nd Cir. 1983).
[106] 40 CFR 1502.25.
[107] 40 CFR 1503.1(a)(4).
[108] Under the Section 106 regulations after my father made his concerns about historic preservation issues known through comments in a meeting and in a letter, the FHWA was required to invite him to participate in the Section 106 process, but they did not.

Checking for these comments and the proper response provides you with a quick and easy way to see test the reasonableness of my assertion that hundreds of substantive comments were simply ignored. To conduct this test, just review Table 6-1 in the Final EIS and check for comments written, at the request of the highway agencies, in 1999 by my attorney, me or other Section 106 Consulting Parties. You will find that these comments are not included. The highway agencies, rather than directly facing the issues raised and responsibly following the NEPA mandate to respond to comments, instead made the decision to sweep the comments under the rug—exactly what the courts say they cannot do.[109]

The failure to respond to comments, as required by 40 CFR 1503.4 (a) and (b), that were submitted upon request pursuant to 40 CFR 1501 (a)(4) is a clear, irresponsible, fatal and reckless error. However, it is one that will come as no surprise to the many members of the public who attempted to become meaningfully involved in the EIS process, as the rules require, only to be ignored or be subject to token efforts of the highway agencies to placate them. As the above and the following discussions show, it appears to be a well established policy of the NYSDOT to present the appearance of giving the public the opportunity to be meaningfully involved, but to take actions at every step of the process to deny any actual meaningful involvement.

## Agency Comments Not Requested, Not Received or Ignored

40 CFR 1503.2, Duty to comment, provides that "Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority." As I pointed out in the scoping section of this letter, many of these agencies were never even informed of the Draft EIS, let alone asked to comment on it.

However, at least one agency, the ACHP, did provide comments, but the comments were not included in the Final EIS.

In the October 1, 1999 edition of the Salamanca Press where serious problems with the Section 106 review were outlined, Mary Ann Nabor of the ACHP was quoted as saying, "There are major issues that were omitted from the programmatic agreement that need to be addressed," and that, "the document did not include the identification and evaluation of historic properties, an assessment of the effect and consultation to resolve adverse effects, including public input." The article also quoted Gary Gottlieb then NYSDOT High Priority Projects Manager, who

---

[109] See for example *National Audubon Society v. Hoffman*, 132 F.3d 7, 12, (2nd Cir. 1997). Where the court said, "The detailed statement 'insures the integrity of the agency process by forcing it to face those stubborn, difficult-to-answer objections without ignoring them or sweeping then under the rug' and serves as an 'environmental full disclosure law so that the public can weigh a project's benefits against its environmental costs.'"

acknowledged the receipt of the ACHP comments. Mr. Gottlieb refused to provide a copy of the comments to Ms. Champagne even saying she would have to wait until the Final EIS to see them.

As the representative of a cooperating agency, Ms. Nabor's comments are required to be included in a draft EIS. The comments are also required to be included in a draft EIS under the ACHP's regulations.[110] However, in clear violation of those regulations they were not, and in clear violation of the NEPA commenting rules they were also not included in the Final EIS or the "ROD".

Because it is known that the comments of the ACHP were swept under the rug, it is not possible to have confidence that comments of other agencies were not similarly treated. However, just as a reminder, it is known that other agencies required by law to be included in the Route 219 EIS process or required to comment on it were not even notified of the EIS process, therefore it is certain that many agency comments have not been considered in the process.

## Examples of Additional Comment Response Errors

There are far too many errors made in responding to public and agency comments to detail in this letter. However, it is only necessary to detail a few points and examples to show that the highway agencies failed to comply with NEPA comment and response requirements. However, before I discuss improper responses to specific comments, I would like to make you aware that another violation thwarting NEPA's full disclosure and public comment mandates occurred when copies of the Final EIS were not sent to all persons who made substantive comments on the Draft EIS or the EA.

40 CFR 1502.19 requires that the entire Final EIS's be furnished to any person, organization, or agency which submitted substantive comments on the draft EIS. My father, who made substantive comments on the Route 219 Draft EIS, notified me in mid-May 2003 that he had not received a copy of the Final EIS. After checking the rules, I notified Robert Arnold, New York Division Administrator of the FHWA, of the failure to provide my father a copy of the Final EIS. I did this in a e-mail message dated May 22, 2003.

In my e-mail, I reminded Mr. Arnold that CEQ regulations and FHWA policy and procedure[111] required the Final EIS to be transmitted no later than the date which the Final EIS is

---

[110] James and Eva Woodmancy, Nancy J. Norton and I also made comments on the "Programmatic Agreement" that were not included in the EIS as required by the Section 106 regulations.

[111] FHWA Technical Advisory, Guidance for Preparing and Processing Environmental and Section 4(f) Documents, T 6640.8A, October 30, 1987 says ""Copies of all approved final EISs must be distributed to all Federal, State, and local agencies and private organizations, and members of the public who provided substantive comments on the draft EIS or who requested a copy (40 CFR 1502.19). Distribution must be made no later than the time the document is filed

filed with the EPA, and informed him that my father had not yet received a copy of the Final EIS. I asked Mr. Arnold to provide my father a copy of the Final EIS and 30 days to provide his comments. Mr. Arnold refused.

Through subsequent e-mail correspondence with Mr. Arnold, I learned that the FHWA was applying a "sustentative" comment standard to determine those people to whom they would send copies of the Final EIS, rather than the NEPA mandated "substantive" standard. Under the "sustentative" standard, Mr. Arnold looked to see if a comment was "sufficiently unique or going to the fundamental or essential components of the document" in the context of the public participation process for the particular EIS in question. If Mr. Arnold determined a comment did not meet his sustentative test, he held the commentator was not worthy of receiving a copy of the Final EIS and one was not sent.

In an e-mail message to me on May 28, 2003, Mr. Arnold described how the "sustentative" comment test was applied to my father's comments. He said, "We have considered your father's comments in the entire context of the extensive public participation process which has occurred on the Route 219 project. This includes your inclusion as a consulting party and as well as the public and agency coordination. I have noted this extensive process and based on this context I do not view your father's comments as 'sufficiently unique or going to the fundamental or essential components of the EIS to merit sending a copy of the FEIS absent a request."

It is very troubling to find that Mr. Arnold thinks he can substitute his standard for NEPA's and then to assert that my father's extensive involvement did not deserve the opportunity to comment on the Final EIS. Certainly, the FHWA may not substitute a self-determined and clearly wrong "sustentative" comment standard for the NEPA substantive comment rules. Even if it could, it could not apply it on a relative or an EIS-by-EIS basis. Neither of those methods comply with the law, and both would run afoul of the constitutional rights of equal protection and due process.

Just as my father made substantive comments that required the FHWA to provide him with a copy of the FEIS for review and comment—so did many others. All it takes to confirm that almost no member of the public was provided with a copy of the Route 219 Final EIS is to compare the lists of persons making comments as shown in Chapter 6 and Appendix U of the Final EIS to the list of persons who were sent a copy of the Final EIS. It is not reasonable , and certainly not true, to believe that so few members of the public provided substantive comments. To comply with NEPA all persons who make substantive comments must be provided the opportunity to review and comment on the FHWA's responses.

The disclosure of comments and the response made to them begins in Chapter 6 of the Final EIS. Additional comments and responses are, inappropriately, included in Appendix U, an

---

with EPA for Federal Register publication and must allow for a minimum 30-day review period before the Record of Decision is approved (40 CFR 1506.9 and 1506.10)."

appendix that was not sent to everyone that was sent a copy of the Final EIS. This action precluded those not sent the full Final EIS the opportunity to see those comments, thwarting NEPA's full disclosure and public comment mandates. Because there are far too many failures to comply with the requirements of 40 CFR 1503.4 to address in this letter I will only give you a few examples.

On page 6-11 of the FEIS response to comment 2 is an effort to trivialize and ignore several important points brought out by Ken Kasprzyk, a NYSDEC forester. Mr. Kasprzyk noted that the freeway alternative would land lock about 700 acres of valuable forest land and stated his concerns about the consequences.[112] The only response to his comments is "See response to comments listed below. (Related Comment(s): 1)".

The response to comment 1 does not address Mr. Kasprzyk's concerns, it is only a general statement that assumes no change in alternatives is possible and does not address the problem Mr. Kasprzyk raised.

A proper response to Mr. Kasprzyk's comments would have included a discussion of the economic and tax base concerns he raised, a change to the farmland protection forms to properly include these omitted lands of statewide importance, and a discussion and analysis of the environmental impact on these important resources.[113]

Comment 3 on page 6-11, the comment listed below Mr. Kasprzyk's which the FEIS said addressed Mr. Kasprzyk's comments, does not do that. Comment 3 is in response to questions I raised regarding historic preservation and is full of errors and fails to address the issues raised. The response incorrectly says, that 1) the property contains a 7 acre lake, 2) the freeway alternative would require the taking of land along its north line, 3) the property has no frontage on a public road, and 4) there is a private road leading to it from the north that crosses properties owned by other Nortons.

None of those things is correct.[114] In addition to these sloppy errors, the response does nothing to address the original comment. However, what it does, is make clear admissions of process and substantive errors contained in the EIS. The response says, that 1) access to the

---

[112] Mr. Kaspryzk's comments can be found on page T-667 of the FEIS.

[113] See page 17 for a discussion of the failure of the EIS to consider impacts to forest land.

[114] The lake is at least 10 acres, the property has frontage on Peth Road and Route 219 and there is no private road leading to it from the north that crosses properties owned by other Nortons. It must also be noted that other significant errors concerning the Norton farm are included in the EIS and extra-EIS Section 106 documentation, including many statements that the highway agencies have been told are incorrect, for example that the property includes housing development and a saw mill, and that the original Norton settlers built and lived in a log cabin on a hill top. All this makes it clear that the EIS preparers have made little or no effort to check even the reasonableness of the information in the EIS let along the accuracy, a violation of the NEPA regulations that require accurate and high quality information.

landlocked acreage "can" be restored through various options, 2) the cabins on the property were not counted as relocations because consultation with the me will be conducted to determine the most appropriate method to maintain access, and that 3) further mitigation measures will be include tree plantings. Each of those statements is an admission that Section 106 or Section 4 (f) have not been complied with and accordingly an admission that the EIS's are inadequate.

Consultation under Section 106 must be conducted prior to the selection of an alternative or mitigation measures. Even though the ACHP says that this required interactive consultation is at the heart of the Section 106 review,[115] the FHWA has repeatedly failed to consult with me. Although this not the first time the FHWA has told me they would violate this key requirement of the Section 106 process, the comment in the FEIS is significant because the FHWA has now in a final and in the record statement said that they did not comply with the Section 106 consultation requirements.

The same response also documents the FHWA's admission that they violated the mandates of Section 4 (f). Section 4 (f) requires that "All measures which will be taken to minimize harm to the Section 4 (f) property"[116] must be included in the evaluation. Please note that is true for other Section 4 (f) properties as well.

The admission that the property is landlocked also shows that they are wrong in saying that the freeway alternative uses only the 5.18 acres of land where the road would be sited. A proper application of Section 4 (f) would clearly consider the landlocked acreage as being taken.[117] As, of course, the application of just a bit of common sense would do the same thing. By not applying this tiny bit of common sense, or the clear requirement of the regulation, the highway agencies understated the Section 4 (f) taking for this property by more than 176 acres.

Several other responses state that Section 4 (f) mandates were not followed, for example on page 6-16 in response to comment 22 the response says the freeway alternative "...in several cases preserves farmland areas by encroaching on historic properties."

The strict requirements of Section 4 (f) have previously been discussed, but to show you how serious these clear admissions of the failure to follow the law are, a few points are worth reiterating. In 1971 the U.S. Supreme Court said that, simply put, Section 4 (f) provides a "plain and explicit bar" to the use of a Section 4 (f) resource in all but the most unusual circumstances.[118] The FHWA's Section 4 (f) regulation says that if a Section 4 (f) resource is used, "Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives

---

[115] See for example, *Protecting Historic Properties: A Citizen's Guide to Section 106 Review*, ACHP, updated 2002; page 14.
[116] 21 CFR 771.135(j)(2).
[117] 21 CFR 771.135(p)(1)(iii) and (4)(iii).
[118] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

reach extraordinary magnitudes."[119] The U.S. Second Circuit Court of Appeals (the circuit that includes New York) put the requirement to avoid historic properties in others words by saying that a road must not take a Section 4 (f) resource unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so.[120]

The EAB's NYSDOT Environmental Procedures Manual Chapter 6.1, Environmental Analysis Bureau, August 1998, says,

> Pursuant to New York State Parks, Recreation and Historic Preservation Law Section 14.09 and Section 106 of the National Historic Preservation Act, NYSDOT must avoid any impacts to cultural resources eligible for or listed on the National Register of Historic Places (NRHP). To do this, NYSDOT must determine if there are any known cultural resources that are eligible for or listed on the NRHP within the project area, and second, if there are any resources that may be eligible for the NRHP that have not been identified. It is critical that eligible and listed resources are identified as early as possible in the project process.

Given these parameters no competent person could concluded that it is permissible to eliminate alternatives that avoid *many* Section 4 (f) resources because the highway agencies think the complaints of a few whining "not-in-my-backyard" farmers meet the extraordinarily high standard required to take a Section 4 (f) resources set by Congress and the courts or to override the absolute prohibition established by the NYSDOT policy and procedure. There is absolutely nothing unusual about using farmland when constructing a freeway through a rural area. The conditions they cite are absolutely ordinary and in no way extraordinary. They are all of the normal type that road building causes.

More than two and a half years ago[121] I informed the highway agencies that when the law says that disruptions must be of extraordinary magnitude, it means it. For example, in *Louisiana Environmental Society, Inc. V. Coleman* 537 F.2d 79 (5th Cir. 1976) the court dealt with two alternatives that would avoid a Section 4 (f) resource. One required displacing 120 single dwellings, 100 single apartments units (one apartment project), 900 persons, seven businesses, one church and one lodge. The other required displacing 377 single families, 1,508 persons, twenty-one businesses and two churches. The court concluded that those disruptions cannot be found to be of an extraordinary magnitude so as to permit the use of the Section 4 (f) resource.

Many comments questioned the failure to look at a Route 16 freeway as an alternative. In response the highway agencies restated the false information contained in the EIS by again saying that prior studies determined Route 219 to be "the" primary alternative rather than "a" primary alternative for a north-south Western New York expressway. In addition, the highway agencies

---

[119] 23 CFR 771.135(a)(2).
[120] *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2nd Cir. 1972).
[121] In a letter to Gary Gottlieb dated June 28, 2002.

said that Route 16 was not analyzed because it did not meet the purpose and need of closing the two-lane corridor gap on Route 219 between Springville and Salamanca, an apparent indication that they do not understand that a principal requirement of NEPA is to analyze alternatives "to" the proposed action or maybe "for" the proposed action. As almost everyone in Western New York would agree, all it takes is the application of a little common sense to realize that Route 16 is a reasonable alternative to Route 219. To dismiss Route 16 as the highway agencies did shows not only a seriously deficient understanding of NEPA but the lack of common sense as well.

Two more quick and clear examples that show the incompetence of the EIS preparers involves their inability to understand the very simplest of rules. My attorney, Alicia Rood, mentioned that no consideration had been given to removing tolls on the NYS Thruway as a means of reducing truck traffic on Route 219. The EIS preparers responded that "The New York State Thruway Authority (NYSTA) owns, maintains, and controls the facilities (including tolls) on the thruway (I-90). The NYSDOT has no jurisdiction over the NYSTA regarding the elimination of tolls on the thruway."

CEQ regulation 40 CFR 1502.14 says, that "This section is the heart of the environmental impact statement....In this section agencies shall: (d) Include reasonable alternative not within the jurisdiction of the lead agency." That seems pretty clear to me, but apparently about 23 years ago some agencies had difficulty understanding this regulation so the CEQ policy titled *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*[122] included question 2b which asks, "Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized." The answer given is "An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable." I guess the Route 219 EIS preparers missed the CEQ's 1981 policy paper and have never gotten around to reading the regulations.

Although minor in comparison to other errors the EIS preparers have made, this is a good example showing just how sloppy and unprofessional the EIS preparers really are. Because Ms. Rood is well qualified and experienced environmental law attorney who deals with NEPA and State Environmental Quality Review Act issues on a daily basis, you would think that the EIS preparers would seriously consider her comments. Yet as you can see, they did not even bother to read the CEQ regulations before they wrote the dismissive reply.

Another example showing the same thing is the response provided to a comment made by James Woodmancy, the Town of Great Valley property tax assessor, flood plain manger and planning board member, and a Route 219 Section 106 Consulting Party. Mr. Woodmancy commented about the failure of the EIS to discuss impacts of the Millennium Pipeline on the environment. As you know, the Millennium Pipeline is a Federal Energy Regulatory Agency approved large diameter pipeline that traverses Cattaraugus County and intersects with the proposed Route 219 freeway interchange in Great Valley. The pipeline would also pass through

---

[122] 46 FR 18026 (1981).

Little Rock City Park and includes cultural resource impacts unacceptable to the SNI,[123] and the ramp of the proposed interchange would need to be built over the pipeline.

As you also know from work the County did in the study of cumulative impacts, an adequate cumulative impact discussion is critical to an adequate EIS. Unfortunately, the EIS preparers know far less than you do about cumulative impacts and gave this response, "Correspondence with the Columbia Gas Transmission Corporation concerning the Millennium Pipeline are ongoing. Exact locations will be addressed during final design."

The last three points show not only how little the EIS preparers understand about NEPA but also their disdain for an element critical to the success of the NEPA process—public and agency comment.

## The 2003 EPA Final EIS Comment Letter

After the Environmental Assessment/ Re-valuation/ Revised Section 4 (f) Evaluation was issued it became clear to me that the NYSDOT and the FHWA had decided they would not follow the environmental laws. It was then I decided to write to the EPA and ask that they take another look at the Draft EIS in view of all the errors that had been discovered over the years as well information about newly discovered errors and project changes.

Because of time constraints and process issues the EPA did not address those issues until their review of the Final EIS. Although I was disappointed the EPA letter did not more fully develop several issues I asked them to look at, I was very pleased to see that they addressed most of them and even more pleased to see the fatal errors they identified on their own.

The EPA letter was a very welcome sight to the people who have worked diligently over the years to ensure that Western New York's transportation improvements are done in a well thought out, efficient and environmentally conscious manner, but who were illegally closed out of the process by the highway agencies and the politicians, like you Mr. Fitzpatrick, who refused to listen them.

### Clean Water Act Comments

Most of the EPA's comments center around the CWA Section 404(b)(1) permit. The issuance of a CWA, in connection with a major federal action like the Route 219 expansion project, requires an EIS under NEPA. The Corps is primarily responsible for the issuance of the permit, but the EPA has veto authority over the Corps.

---

[123] A situation that has been discussed at Cattaraugus County Planning Board Meetings.

Because the failure to address all environmental issues in a single EIS can cause senseless delays, it has long been recognized that appropriate state and federal agencies become cooperating agencies in federal-aid highway projects that will required a CWA permit. This is recognized in CEQ, FHWA, Corps, EPA and F&WL regulations, policy and procedure and guidelines.

For example, a March 19, 1992 memorandum[124], transmitted FHWA guidance that expanded and clarified "the responsibilities of the lead agency and the cooperating agencies, particularly those involved in the Section 404 permitting process." In part, this guidance says that:

> Additional Agency Responsibilities with the CLEAN WATER ACT Section 404 Permit
>
> In addition to the normal cooperating agency responsibilities listed above, these agencies would be expected to:
>
> • Provide assistance to the lead agency during development of the project purpose and need.
>
> • Provide information on alternatives. This includes the "no practicable alternative" finding.
>
> • Assist the lead agency in determining appropriate and practicable mitigation, including "all practicable measures to minimize harm." These measures should reflect avoidance, minimization, and compensation
>
> • Cooperate in the application of principles for integration of NEPA and Section 404 Permits contained in Chapter 11 of Applying the Section 404 Permit Process to Federal-aid Highway Projects.
>
> The lead agency should make every effort to identify and attempt to resolve cooperating agency concerns during early coordination and scoping activities. Deferring such concerns to later stages of project development will only delay or possibly jeopardize the project. Although some concerns may not be completely resolvable despite concerted efforts to reach agreement, there are certain aspects of the project that require concurrence before moving ahead. For example, on projects requiring a permit under Section 404 of the Clean Water Act it is essential to obtain resource and permitting agency concurrence that there is no practicable alternative to locating the alignment in waters of the United States.

---

[124] Memorandum from Director, Office of Environment and Planning, to Regional FHWA administrators, March 19, 1002, subject INFORMATION: Revised Guidance on Cooperating Agencies.

> Further, the Final EIS must adequately support this determination. A cooperating agency does have a right to expect that the highway project's NEPA document will meet its needs, and an obligation to tell the lead agency if, at any point in the process, its needs are not being met.

In a May 1, 1992 joint memorandum, *Implementation of the Intermodal Surface Transportation Act*, EPA Administrator William K. Rielly, Assistant Secretary of the Army, Nancy P. Dorm and the Secretary of Transportation, Andrew H. Card stated that "Effective immediately, it will be the official policy of FHWA, the Corps and the EPA to fully implement the intent of the 'Redbook'."

The "Redbook"[125], a 77 page report published in September 1988, by the FHWA, the National Marine Fisheries Service, the Corps, the EPA and F&WL, is the product of a work group formed in September 1985 to identify methods for improving interagency CWA permit activities. Chapter 11, referenced in the FHWA guidance on cooperating agencies, is titled, *Permit Considerations During the NEPA Process*, and presents ideas regarding joint NEPA and CWA compliance procedures and provides ideas addressing a range of alternative ways to coordinate the NEPA and CWA process requirements in a single environmental document, and notes that, in projects like Route 219, where the CWA permit application is not included in the highway agency draft EIS, public hearings and requests for CWA permit related comments must be done in a separate process.

Redbook guidance was ignored at every step of the Route 219 EIS process, and the EPA letter makes it clear that Route 219 Final EIS has not met any of the requirements outlined in FHWA cooperating agency guidance under the heading "Additional Agency Responsibilities with the CLEAN WATER ACT Section 404 Permit." The EPA letter mentions problems with purpose and need, alternatives, environmental impact avoidance, minimization and mitigation measures, and throughout the letter clearly reflects the fact that no efforts were made to apply Redbook principles of NEPA and CWA integration. As the EPA points out, no effort was made to show consideration of, let along compliance with CWA regulations, despite EPA warnings that the Final EIS must do that.

## Farmland

After five frustrating years of making repeated attempts to inform the highway agencies of errors related to farmland impacts it was very gratifying to see that the EPA found the EIS assessment of farmland impacts to be insufficient. As previously discussed, I notified the highway agencies of many errors in farmland impacts in 1998 and 1999. Others, including my

---

[125] The actual title of what is generally called the "Red Book" is *Applying The Section 404 Permit Process To Federal-Aid Highway Projects, Improving Interagency Coordination on Federal-Aid Highway Projects and Integrating the National Environmental Policy Act and Section 404 Requirements*.

sister and the NYSDEC also attempted to make the highway agencies aware of these errors. By failing to comply with NEPA commenting provisions, the highway agencies failed to identify these obvious, yet fatal errors years ago.

Although far from as important as historic sites, endangered species or wetland and waterbody issues, farmland is nevertheless an important environmental resources that must be properly considered in an EIS. Because the highway agencies make such a big deal out of their efforts to protect farmland, the indisputable evidence that they failed so convincingly to do so is a very telling evidence in which to judge the competence of the EIS preparers.[126]

## Great Valley Creek Relocation

Impacts to Great Valley Creek must be considered under the CWA, Section 4 (f) and the ESA— the three strictest environmental protection laws in the Nation. Because the Draft EIS made so little mention of the impacts to the creek or any effort to avoid then, it was very obvious that the Draft EIS did not even come close to providing the information or justification to relocate it.

Accordingly, I notified the highway agencies several times in 1998 and 1999 that the Draft EIS failed to properly consider the issues involved in the relocation of Great Valley Creek. I did this in letters and in two meetings.

Unfortunately, because the highway agencies chose to ignore the law and my warnings, it was necessary to point out this problem to the EPA. As I am sure you understand, I was pleased that the EPA, in its very long list of deficiencies regarding water resources, found the relocation of Great Valley Creek to be of "particular concern."

This is another example of what an extraordinarily poor job the Route 219 EIS preparers have done throughout the years. If the proper agencies had been involved in scoping, this fatal error could have been prevented, or if proper attention had been paid to public and Section 106 consulting party comments, these problems would have been recognized and corrections could have been made in 1999 at the latest. Instead, the EIS preparers' incompetence, along with their disdain for public involvement, caused a waste of five (and still counting) years.

## Indirect and Cumulative Impacts

This is another area where I had made repeated attempts, in letters and meetings, to inform the highway agencies that they had not properly considered important project indirect and cumulative impacts. However, because the highway agencies chose to ignore the law and my warnings, I pointed out this problem to the EPA.

---

[126] See pages 15 through 17 of this letter where this point was also made and explained.

It only takes the application of common sense to understand that when a road will displace people from farms and homes, and land is made inaccessible, that the owners will need replacement property. The same applies to understanding that if (as you, the County Planning Board, the Route 219 Committee and the highway agencies claim) a freeway will cause significant job and economic growth that this projected growth will have an impact on the environment. Through letters I informed the highway agencies of this, but because they failed to properly respond to my comments, I also asked the EPA to consider this in its review. The EPA agreed with me and informed the FHWA that because the EIS failed to consider induced growth and other indirect and cumulative impacts, it was inadequate.

As you would see if you read the EPA letter, the failure to consider cumulative impacts permeated the EIS and resulted in the failure to properly consider impacts to a wide range of important resource. For example the EPA noted the failure to consider cumulative impacts to historic properties. Because these impacts must be considered under the Clean Water Act, Section 106 and Section 4 (f) this means that an expert agency has determined that these laws, as well as NEPA, were not complied with.

### Other

Other fatal errors addressed in the EPA letter will not be discussed here because they are somewhat complex, not easy to explain or have been mentioned elsewhere in this letter. These important issues include the areas of project purpose and need, alternatives, tiering and segmentation, all of which are areas where the EPA says the EIS is deficient.

## The 2003 "Record of Decision"

### Background Information

A record of decision is the final document in the administrative process, and "must explain the basis for the project decision as completely as possible based on the information contained in the EIS (40 CFR 15202.2)."[127]

FHWA guidance requires that for all alternatives considered, the ROD must explain the balancing of values which formed the basis for the decision and identify the environmentally preferred alternative (the alternative that causes the least damage to the biological and physical environment), and where lands subject to Section 4 (f) were a factor in the selection of the preferred alternative the ROD should explain how the Section 4 (f) lands influenced the

---

[127] *Technical Advisory, Guidance for Preparing and Processing Environmental and Section 4 (f) Documents, T6640.8A*, October 30, 1987, Chapter VIII. Record of Decision-Format and Content.

selection.[128] "The values (social, economic, environmental, cost-effectiveness, safety, traffic, service, community planning, etc. which were important factors in the decisionmaking process should be clearly identified along with the reasons some values were considered more important than others. The Federal-aid highway program mandate to provide safe and efficient transportation in the context of all other Federal requirements and the beneficial impacts of the proposed transportation improvements should be included in this balancing. While any decision represents a balancing of values, the ROD should reflect the manner in which these values were considered in arriving at the decision."[129]

FHWA guidance and CEQ regulations require that substantive comments received on the final EIS should be identified and given appropriate responses.[130]

## The Route 219 "ROD"

It is clear that because the "ROD" is highly speculative and contingent upon future analysis, studies, permits and outcomes of negations, it is not the final document in the administrative process, and therefore cannot be a true ROD. As noted on page 2 of this letter, even the FHWA does not consider this to be a final decision as evidenced by a letter from the FHWA's attorney.

The "ROD" also fails to include the information required by FHWA guidance and CEQ regulations, and it contains false or misleading statements, statements that conflict with information in the Final EIS. Further, it fails to respond to substantive comments received on the Final EIS.

As with all NEPA documents prepared by the FHWA in the Route 219 process, this one contains an extraordinary number of errors. Therefore I will only give you a few examples in this letter.

On the first page of the "ROD" it says, "The freeway alternative....along with others considered in the Final EIS/Final Section 4 (f) Evaluation is fully described in Chapter Three of the Document." Obviously, it is not. Nothing in the Final EIS describes how freeway alternative No. 26, which was determined to be not feasible or prudent in the 1995 Freeway Alternatives Analysis Report cited in newspapers, project newsletters and the Draft and Final EIS's, became the selected alternative. Further, none of the information in the Final EIS shows how the freeway location within Alternative 26 was determined.

Obviously, this failure violates the key requirement that the ROD "must explain the basis for the project decision as completely as possible based on the information contained in the EIS

---

[128] *Id.*.
[129] *Id.*
[130] *Id.*

(40 CFR 15202.2)" and once again highlights of the obvious problem of the EIS missing its heart.[131]

It is all very clear and simple—neither the Draft nor the Final EIS contains sufficient information to base an alternative selection on, making it impossible for the "ROD" to comply with the law.

On page two of the "ROD" it says, "Furthermore, comments by the U.S. EPA identify concerns that must be resolved in the Section 404 permit process." This statement concedes the need for another EIS. As previously explained, the issuance of a CWA permit in a federal-aid highway project, a major federal action significantly affecting the human environment, requires the preparation of an EIS. Because the EPA unequivocally stated that the highway agency EIS's were insufficient, no permit will be issued until these are addressed, and they can only be addressed in another EIS.

On page seven of the "ROD" Mr. Arnold makes desperate and ridiculous statements concerning cumulative impacts caused by induced growth. Public and EPA comments informed Mr. Arnold of the lack of any cumulative impact analysis in the Draft EIS and an insufficient analysis in the Final EIS. Yet in the "ROD" Mr. Arnold pleads that while impacts caused by induced growth will occur and therefore project purpose and need is met, the environmental impacts of the growth are far too speculative to be estimated, a position that so illogical it is best described as just plain silly.

Almost 13 years ago in Position Paper: Secondary and Cumulative Impact Assessment in the Highway Project Development Process, Federal Highway Administration Project Development Branch, HEP-31 April 1992, the FHWA declared that, in accordance with long standing NEPA principals, an EIS must address secondary and cumulative impacts, and where a highway project has a clear link or is planned to promote subsequent development, secondary and cumulative impacts must be estimated since they are likely to be great.

On page 12 Mr. Arnold concedes that the "ROD" fails to address the extensive and substantive comments my sister and I made on the Final EIS. As previously explained, responding to public comment is a key requirement of NEPA. Accordingly, Mr. Arnold's outright admission of violating this key requirement of NEPA means that the "ROD" is invalid on its face.

In short the "ROD" is a farce. Unfortunately it has served the purpose of duping you and others into thinking the project is moving ahead when it is not.

## The FHWA Defends the "ROD" by Proclaiming Bradford Pennsylvania a "Major City and Center of Commerce"

---

[131] See page 18 of this letter.

As noted in the previous section, a ROD is required to respond to all substantive comments made on a Final EIS. For the Route 219 "ROD" the FHWA replied to the EPA in a letter not included with the "ROD", not sent to me by the FHWA's attorney and not available on the NYSDOT or FHWA Internet sites.[132]

That violation of NEPA pales in comparison to all the egregious false and misleading "facts" and unsupported "analysis" contained in this letter. The letter is amazingly condescending to the principal EIS reviewing agency and the expert agency controlling the issuance of the Clean Water Act permit, and it contains few truthful statements or accurate analyses.

As with the EIS's and the "ROD" there are far too many errors to include in this letter, but it takes only one example to show how desperate and deceitful the FHWA can be. In addressing the segmentation issue raised by the EPA, the FHWA letter asserts Route 219 is a four-lane expressway "through Bradford, a major city and center of commerce in northwest Pennsylvania."

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.[133] The University of Pittsburgh at Bradford says, "The city of Bradford offers a small town environment with modern amenities and plentiful outdoor recreational opportunities. As the only institution of higher learning in a six-county area, UPB plays an important role in the region's cultural, educational, and economic development, and enrolls about 1,100 full-time equivalent students.[134]

How about you Mr. Fitzpatrick, are you ready to declare a town, described by its Chamber of Commerce as being well know for preserving the unhurried aspects and pure simplicity of small-town America, located in an area so rural that it offers the only institution of higher learning in a six-county area, a "major city and center of commerce?"

If you do, I doubt that many Western New Yorkers will require much investigation to confirm that you do not know what you are talking about. Just as it will not take the EPA, the Corps or the courts much investigation to confirm that Mr. Arnold's letter to the EPA is not credible.

---

[132] Another reason the so-called "ROD" is not a valid ROD.

[133] http://www.visitpa.com/visitpa/visitDetails.do?name=Bradford+Area+Chamber+of+Commerce or http://www.allegheny-online.com/bradford.html

[134] http://www.pitt.edu/~provost/ch1_history.htm

## Additional Historic Sites Recently Discovered

The next item I will discuss is the early 2004 discovery of additional potential National Register sites that unequivocally require the preparation of a Draft EIS. Yet, months after these discoveries were made, the NYSDOT has not yet informed the public of the findings or the absolute need for another Draft EIS to disclose these discoveries.

Using contextual studies that the SHPO long ago determined deficient as a basis, phase 2 archaeological studies begun in 2003 identified at least five National Register eligible properties impacted or potentially impacted by the project.[135] The discovery of these sites constitutes a "modification of the undertaking" requiring supplemental NEPA documents under 36 CFR 800.8(c)(5).[136] However, proper action under NEPA was not taken, thereby wasting yet more precious time and money.

## The Preferred Freeway Alternative - Partial Build Assessment

The current NYSDOT "plan" that the *Buffalo News* reported was presented to you in a recent Route 219 Committee meeting and released to the public a few weeks later is the latest blunder in this process.

The published partial build assessment is a 118-page report filled with fluff, unnecessary and superfluous "analysis" along with inane and unsupported conclusionary statements.

The stated purpose of the assessment is to determine if the Final EIS remains valid for the proposed action and if new information, impacts or circumstances would require a new EIS.

It is obvious to anyone who read the Final EIS, that not only does it not support a partial build alternative, it flatly states that a partial build alternative does not meet project purpose and need [137]. It just does not get easier or clearer than that. Yet rather than reading their own EIS, the highway agencies and their consultants wasted more of our time and spent more of our money to produce yet another fatally flawed, totally unnecessary and useless document.

Even if the Final EIS did not preclude a partial build alternative, it should be very clear to all but the dullest among us that a partial build alternative is a completely new alternative, and

---

[135] The sites preliminarily determined to be National Register eligible were the Dorothy Scott 1 Site, Dorothy Scott 2 Site, Dorothy Scott 3 Site, Dorothy Scott 4 Site and the Blackman-Eaton Site.

[136] *Preservation Council of Erie County v. Federal Transit Authority*, 02-6198 and 02-6280, 2d Cir. January 22, 2004. Also, previously discussed, NEPA, FHWA policy and procedure and case law all require disclosure of these sites is an EIS.

[137] Final EIS page 6-18.

would therefore cause impacts and consequences not described or analyzed in the Final EIS. This new alternative, under NEPA, must be compared to the other alternatives analyzed. Although the highway agencies clearly do not understand this, I hope that by now you do. As I have mentioned several times in this letter, the alternatives analysis process is the heart of NEPA. Unfortunately, because the heart has not been included in any Route 219 NEPA document to date, all have been dead on arrival.

Also, as a quick reminder for you, as explained on page 47 of this letter, CEQ and FHWA regulations and policy and procedure require that a ROD be based upon information contained in a final EIS. This requirement makes it impossible to issue a ROD approving a partial build alternative for this project based on a final EIS that categorically excludes the possibility of a partial build alternative. Further, because the partial build assessment is not an EIS, no ROD may be based on it.

I will not go into all the other reasons the assessment is nothing more than a "smoke and mirrors" attempt to dupe you and others into thinking this project has hope of reaching fruition. As with all the other Route 219 documents there are far too many errors to reasonably discuss in a letter like this. I will point out only one very obvious error—the failure to mention the discovery of additional historic properties.

CEQ NEPA regulations require environmental assessments to discuss impacts to historic properties. As noted in the previous section of this letter, it has only been a little more than a year since additional National Register eligible properties were discovered. Despite this and despite the fact that the table of contents includes historic properties—none were disclosed or discussed, making the partial build assessment invalid on its face.

In summary, the partial build assessment is just one more astonishing example in this decade-long debacle, which shows just how badly and in how many ways the EIS preparers can mess things up.

## Actions Requested

If you have read this letter I think it is next to impossible for you to believe that Route 219 freeway alternative proposed in the Final EIS or "approved" in the "ROD" will ever come to fruition, and that the partial build option is a complete absurdity.

Accordingly I am asking you fulfill your obligations as a representative of the people of Cattaraugus County and to put as much effort into stopping this extraordinarily wasteful and completely hopeless project as you previously have in promoting it.

To this end I am requesting that you:

(1) Distribute a copy of this letter to members of the Legislator (because Western New York residents, property owners and other stakeholders will rightly hold all of these people accountable for understanding the implications of their past and future actions and it is important that they have authoritative and reliable information to base their decisions on),

(2) Pass a resolution to notify the NYSDOT and the FHWA that the County no longer supports the current Route 219 expansion project due to the extraordinary number of issues that cannot be resolved without preparing another EIS,

(3) Terminate the Route 219 Committee,

(4) Establish a County transportation improvement committee to work with federal, tribal, state and local agencies or governments, as well as environmental, historic preservation, taxpayer, business, citizen and other appropriate groups to develop plans that will address the serious transportation related safety and economic needs facing the County, and,

(5) Request that this new Committee review the errors made in the Route 219 debacle and recommend personnel changes (including the termination of state and local government employees responsible for the gross mishandling of the Route 219 projects that lead to an outragous and unnecessary waste of time and money) and organizational and process changes to correct the problems identified.

I plan to contact in the near future to set up a time when we can meet to discuss these issues further.

Sincerely,

William M. Norton