

# *LAW OFFICE OF GARY A. ABRAHAM*

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October 26, 2006

Kenneth C. Taft  
Deputy Regional Permits Administrator  
Region 9 - Allegany Suboffice  
New York Department of Environmental Conservation  
182 East Union - Suite 3  
Allegany, NY 14706-1328

Re: Clean Water Act Section 401 Water Quality Certification;  
N.Y.S. Dept. of Transportation (“NYDOT”) Joint Application for Permit,  
Southern EXPRESSWAY/US Rte 219–Section 5

Dear Mr. Taft:

Please accept the following comments on the above-referenced proposal on behalf of [Concerned Citizens of Cattaraugus County, Inc.](#) (“CCCC”). The mission of CCCC, a not-for-profit corporation, is to ensure that the laws protecting the environment in Cattaraugus County are fully enforced.

Clean Water Act Section 401 water quality certifications in New York are governed by 6 NYCRR §608.9. The regulation provides, in pertinent part, that the applicant is required to show that the proposal will comply with “State statutes, regulations and criteria otherwise applicable to such activities.” 6 NYCRR § 608.9(a)(6).

Prior to approval of a Section 401 certification, the Department must apply the criteria for a [State Environmental Quality Review](#) (“SEQR”), which requires the Department to make findings. *See* 6 NYCRR § 617.11(c). The Department’s findings must “weigh and balance relevant environmental impacts with social, economic and other considerations,” 6 NYCRR § 617.11(d)(2), and ultimately must “certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable.” 6 NYCRR § 617.11(d)(5).

SEQR also discourages segmentation of project reviews, “the division of the environmental review of an action such that various activities or stages are addressed . . . as though they were independent, unrelated activities, needing individual determinations of significance.” NYCRR § 617.2(ag). “Considering only a part or segment of an action is contrary to the intent of SEQR.” NYCRR § 617.3(g)(1).

According to the Department’s [public notice](#), this proposal “is the northern-most section of a larger project plan to extend the freeway south to Route I-86 near Killbuck in the Town of

Salamanca.” However, the larger project plan identifies an alternative four-lane highway upgrade that would be far less destructive, and far less costly than the freeway alternative. Indeed, technical comments objecting to the freeway alternative on these grounds have been made to other involved agencies by the U.S. Environmental Protection Agency (“EPA”) and the Fish and Wildlife Service of the U.S. Department of the Interior (“FWS”).<sup>1</sup>

NYSDOT submitted a “Joint Application for Permit” to the Department and to the U.S. Army Corps of Engineers (“ACOE”), dated June 15, 2005, which incorporates a June 20, 2005 letter from NYSDOT to the Department detailing the scope of construction of Section 5 and its impacts on wetlands and streams and proposed mitigation of those impacts. However, no analysis of alternatives is included, nor is there any analysis of social, economic, or cultural impacts. For these one must turn to the [environmental impact statement NYSDOT has prepared](#) for the the larger project plan.

Based on its technical review of the environmental impact statement for the the larger project, EPA objected to the freeway proposal because, according to NYDOT’s own research, the accident rate for a four-lane divided highway is “slightly higher” than the accident rate for the existing road. (July 24, 1998 EPA Comments). In light of the significant adverse impacts to wetlands, streams and associated habitats, EPA concluded that “upgrade” alternative (four travel lanes along the existing alignment) was less damaging and clearly feasible. Id.

EPA also notes that NYSDOT is obligated to show why an alternative (such as the “upgrade” option) cannot be found that would avoid destruction of wetlands, which “are relatively scarce in the Cattaraugus Creek watershed.” ([February 28, 2006 EPA Comments](#), Attachment item 5). Under SEQR, NYSDOT is also obligated to make such a demonstration to the Department.

FWS objected to the freeway proposal because impacts to wildlife and habitat have not been adequately considered. [FWS, letter to ACOE, February 28, 2006](#). This provides further grounds for insisting on a demonstration why the upgrade option is not a reasonable alternative.

Following the intervention of Rep. John R. “Randy” Kuhl (R-NY, 29th Dist.), NYSDOT provided supplemental information for one segment of the project, the three-mile road segment from Springville to Peters Road in Ashford Junction. See [EPA, letter to Rep. Kuhl, April 21, 2006](#). I understand following this intervention a number of meetings were held among NYSDOT, the Department, EPA and FWS that have resulted in additional modifications to the Section 5

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<sup>1</sup> Copies of the following comments are attached to, adopted by and incorporated into these comments:

- [EPA to Harold J. Brown, Federal Highway Administration, July 24, 1998](#)
- [EPA to Robert Arnold, Federal Highway Administration, June 4, 2003](#)
- [EPA to Lt. Colonel Timothy B. Tochette, ACOE, February 28, 2006](#)
- [FWS to Lt. Colonel Timothy B. Tochette, ACOE, February 28, 2006](#)

proposal such that, with certain conditions, EPA and FWS have removed their objections to permitting Section 5.<sup>2</sup>

However, EPA's and FWS's earlier objections remain valid: total wetland fill for all phases of the Route 219 freeway alternative would be over 30 acres plus elimination of 37,000 feet of perennial and intermittent streams, compared to 11.6 acres and few impacts to streams for the "upgrade" alternative. ([June 4, 2003 EPA Comments, p. 2](#))

Notwithstanding political pressure, Segment 5 appears to be a step toward implementing the Route 219 project as a whole. In addition to the comments of EPA and FWS, (footnote 1, above), one or more meetings among ACOE, NYSDOT and the Department have taken place recently on "Section 6 of the Route 219 Project," providing further evidence that Segment 5 is not in fact independent of other segments of the larger project. [L. Ammons, ACOE, letter to K. Taft, NYSDEC, July 6, 2006 \(email\)](#), attached hereto. It is thus clear that the Department expects Section 5 to be segment of "the Route 219 Project," and this larger project is the freeway alternative whose impacts are not being publicly reviewed at this time. Approval of Section 5 under these circumstances constitutes impermissible segmentation under SEQR.

The larger project's stated goal—to improve traffic conditions, address safety issues, and enhance economic opportunities—does not justify the impacts of the four-lane freeway option for Section 5 in light of the substantially lesser costs and impacts that would be expected from an upgrade from Springville to Peters Road along the existing Route 219 alignment. See footnote 1, above.

In addition to its impacts on the natural environment, the applicant has not offered sufficient evidence that social and economic impacts adverse to Cattaraugus County would be avoided by the freeway alternative to the same degree as the upgrade alternative. Apart from conclusory resolutions in support of the freeway alternative, Cattaraugus County officials have not submitted any comments during the the earlier stages of other involved agencies' review of the Project. By contrast, I understand the Erie County planning department commented to ACOE that additional signage would be needed along the proposed Springville interchange to protect business interests from suffering the effect of freeway bypass should the Project be implemented. One need only drive on an interstate highway through the Appalachia portion of southern Pennsylvania, West Virginia and Virginia to see that freeways can depress the social and economic qualities of the rural communities they bypass. However, the Section 5 proposal offers

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<sup>2</sup> By reducing wetland fill from 12.2 to 10.8 acres for this phase of the project, EPA found NYDOT modified the project enough to justify withdrawal of EPA's objections to Section 5. [EPA, letter to ACOE, July 12, 2006](#). FWS has removed its objections to Section 5 on the same grounds, further conditioned on a number of modifications to the mitigations for wetland and stream destruction or disturbance. [FWS, letter to ACOE, October 6, 2006](#). However, it should be noted that the conditions for FWS approval will substantially increase the costs of Segment 5 and thereby increase the costs of the larger freeway alternative.

little or nothing to allay such concerns. Indeed, the segmentation of review from the larger project hinders the ability of the public to comment on the actual impacts of the project.

For the reasons provided above, CCCC urges the Department to disapprove the application for a water quality certification as premature. We look forward to commenting on the full range of environmental impacts under SEQR when a complete application addressing the scope of the full Route 219 Project is submitted.

Respectfully submitted,

s/

Gary A. Abraham  
*Attorney for CCCC*

gaa/encs.

cc: Lt. Colonel John S. Hurley, District Engineer, Buffalo District  
U.S. Army Corps of Engineers

ATTACHMENTS:

[EPA to Harold J. Brown, Federal Highway Administration, July 24, 1998](#)

[EPA to Robert Arnold, Federal Highway Administration, June 4, 2003](#)

[EPA to Lt. Colonel Timothy B. Tochette, ACOE, February 28, 2006](#)

[FWS to Lt. Colonel Timothy B. Tochette, ACOE, February 28, 2006](#)

[EPA to Hon. John R. Kuhl, Jr., April 21, 2006](#)

[L. Ammons, ACOE, to K. Taft, NYSDEC, July 6, 2006 \(email\)](#)

[FWS to Lt. Colonel John S. Hurley, ACOE, October 6, 2006](#)