

STATE OF NEW YORK  
COUNTY OF ERIE SUPREME COURT

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In the Matter of the Application of MARCIA E. LADIANA,  
and TERRENCE A. ROBINSON,  
Petitioners,

**VERIFIED PETITION**  
**FOR**  
**WRIT OF MANDAMUS**

Index No.

For an Order and Judgment Pursuant to Article 78 of the  
New York Civil Practice Law and Rules

-against-

The New York State Department of Transportation  
Respondent.

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Petitioners Marcia E. Ladiana and Terrence A. Robinson, *pro-se*, for their Verified Petition for an Order and Judgement Pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) against Respondent, The New York State Department of Transportation (NYSDOT), allege as follows:

**PRELIMINARY STATEMENT**

1. Petitioners bring this writ of mandamus to compel Respondent to prepare and issue an Environmental Assessment, in cooperation with their co-lead agency, The Federal Highway Administration (“FHWA”), that meets strict standards in accordance with the New York State Environmental Review Act (“SEQRA”) and related statutes, rules, and regulations.
2. The original Humboldt Parkway was part of a historic system of parks, parkways, and circles designed by Frederick Law Olmsted and Calvert Vaux in the late 19th century.
3. The Humboldt Parkway was a boulevard with an approximately 86-foot-wide tree-lined median that connected Humboldt Park (now Martin Luther King, Jr. Park) with Delaware Park, creating a park-like neighborhood atmosphere.

4. The boulevard served as a focal point for the adjacent neighborhoods, providing a link between the various local streets and nearby recreational attractions, cultural and religious institutions, and local businesses.
5. The origins of the concept for the Kensington Expressway date to the 1946 *Report on New York State Thruway and Arterial Routes for the Buffalo Urban Area*, prepared by the New York State Department of Public Works. The original planned route for the expressway was from downtown, through the Fruit Belt neighborhood, and terminating at the southern end of Humboldt Parkway. In this plan, Humboldt Parkway was maintained as a traffic thoroughfare and traffic was envisioned continuing northeast on an improved Kensington Avenue.
6. Plans were later refined to include an expressway connection to the airport. Demolition and land clearing began in 1957 and approximately 600 households were displaced and relocated (primarily in the Fruit Belt). Several portions of the Humboldt Parkway were removed during the construction in the 1950's and 1960's; however, the segment between Northampton Street and Northland Avenue was initially maintained and became known as the "Humboldt Hourglass."
7. With the increased traffic spurred by the expressway connections on either end, the Humboldt Parkway area experienced a high number of accidents that the NYSDOT addressed by removing the remaining section of the Humboldt Parkway and replacing it with a below grade (depressed) expressway configuration between 1968 and 1970. Local roadway access was provided by construction of the present-day Humboldt Parkway on either side of the depressed expressway.
8. The Kensington Expressway severed several local east-west streets and reduced connectivity between the east and west portions of the neighborhoods. Between Best Street and Sidney Street, east-west street connections (between northbound Humboldt Parkway and southbound Humboldt Parkway) that were terminated by the expressway included: Girard Place, Riley Street, Landon Street, Glenwood Avenue, Winslow Avenue, and Woodlawn Avenue.
9. East-west vehicular, pedestrian and bicycle travel across the expressway was provided on five bridges that carry the local street network (East Ferry Street, East Utica Street, Northampton Street, Dodge Street and Best Street).

10. The loss of the wide median with mature trees along the Humboldt Parkway altered the aesthetic character of the neighborhood and substantially reduced greenspace within the corridor. Scattered street trees are present along the Humboldt Parkway sidewalks, but some blocks have few or no trees. The six-lane expressway and concrete retaining walls are the predominant element of the viewshed for residents along the transportation corridor. The Kensington Expressway construction and loss of the historical Humboldt Parkway substantially affected quality of life in adjoining neighborhoods.
11. In 2009, the NYSDOT initiated a project (PIN 5512.46) to rehabilitate the retaining walls along NYS Route 33, upgrade the railing systems on top of the retaining walls, and install landscape enhancements along Humboldt Parkway bordering the expressway on either side.
12. The original project limits for PIN 5512.46 extended from the Elm-Oak Arterial to NYS Route 198. In May 2009, the scope of PIN 5512.46 was reduced to only include the section of NYS Route 33 between the Elm-Oak Arterial and Best Street, so that the section of NYS Route 33 between Best Street and NYS Route 198 could be evaluated with the goal of advancing a more comprehensive project to address neighborhood concerns of connectivity, economic development, health, and the environment.
13. In 2011, the NYSDOT commissioned the *Kensington Expressway Concept Design Study – Evaluation of Project Alternatives*, August 2012 (Concept Design Study). The Concept Design Study examined the engineering attributes of a variety of concepts that would address a set of “goals and objectives.”
14. On January 22, 2022, Governor Kathy Hochul announced that the NYSDOT would commence an environmental review to assess concepts for reconnecting the east-west neighborhoods in the City of Buffalo that were divided by the construction of the depressed section of the Kensington Expressway more than six decades ago.
15. The Project Scoping Report for NYSDOT Transportation Project P.I.N. 5512.52 was prepared by NYSDOT in coordination with their co-lead agency on the Project, FHWA, in December 2022.
16. The Draft Design Report/Environmental Assessment for the Project was published September 12, 2023.

### **PARTIES**

17. Petitioners are citizens of the United States and life-long residents of New York State.
18. Petitioner, Marcia E. Ladiana is a homeowner, resident, and taxpayer in New York State. 845 Humboldt Parkway, Buffalo New York 14208 has been her primary residence since 1988; she currently resides at that address. Without the Court's timely intervention, she will suffer imminent injury in fact and irreparable harm.
19. Petitioner, Terrence A. Robinson is a homeowner, resident, and taxpayer in New York State. 845 Humboldt Parkway, Buffalo New York 14208 has been his primary residence since 1988; he currently resides at that address. Without the Court's timely intervention, he will suffer imminent injury in fact and irreparable harm.
20. Respondent, The New York State Department of Transportation is a New York State Government Agency with offices located at 100 Seneca Street, Buffalo, New York 14203. NYSDOT is the lead agency and sponsor of the Project.

### **VENUE**

21. Venue is proper in Erie County because that is where the Respondent has failed to perform the duties specifically enjoined upon them by law; because material events have taken place in Erie County, as described in the paragraphs below; and because Respondent has offices located in Erie County.

### **LEGAL BACKGROUND**

22. The Project is federally, and state funded and is classified as a National Environmental Policy Act (NEPA) Class III action under 23 CFR 771, which requires the preparation of an Environmental Assessment (EA) to determine whether or not the Project will result in significant impacts to the environment. The FHWA and NYSDOT, as joint lead agencies, have advanced the Project through the NEPA EA process.
23. NYSDOT states: "The Project is classified as a non-Type II (EA) action under SEQRA, indicating that it has the potential for significant environmental impacts or substantial controversy on environmental grounds."
24. The New York State Department of Transportation (NYSDOT), prepared a Draft Design Report / Environmental Assessment (DDR/EA) for the New York State Route 33 Kensington Expressway Project (the Project) in cooperation with the Federal Highway Administration (FHWA), in accordance with the requirements of the Council on

Environmental Quality (CEQ) regulations for implementing the National Environmental Policy Act (NEPA), as amended, (40 Code of Federal Regulations [CFR] Parts 1500-1508); the FHWA *Environmental Impact and Related Procedures; Final Rule* (23 CFR 771); the NYSDOT *Procedures for Implementation of the State Environmental Quality Review Act* (SEQRA) (17 New York Codes, Rules and Regulations [NYCRR] Part 15); and the NYSDOT Project Development Manual.

**NY Route 33, Kensington Expressway | Concept Design Study – August 2012**

25. The Concept Design Study (2012 Study) contains the following:

**“1.5.4 Environmental Stewardship**

The NYSDOT recognizes the importance of environmental stewardship in the advancement of projects. It is likely that State and Federal funds will be used to construct this project. Therefore, Title 17 (Transportation) of the New York Code of Rules and Regulations, Part 15 must be followed with regard to the NYSDOT’s implementation of the State Environmental Quality Review (SEQR) Act. Likewise, the Title 23 (Highways) of the Code of Federal Regulations, Part 771 must be followed with regard to the Federal Highway Administration’s compliance with implementing regulations of the National Environmental Policy Act (NEPA). Additionally, should local funds from the City of Buffalo be used on the project, compliance with local laws (if any) relating to the implementation of SEQR will be required.”

26. **The National Environmental Policy Act (NEPA)**, signed into law on January 1, 1970, requires Federal agencies to consider the environmental effects of proposed major Federal actions significantly affecting the quality of the human environment. The environmental review process initiated with the passage of the 1966 National Historic Preservation Act (NHPA) (P.L. 89-665; 80 Stat. 915; 16 U.S.C. 470) by Congress ushered in the new legal framework.

27. The passage of the National Environmental Policy Act of 1969 (NEPA) (P.L. 91-190; 83 Stat. 852; 42 U.S.C. 4321) in December 1969 and its subsequent signing into law on January 1, 1970, expanded environmental reviews and formally established environmental protection as a Federal policy. NEPA and NHPA require Federal officials to “stop, look, and listen” before making decisions that impact historic properties and the human environment.

28. NEPA and NHPA each created agencies to implement major environmental programs that shape Federal project planning. The Advisory Council on Historic Preservation (ACHP) and the Council on Environmental Quality (CEQ) administer regulations viewed

as the cornerstones of the Federal environmental review procedures. The CEQ *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, (40 C.F.R. Parts 1500- 1508) (CEQ regulations) encourage integration of the NEPA process (NEPA review) with other planning and environmental reviews, such as Section 106 of NHPA (Section 106).

29. The regulations that implement **Section 106**, *Protection of Historic Properties* (36 C.F.R. Part 800), encourage agencies to plan Section 106 consultations coordinated with other requirements of other statutes, as applicable, such as NEPA.
30. Coordination, addressed in 36 C.F.R. § 800.8(a), “*Coordination With the National Environmental Policy Act*,” encourages agencies to coordinate compliance with Section 106 with any steps taken to meet NEPA review requirements.
31. 36 C.F.R. § 800.8(c), “*Use of the NEPA process for section 106 purposes*,” authorizes agencies to use the procedures and documentation required for the preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) or an Environmental Impact Statement (EIS) and Record of Decision (ROD) to comply with Section 106 in lieu of the procedures in 36 C.F.R. § 800.3 through 36 C.F.R. § 800.6 of the Section 106 regulations.
32. Section 106 is concerned exclusively with impacts to historic properties, defined in NHPA as properties that are listed, or may be eligible for listing, in the National Register of Historic Places (National Register).
33. In Section 106 consultations, representatives of affected communities may also raise environmental justice issues. Such issues which can be addressed through historic preservation considerations may contribute to the agency’s overall environmental justice compliance.
34. **The State Environmental Quality Review Act (SEQRA)** requires that all agencies of government at the state, county, and local level within New York comply with SEQR. SEQR demands the Environmental Impact Statement (EIS) balance environmental harm against social and economic needs in considering the environmental impact of a project (see 6 NYCRR § 617.11 [d] [2] (findings must “weigh and balance relevant environmental impacts with social, economic and other considerations”)); see also Matter

of Hudson River Fisherman's Assn v Williams, 139 AD2d 234 [3d Dept 1988] (need for drinking water supply outweighed harm to fish life)).

35. **§ 617.1 AUTHORITY, INTENT AND PURPOSE** - This Part is adopted pursuant to sections 3-0301(1)(b), (2)(m) and 8-0113 of the Environmental Conservation Law to implement the provisions of the State Environmental Quality Review Act (SEQR)
36. This Part is intended to provide a statewide regulatory framework for the implementation of SEQR by all state and local agencies. It includes:
- (1) procedural requirements for compliance with the law.
  - (2) provisions for coordinating multiple agency environmental reviews through a single lead agency (section 617.6 of this Part).
  - (3) criteria to determine whether a proposed action may have a significant adverse impact on the environment (section 617.7 of this Part);
  - (4) model environmental assessment forms to aid in determining whether an action may have a significant adverse impact on the environment (Appendices A and B of section 617.20 of this Part); and
  - (5) examples of actions and classes of actions which are likely to require an EIS (section 617.4 of this Part), and those which will not require an EIS (section 617.5 of this Part).
37. **§ 617.4 TYPE I ACTIONS**
- (a) The purpose of the list of Type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than Unlisted actions. All agencies are subject to this Type I list.
  - (b) The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:
    - (6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds: or the expansion of existing nonresidential facilities by more than 50 percent of any of the following thresholds:
      - (i) a project or action that involves the physical alteration of 10 acres.
38. **§ 617.6 INITIAL REVIEW OF ACTIONS AND ESTABLISHING LEAD AGENCY**
- (a) Initial review of actions.

(1) As early as possible in an agency's formulation of an action it proposes to undertake, or as soon as an agency receives an application for funding or for approval of an action, it must do the following:

1. (i) Determine whether the action is subject to SEQRA. If the action is a Type II action, the agency has no further responsibilities under this Part.
2. (ii) Determine whether the action involves a federal agency. If the action involves a federal agency, the provisions of section 617.15 of this Part apply.

(2) For Type I actions, a full EAF (see section 617.20, Appendix A, of this Part) must be used to determine the significance of such actions. The project sponsor must complete Part 1 of the full EAF, including a list of all other involved agencies that the project sponsor has been able to identify, exercising all due diligence. The lead agency is responsible for preparing parts 2 and 3.

#### 39. § 617.7 DETERMINING SIGNIFICANCE

(a) The lead agency must determine the significance of any Type I or Unlisted action in writing in accordance with this section.

(c) Criteria for determining significance:

(1) To determine whether a proposed Type I or Unlisted action may have a significant adverse impact on the environment, the impacts that may be reasonably expected to result from the proposed action must be compared against the criteria in this subdivision. The following list is illustrative, not exhaustive. These criteria are considered indicators of significant adverse impacts on the environment:

(i) a major change in the use of either the quantity or type of energy;

#### 40. 17 NYCRR Part 15 - PROCEDURES FOR IMPLEMENTATION OF STATE ENVIRONMENTAL QUALITY REVIEW ACT

##### Section 15.1. Purpose and authority.

(a) The purpose of this Part is to establish such additional procedures as are necessary for the implementation of the State Environmental Quality Review Act (SEQRA) by the New York State Department of Transportation. In accordance with the authority contained in section 8-0113, subdivision 3 of ECL and 6 NYCRR 617.4, the procedures contained in this Part vary from those contained in 6 NYCRR Part 617.

The purpose of this variance is to allow the department to establish a procedure for SEQR implementation which corresponds with, and is integrated into, procedures for compliance with the National Environmental Policy Act.

- (b) Such coordination of procedures is directed by SEQR in section 8-0111 and is consistent with Council on Environmental Quality regulations implementing the National Environmental Policy Act which have an effective date of July 30, 1979 (40 CFR 1500 et seq.).
- (c) The major differences between this Part and 6 NYCRR Part 617 are:
  - (1) lead agency determinations are made at an earlier time in the SEQR process; and
  - (2) all actions which are not type II actions are processed in the same manner (similar to type I under 6 NYCRR Part 617).
- (d) These regulations are designed to be no less protective of the environment than 6 NYCRR Part 617.

**41. Section 15.11. Criteria for determining whether an action may have a significant effect on the environment.**

- (a) An action may have a significant effect on the environment when the action can reasonably be expected to have one or more of the following effects: ...
  - (6) a major change in the use of either the quantity or type of energy.

**42. The Climate Leadership and Community Protection Act (“CLCPA”) is landmark legislation in New York state, enacted to address climate change and its inequitable burdens on disadvantaged communities. The CLCPA makes clear that the State must prioritize the health and safety of environmental justice communities in advancing greenhouse gas reduction goals (see generally L 2019, ch. 106, §1)**

**43. The 2019 New York Climate Leadership and Community Protection Act (“CLCPA”) established targets to transform New York’s energy generation and efficiency. A concurrent goal of the CLCPA is to relieve long-standing environmental justice burdens on “disadvantaged communities”.**

**44. Article 6 State Smart Growth Public Infrastructure Policy Act**

**§ 6-0107 State smart growth public infrastructure criteria.**

- 1. In addition to meeting other criteria and requirements of law governing approval, development, financing and state aid for the construction of new or expanded public

infrastructure or the reconstruction thereof, no state infrastructure agency shall approve, undertake, support or finance a public infrastructure project, including providing grants, awards, loans or assistance programs, unless, to the extent practicable, it is consistent with the relevant criteria specified in subdivision two of this section.

45. Before making any commitment, including entering into an agreement or incurring any indebtedness for the purpose of acquiring, constructing, or financing any project covered by the provisions of this article, the chief executive officer of a state infrastructure agency shall attest in a written smart growth impact statement that the project, to the extent practicable, meets the relevant criteria set forth in subdivision two of this section, unless in any respect the project does not meet such criteria or compliance is considered to be impracticable, which shall be detailed in a statement of justification.

#### **Certified Local Government**

46. Congress established a preservation program for the United States with the National Historic Preservation Act of 1966. Since that time, the national historic preservation program has operated as a decentralized partnership between the federal government and the states with the common purpose of identifying, evaluating, and protecting the nation's historic properties. All preservation related programs are implemented primarily by the states through its State Historic Preservation Officers (SHPOs) whose authority was also established by the 1966 legislation.
47. Recognizing the success of this relationship, Congress expanded the partnership to provide for participation by local governments. The 1980 amendments to the National Historic Preservation Act [16 U.S.C. 470a (7)(C)] contained the authorization in *Section 101(a)(7)(C)* for a federal-state-local preservation partnership that became known as the **Certified Local Government (CLG)** program.
48. The local government shall solicit and respond to public comment on all historic preservation issues that are of general public interest, including, but not limited to local district designations, State and National Register nominations and establishment of policies and procedures. The local legislation shall be enforced continuously and consistently.

## **New York State Constitution**

49. On November 2, 2021, New York voters approved an Amendment to the State Constitution's Bill of Rights providing that: "Each person shall have the right to clean air and water, and to a healthful environment." In those sixteen words, the right to a healthy environment was, cloaked in constitutional protection in New York and deemed the equivalent to the sixteen current constitutional guarantees in the state Bill of Rights.
50. Article I, Section 19 guarantees Petitioners' rights and protections.

## **FACTUAL BACKGROUND**

### **Project Location**

51. The Project is located in the City of Buffalo, Erie County, New York. The term "transportation corridor" is used to describe the sections of NYS Route 33 and Humboldt Parkway being considered for improvements in the Project.
52. The transportation corridor is defined as NYS Route 33 (Kensington Expressway) and Humboldt Parkway between Best Street and Sidney Street
53. The Project limits (limits of work) extend along the Kensington Expressway and Humboldt Parkway from approximately High Street (southern limit) to approximately Northland Avenue (northern limit), a total distance of approximately 7,100 feet, and include adjacent areas of proposed disturbance associated with regrading.
54. Five east-west bridges traverse the Kensington Expressway (East Ferry Street, East Utica Street, Northampton Street, Dodge Street and Best Street) within the transportation corridor. Humboldt Parkway, which begins at Northampton Street and extends north beyond the Project limits, is adjacent to the Kensington Expressway on both sides and is part of the Project.

### **Build Alternative**

55. The Build Alternative includes the capping of approximately 4,150 feet of the existing NYS Route 33 Kensington Expressway to form a tunnel; the approximate limits of the proposed tunnel are from Dodge Street to Sidney Street. The "greenspace" cap on this tunnel alone exceeds 435,000 sq. ft., or ten acres.
56. The Project also includes various City of Buffalo streets adjacent to the Kensington Expressway and Humboldt Parkway (the proposed local street improvements are discussed in Section S.3.2). The bounding street limits of these improvements are

generally High Street to the south, Northland Avenue to the north, Fillmore Avenue to the east, and Wohlers Avenue to the west.

### **Construction Operations**

57. The aging infrastructure of Humboldt Parkway and the Kensington Expressway creates several needs. These include: The replacement of concrete retaining walls, which have been deteriorating rapidly in the past 5 to 10 years and the rehabilitation of pavement, which has exceeded its service life on the Kensington Expressway and the Humboldt Parkway.
58. Retaining walls within the Project limits were constructed in 1963 (Michigan Avenue to Northampton Street) and 1970 (Northampton Street to Northland Avenue). These walls have been deteriorating at a rapid rate over the past 5 to 10 years. The prominent distress is in the lower third of the walls where snow and salt accumulate during the winter months. Patching treatments would not sufficiently address the deterioration of the retaining walls.
59. Subsequent to the Project Scoping Report, condition inspections were performed on all eight retaining walls in May 2023.
60. The construction sequence for the new tunnel construction is assumed to take the form of several tasks that would occur sequentially and simultaneously along the corridor, which would include:
  - Construction of temporary support of excavation (SOE) walls.
  - Retaining wall demolition.
  - Bridge demolition.
  - Construction of new retaining and tunnel walls.
  - Removal of overburden.
  - Removal of rock by mechanical means.
  - Removal of rock by blasting.
  - Erection of tunnel roof sections.
  - Reconstruction of Humboldt Parkway (both northbound and southbound); and
  - Landscaping and environmental enhancements.

61. It is anticipated that the eastbound Kensington Expressway would be constructed beginning at the northern limits of the existing/proposed east retaining wall approximately 580 feet north of Sidney Street, and progressing to the south,
62. This process would be conducted sequentially, typically moving in 250-foot to 300-foot segments with the following anticipated effort:
- Retaining wall removal and construction of new east retaining and tunnel walls
- i. Construct SOE walls behind existing east retaining wall:
    - SOE walls are required to be installed prior to the removal of the east retaining wall.
    - SOE walls would begin at approximately 580 feet north of Sidney Street.
    - The SOE walls would be installed behind the existing east retaining wall to support the proposed northbound Humboldt Parkway. Installation of the SOE walls are anticipated to be performed from the northbound Humboldt Parkway (top-down construction).
    - Installation of the SOE walls could involve drilled soldier-pile and lag walls. The soldier piles would be installed first.
  - ii. Removal of existing retaining walls
    - Removal of the east retaining wall would be advanced after the installation of approximately 250 feet to 300 feet of SOE wall as noted in 1.A.i. and would progress from north to south.
    - This work is anticipated to be performed from the eastbound expressway.
    - As the existing retaining walls are removed, lagging for the soldier-pile and lag wall and installation of tie-back supports for the wall would be installed.
63. Soil overburden removal (eastbound):
- i. Soil overburden removal is assumed to begin after a portion of the tunnel center wall has been constructed, working from the northern project limits, approximately 580 feet north of Sidney Street, and progressing to the south, to the proposed southern tunnel portal at Dodge Street.
  - ii. Removal of the overburden within the Kensington Expressway would require removal of the concrete pavement. This work could require concrete saws and would require excavators and mounted impact hammers (hoe rams) to break up the concrete. Excavators and front-end loaders would place the concrete debris into dump trucks for removal off-site.

64. Rock removal (by mechanical means):

- i. This work is anticipated to occur after removal of existing retaining walls and overburden soils.
- ii. It is assumed that rock removal utilizing mechanical means (i.e., mounted impact hammers or excavator mounted rock mills) would be used where the maximum depth of rock removal is 5 feet. or less.
- iii. Mounted impact hammers (hoe rams) or mounted rock mills would break up the existing rock, while excavators or front-end loaders would load dump for removal off-site.

65. Rock removal (by blasting):

- i. This work is anticipated to occur after removal of the existing retaining walls and overburden soils.
- ii. It is assumed that rock removal by blasting would be utilized where the depth of rock removal is more than 5 feet.
- iii. Pneumatic tools, rock drills (potentially excavator mounted) would drill a pattern of holes in the rock to strategically break up the rock. Once holes are drilled, charges would be loaded into the holes, and blast mats would be installed with excavators (blast mats are used to contain the blast/debris and dust). This would be performed sequentially along the length of the project limits for each stage.
- iv. After the blasting occurs, excavators or front-end loaders would load dump trucks for removal off-site.

66. Retaining walls are covered with the 250,000 sq. ft. of Asbestos Containing Material (ACM), used as waterproofing in their construction 50 years ago.

67. Remediation of ACM during the construction process would be an extensive and expensive series of operations with risk of fugitive dust emissions and/or residue.

68. No record of the 2023 repair of the Dodge Street Bridge is contained in the DDR/EA or its appendices – details of ACM presence would be documented there.

**Blasting Operations**

69. The Concept Design Study (2012 Study) contains the following:

#### 2.5.4.a Geotechnical Considerations

Based on the original record plans and subsurface borings taken at that time, the depth to rock is relatively shallow throughout a majority of the project area. Significant rock excavation will be required, especially to install the new drainage system. Depths of rock excavation vary through the project area but would be as much as 6 feet for the entire cross section of NY Route 33 in some areas, and up to 12 feet deep in specific locations for drainage installation. Rock elevations at regular stationing have been added to the proposed cross sections to delineate the extent of excavation needed.

Recent NYSDOT experience in the project area indicates that the rock is fairly hard and difficult to remove. Considering the large amount of rock excavation expected to construct this alternative, the large cost associated with this excavation needs to be incorporated into the project estimate. If blasting is utilized, consideration should be given to the potential impacts of blasting to the Humboldt Parkway properties, both from an environmental and structural standpoint. Blasting through solid rock can result in greater impact damages, and the age and structural integrity of the area's infrastructure is a concern.

70. Air quality: Within the project area, air quality will decrease during construction due to an increase in particulates from diesel exhaust emissions from construction vehicles.
71. Another concern is the release of harmful gases from the bedrock when blasting is used. Air quality monitoring on private property, including basements of buildings, will be required as a safety precaution.

#### Energy

72. Tunnel systems would include fire alarm, detection, and suppression systems, closed-circuit television (CCTV), and communications and control systems for the operation of the various tunnel systems.
73. The estimated annual energy required to safely operate the tunnel is (11,516 MMBtu).
74. Construction of the Build Alternative would require the short-term expenditure of energy and its related production of GHG emissions.

| Energy Use (mmBtu) |         | CO <sub>2</sub> e (metric tons) |
|--------------------|---------|---------------------------------|
| Construction       | 58,710  | 5,770                           |
| Equipment          |         |                                 |
| Materials          | 210,290 | 29,300                          |
| Materials          | 8,850   | 850                             |
| Transportation     |         |                                 |
| Worker             | 9,310   | 700                             |
| Transportation     |         |                                 |
| Total              | 287,160 | 36,620                          |

75. The short-term GHG emissions and energy consumption from construction of the Build Alternative were calculated using the Federal Highway Administration (FHWA) Infrastructure Carbon Estimator (ICE).
76. Based on coordination with National Grid and the power demands required to support tunnel operations, power will be supplied to the project site via two separate utility feeders that originate from a common National Grid terminal substation.
77. Each service feeder will terminate in a dedicated, partially underground, NYSDOT electrical substation. Each NYSDOT electrical substation will be approximately 22 feet wide by 75 feet long.

**Control Rooms.**

78. The following technical rooms will be required along the length of the tunnel:
- Three electrical rooms with transformers and switchgear: one near the south portal, one near the middle of the tunnel, and one near the north portal, each approximately 20 feet wide by 50 feet long and 8.5 feet high.
- Three communication rooms: one near the south portal, one near the middle of the tunnel, and one near the north portal, each approximately 20 feet wide by 20 feet long and 8.5 feet high.
- A pumphouse for fixed firefighting system (FFFS) pumps near the middle of the tunnel, approximately 20 feet wide by 75 feet long and 8.5 feet high.
- A pumphouse for tunnel drainage collection at the low point near the north end of the tunnel, approximately 20 feet wide by 50 feet long and 20 feet high.
- A pumphouse for groundwater drainage and capture of stormwater at the north portal: near the low point and in proximity to the north end of the tunnel, approximately 20 feet wide by 10 feet long, 8.5 feet high.
79. The above noted technical rooms will be placed below ground, under the Humboldt Parkway, and alongside the tunnel. Electrical rooms will be equipped with fire/smoke detectors and will be connected to the fire alarm system. Adequate heating, ventilation, and air conditioning (HVAC) systems will be provided, with grates for air intake and exhaust at the local street level.

80. Appendix C – Utilities, of the DDR/EA, is “Not Used”. Details of existing infrastructure, prospective utility infrastructure construction, energy cost of construction, maintenance, etc. are not readily available.
81. Petitioners reside at 845 Humboldt Parkway, west of the expressway, 4 homes north of East Utica Street, in the area designated as mid-tunnel.

#### **Section 106**

82. The Federal Highway Administration (FHWA), in coordination with the NYSDOT, initiated consultation with the SHPO on November 4, 2022.
83. Based on the results of the 2022 Screening, an architectural reconnaissance survey was conducted. One individual property and two historic districts were previously listed in the NRHP, and one individual property was previously determined by the SHPO to be eligible for inclusion in the NRHP.
84. Based on the results of the Architectural Reconnaissance Survey, the NYSDOT recommended three additional historic districts and five additional individual properties as eligible for inclusion in the NRHP.
85. On August 18, 2023, a draft Finding Documentation prepared for the Project was submitted to the SHPO, Tribal Nations, and Consulting Parties for review.
86. The draft Finding Documentation assessed the Project’s effects on the identified historic properties, applying the criteria of adverse effect (36 CFR 800.5(a)(1)) and recommended a Finding that the Project would have No Adverse Effect on historic properties.
87. As stated in the DDR/EA “In accordance with 36 CFR 800.5 and 36 CFR 800.8, FHWA will continue to consider input from the consulting parties and the public; however, it is anticipated that the project will have No Adverse Effect on Historic Properties.”
88. FHWA will make its Section 106 Finding prior to issuing a NEPA determination. The Section 106 Finding will be documented in the NEPA decision document.
89. According to the DDR/EA “The FHWA in coordination with the NYSDOT, and in consultation with the SHPO, has applied the Criteria of Adverse Effect (36 CFR 800.5(a)(1)) to identified historic properties within the APE, and is proposing that the Project would have No Adverse Effect on historic properties.”
90. Local governments, local organizations, and individuals with a demonstrated interest in the Project and historic resources in the Study Area were invited to apply to be Section

106 consulting parties. Individuals and organizations that responded in writing to NYSDOT and FHWA requesting Consulting Party status. FHWA and NYSDOT approved ten of those with a demonstrated interest, and they are considered Consulting Parties.

91. There is no evidence in the Record of participation by the City of Buffalo Preservation Board and/or any other representative of the Certified Local Government or other regional parties with an interest in the Section 106 review.
92. Petitioner Terrence Robinson was notified in a letter dated September 12, 2023, that his request to participate as a Consulting party member in the Section 106 process had been approved. In a letter dated October 12, 2023, the petitioner submitted comments on the Draft Finding Documentation wherein FHWA in coordination with NYSDOT made a finding of **No Adverse Effect** to identified historic properties.
93. NYSDOT and FHWA convened a final meeting of Consulting Party members on November 28, 2023. 30 minutes prior to the meeting, Consulting Party members received a matrix of comments submitted previously and responses. Notwithstanding the universal opposition to the finding of **No Adverse Effect** voiced by every local Consulting Party member present, NYSDOT/FHWA affirmed their determination to proceed with that finding.

#### **URGENCY**

94. Respondent has stated their ESTIMATED COMPLETION DATE OF ENVIRONMENTAL REVIEW AND PERMITTING 12/16/2023.
95. Respondent's announcement of a No Adverse Effect finding in the section 106 process is imminent.
96. Respondent's announcement of a Finding of No Significant Impact and/or Determination of No Significant Impact in the Final DDR/EA is imminent.
97. Petitioners with certainty will suffer injury in fact and/or irreparable harm without the Court's immediate intervention.
98. If Respondent is permitted to proceed with a Project of this scope and magnitude, a traffic project that continues its 50 year toll of noxious emissions, at a cost of 1.2 billion dollars, 5 years of construction traversing four "Disadvantaged Community" census tracts, through an historic residential neighborhood while disconnecting those communities

from the traffic artery that is built, THEN, this New York State agency will have succeeded in nullifying SEQRA statutes in Erie County.

99. Respondent's procedural/evidentiary flaws, errors, evasion, and deliberate omissions in the NEPA/106 process to date, undermine the credibility of the conclusions therein. When viewed individually and in total these factors demonstrate Respondent's failure to adhere to SEQRA's mandatory standards and raise questions as to the sufficiency of the evidence adduced in the processes that are the subject of these proceedings.

**PETITION FOR WRIT OF MANDAMUS AGAINST RESPONDENT**

**Failure to Fulfill Constitutional Duty Under Article I,  
Sections 19 of the New York Constitution**

100. Petitioners reallege and reincorporate by reference all prior paragraphs of this Verified Petition and the paragraphs below as though fully set forth herein.
101. A writ of mandamus is available where a government body or officer fails to perform a duty enjoined upon it by law. CPLR § 7803(1).

**PRAYER FOR RELIEF**

**WHEREFORE**, Petitioners pray for relief as follows:

1. Grant Petitioners' Verified Petition for a Writ of Mandamus by commanding the New York State Department of Transportation to fulfill their constitutional duty under Article I, Section 19 of the New York Constitution by acting in accordance with the New York State Environmental Quality Review Act and New York Code of Rules and Regulations
2. Petitioners request the Court's indulgence to amend the Verified Petition in the event Respondent takes action that renders the current Petition infirm or invalid.
3. Grant such other and further relief as this Court may find just and proper.

Dated: December 13, 2023

STATE OF NEW YORK)  
COUNTY OF ERIE) SS:

MARCIA E. LADIANA, being duly sworn, deposes and says:

1. That she is a petitioner in the within action.
2. That she has read the foregoing verified Petition and knows the contents thereof.
3. That the same is true to the knowledge of the deponent, except as to matters therein stated to be alleged on information and belief, and that as to those matters, she believes it to be true.

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Marcia E. Ladiana

STATE OF NEW YORK)  
COUNTY OF ERIE) SS:

Terrence A. Robinson, being duly sworn, deposes and says:

1. That he is a petitioner in the within action.
2. That he has read the foregoing verified Petition and knows the contents thereof.
3. That the same is true to the knowledge of the deponent, except as to matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

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Terrence A. Robinson

STATE of NEW YORK)  
COUNTY of ERIE) SS:

On the 13<sup>th</sup> day of December, in the year 2023, before me, the undersigned, a Notary Public in and for said State, personally appeared Marcia E. Ladiana and Terrence A. Robinson, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) are subscribed to the within instrument and acknowledged to me that she/he executed the same in her/his capacity, and that by her/his signature on the instrument, the individual(s), or the person(s) upon which the individual(s) acted, executed the instrument.

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Notary Public