



# PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

2000 P Street NW, Suite 240 ♦ Washington, DC 20036  
Phone: (202) 265-PEER ♦ Fax: (202) 265-4192 ♦ [info@peer.org](mailto:info@peer.org) ♦ <http://www.peer.org>

August 7, 2014

Michael Boots  
Acting Chair  
White House Council on Environmental Quality  
722 Jackson Place, NW  
Washington, DC 20503

[Michael J. Boots@ceq.eop.gov](mailto:Michael.J.Boots@ceq.eop.gov)

Re: Call for CEQ Investigation of FHWA's NEPA Environmental Analysis of the New York Gateway Connections Improvement Project to the U.S. Peace Bridge Plaza in Buffalo, New York

Via U.S. Mail & Email

Dear Acting Chair Boots:

Public Employees for Environmental Responsibility (PEER) hereby requests an immediate investigation by the White House Council on Environmental Quality (CEQ) into an urgent matter under your jurisdiction. The Federal Highway Administration (FHWA) and New York State Department of Transportation (NYSDOT) recently violated the National Environmental Policy Act<sup>1</sup> (NEPA) by “committing resources prejudicing selection of alternatives before making a final decision”<sup>2</sup> for a major construction project at the Peace Bridge international border crossing in Buffalo, New York.

PEER placed Freedom of Information Act (FOIA) and New York State Freedom of Information Law (FOIL) requests with agencies tied to the New York Gateway Connections Improvement Project, including FHWA, NYSDOT, the New York State Thruway Authority (NYSTA), and the Buffalo and Fort Erie Public Bridge Authority (PBA). NYSDOT and NYSTA failed to respond to our requests in the period required by law. However, materials yielded from FHWA and PBA, combined with media coverage<sup>3</sup> and construction bidding documents obtained through the NYSDOT website,<sup>4</sup> provide definitive proof that FHWA and NYSDOT violated NEPA through “predetermination.”

On June 3, 2014, FHWA and NYSDOT issued the Final Environmental Impact Statement (FEIS) Record of Decision (ROD) for the \$35 million New York Gateway Connections

---

<sup>1</sup> 40 CFR Parts 1500-1508.

<sup>2</sup> 40 CFR Part 1502.2(f).

<sup>3</sup> Mike Desmond, *Complex Peace Bridge project continues*, WBFO, May 22, 2014, available at <http://news.wbfo.org/post/complex-peace-bridge-project-continues>.

<sup>4</sup> New York State Department of Transportation, Bid Documents for Contract No. D262652, available at [https://www.dot.ny.gov/doing-business/opportunities/const-contract-docs?p\\_d\\_id=D262652](https://www.dot.ny.gov/doing-business/opportunities/const-contract-docs?p_d_id=D262652).

Improvement Project to the U.S. Peace Bridge Plaza.<sup>5</sup> This project entails the construction of several entrance and exit ramps connecting the Peace Bridge complex to Interstate 190. **Before** the ROD was issued, however, FHWA and NYSDOT committed predetermination by:

1. Funding and completing final engineering drawings, stamped by licensed professional engineers, for the preferred action alternative identified in the project's FEIS; **and**
2. Beginning construction of the preferred action alternative identified in the project's FEIS.

Two volumes of highly complex project engineering drawings totaling 687 pages for the New York Gateway Connections Improvement Project are available on the NYSDOT website.<sup>6,7</sup> Of those, 434 pages contain a PS&E date (Plans, Specifications, and Estimates date) of May 27, 2014, meaning that these pages were completed **seven days before the ROD was issued**. A total of 94 pages were stamped and signed by licensed professional engineers on May 27, 2014, and another two pages were stamped and signed on June 2, 2014. The extreme cost and level of effort required to produce these drawings, which reflect only the preferred action alternative identified in the FEIS, represent a commitment of federal resources (funding) prejudicing an unbiased selection of other alternatives.

On May 22, 2014, **12 days before the ROD was issued**, WBFO Radio in Buffalo reported that a barge carrying a crane was docked just south of the Peace Bridge at the mouth of the Niagara River, digging soil borings for the New York Gateway Connections Improvement Project pedestrian bridge detailed in the preferred action alternative of the FEIS.<sup>8</sup> The extreme cost and level of effort associated with the procurement of a barge and crane to conduct construction work before the NEPA process was complete again represents a commitment of federal resources (funding) prejudicing an unbiased selection of other alternatives.

Both FHWA and the U.S. Environmental Protection Agency (EPA) have issued policy and guidance regarding the NEPA process applicable to this case. According to FHWA's "National Environmental Policy Act and transportation decision-making" policy handbook:<sup>9</sup>

***A ROD must be issued before any project approvals (e.g., for design, right-of way acquisition, construction) can be given on the selected course of action [emphasis added***

---

<sup>5</sup> Federal Highway Administration and New York State Department of Transportation, *Joint Record of Decision / Findings Statement, New York Gateway Connections Improvement Project to the U.S. Peace Bridge Plaza*, June 3, 2014, available at <https://www.dot.ny.gov/portal/page/portal/content/delivery/Main-Projects/576080-Home/576080-Repository/5760%2080%20NY%20Gateway%20Joint%20ROD%20Signed.pdf>.

<sup>6</sup> New York State Department of Transportation, Engineering Drawings for New York Gateway Connections Improvement Project Vol. 1, available at [https://www.dot.ny.gov/portal/pls/portal/MEXIS\\_APP.BC\\_CONST\\_NOTICE\\_ADMIN.VIEWFILE?p\\_file\\_id=4824&p\\_is\\_digital=Y](https://www.dot.ny.gov/portal/pls/portal/MEXIS_APP.BC_CONST_NOTICE_ADMIN.VIEWFILE?p_file_id=4824&p_is_digital=Y).

<sup>7</sup> New York State Department of Transportation, Engineering Drawings for New York Gateway Connections Improvement Project Vol. 2, available at [https://www.dot.ny.gov/portal/pls/portal/MEXIS\\_APP.BC\\_CONST\\_NOTICE\\_ADMIN.VIEWFILE?p\\_file\\_id=4831&p\\_is\\_digital=Y](https://www.dot.ny.gov/portal/pls/portal/MEXIS_APP.BC_CONST_NOTICE_ADMIN.VIEWFILE?p_file_id=4831&p_is_digital=Y).

<sup>8</sup> Mike Desmond, *Complex Peace Bridge project continues*, WBFO, May 22, 2014, available at <http://news.wbfo.org/post/complex-peace-bridge-project-continues>.

<sup>9</sup> Federal Highway Administration, *National Environmental Policy Act and transportation decision-making: Project development and documentation overview*, Aug. 21, 1992, available at <http://www.environment.fhwa.dot.gov/projdev/tdmpdo.asp>.

throughout].

Furthermore, according to EPA's "Managing your environmental responsibilities" (2005) guidebook:<sup>10</sup>

*After [an FEIS] is prepared, a federal agency will prepare a [ROD] addressing how the findings of the EIS, including consideration of alternatives, were incorporated into the agency's decision-making process. If you perform these activities prior to the start of construction, it will help to avoid significant project delays and possible project cancellation.*

FHWA and NYSDOT **completed design and construction work before the ROD was issued** for the New York Gateway Connections Improvement Project in clear violation of NEPA and FHWA policy, and EPA NEPA guidance. In doing so, they prematurely obligated the federal government to a single course of action by completing engineering drawings and beginning construction activities for the preferred action alternative identified in the New York Gateway Connections Improvement Project FEIS before the NEPA process was complete, thereby prejudicing the government's selection of available alternatives.

In *Forest Guardians v. United States Fish and Wildlife Service* (2010) the Tenth Circuit Court of Appeals noted that predetermination occurs "when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome before the agency has completed the environmental analysis."<sup>11</sup> In *Metcalf v. Daley* (2000), the Ninth Circuit Court of Appeals held that federal agencies had violated NEPA by making an "irreversible and irretrievable commitment of resources" prior to completing a NEPA environmental analysis.<sup>12</sup> In the case of the New York Gateway Connections Improvement Project, FHWA and NYSDOT irreversibly and irretrievably committed federal financial resources to the completion of construction drawings, construction bid documents, and construction-related services before FHWA and NYSDOT completed the requisite NEPA environmental analysis.

FHWA and NYSDOT's illegal act of predetermination is why PEER is calling on the White House to uphold its legal mandate to ensure federal compliance with NEPA by investigating FHWA and NYSDOT's actions in detail and holding those responsible accountable for their actions. It is particularly critical that CEQ immediately order FHWA and NYSDOT to rescind their ROD and halt further construction of the New York Gateway Connections Improvement Project until CEQ completes its investigation into this egregious and gratuitous violation of the law and breach of public trust.

Through our FOIA and FOIL requests, PEER obtained recordings of regular public

---

<sup>10</sup> U.S. Environmental Protection Agency, *Managing your environmental responsibilities: A planning guide for construction and development*, Section XII, p. 85, Apr. 2005, available at [http://www.epa.gov/compliance/resources/publications/assistance/sectors/constructmyer/myer1c\\_nepa.pdf](http://www.epa.gov/compliance/resources/publications/assistance/sectors/constructmyer/myer1c_nepa.pdf).

<sup>11</sup> See *Metcalf v. Daley*, 214 F.3d 1135 (9<sup>th</sup> Cir. 2000).

<sup>12</sup> See *Forest Guardians v. United States Fish and Wildlife Service*, 611 F.3d (10<sup>th</sup> Cir. 2010).

monthly meetings of the PBA board, including an April 25, 2014 meeting that exposes shocking revelations of public deception used by representatives of Governor Andrew Cuomo (see enclosed transcripts). Among those in attendance at the April 25, 2014 meeting were three representatives from the Cuomo Administration:<sup>13</sup>

- *Sam Hoyt*, PBA Board Member appointed by Governor Andrew Cuomo;
- *Maria Lehman*, Project Manager for the New York State Department of Transportation assigned to the New York Gateway Connections Improvement Project; and
- *Anthony Masiello*, PBA Board Member appointed by Governor Andrew Cuomo.

In the recording of the April 25, 2014 meeting, Ms. Lehman articulates a directive of Governor Cuomo and then admits that FHWA and NYSDOT are in the process of completing design work on the preferred action alternative identified in the FEIS:<sup>14</sup>

*I have, as does Sam [Hoyt], the governor's word that unless we get a restraining order, [the construction contract for the New York Gateway Connections Improvement Project is] gonna get awarded—our intent is—the design is underway now, the final plans are due to be done the end of May [2014], we're going to be bidding it in late June, and we wanna have a shovel in the ground late September [2014].*

In response to a questions raised by Mr. Masiello about publicizing the New York Gateway Connections Improvement Project, Ms. Lehman acknowledges the conscious effort of FHWA and NYSDOT to draw public attention to the project. Responding to Ms. Lehman, Mr. Hoyt goes on to suggest that FHWA and NYSDOT officials “brainwashed” members of the public who might otherwise object to the project.<sup>15</sup>

**Masiello:** *So, but, can't we promote this? Can't we publicize this? Can't we market this?*

**Lehman:** *I think some of it has been a conscious decision not to kick sleeping dogs that otherwise might not be paying as close of attention as they are.*

**Hoyt:** *But along those lines, we've also—continuing the analogy—brainwashed—no, worked closely with, nudged those sleeping dogs and brought them over to our side. The Olmsted Parks Conservancy is the best example. A litigant in previous situations, now celebrating this project and supporting this project.*

The April 24, 2014 PBA board meeting recording also documents a manipulative strategy successfully employed by Ms. Lehman to secretively transfer (sell) property owned by the City of Buffalo to New York State without public discussion using the help of the city's Real Estate Division and three city council members (Darius Pridgen, Council President; David Rivera, Council Member; and Demone Smith, Council Majority Leader). Ms. Lehman goes on to state

---

<sup>13</sup> *Partial Transcript of Buffalo and Fort Erie Public Bridge Authority board meeting*, 44:39 – 48:00, Apr. 25, 2014.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

that she will use this strategy again to obtain city-owned property adjacent to the Peace Bridge. Following Ms. Lehman's explanation, Mr. Masiello—former mayor of the City of Buffalo—states his concurrence with Ms. Lehman's strategy.<sup>16</sup>

Based on the foregoing information pointing to the fact that FHWA and NYSDOT completed design and construction work before issuing the ROD for the New York Gateway Connections Improvement Project, and well-established legal precedence on the subject of predetermination, it is clear that CEQ's immediate intervention in this case is absolutely necessary. PEER respectfully requests that CEQ direct FHWA and NYSDOT to rescind their ROD and halt further construction of this project until CEQ completes a thorough investigation into the actions of FHWA and NYSDOT. The level of deception admittedly practiced by representatives of Governor Cuomo only adds to the grave nature of the situation.

I greatly look forward to your quick response to this request and invite you to contact me with any questions, concerns, or comments. I can be reached at (202) 265-PEER.

Sincerely,

Jeff Ruch  
Executive Director

Enclosures

---

<sup>16</sup> *Partial Transcript of Buffalo and Fort Erie Public Bridge Authority board meeting, 22:30 – 24:04, Apr. 25, 2014.*