

Memo to: 1.253 Students
From: Fred Salvucci
Subject: Feedback on “Super 7”

(A) Core issues in this case

(1) The core of this case is the interplay of the two “commons,” the Concrete Commons expansion implementation machine CONNDOT wants to build a project conceptualized in an earlier period, before significant public concern with the Green Commons generated new policy and implementation mechanisms, and more recent strengthened powers of DEP to protect the Green Commons.

The expansion culture is embedded in CONNDOT; they think sequentially of a pipeline of projects where one phase must follow another to justify that the earlier step wasn’t “wasted.”

Environmental Impact Statements are done ex post facto to bless conceptual decisions already made, and once they have plans ready to build they consider it wasteful not to build them. CONNDOT has (from their point of view) been through all of the steps, including buying the land and designing the road, so they cannot imagine doing other than building it. From their point of view, the new law threatens this inexorable sequence, so they seek to reduce new environmental law and regulation to bureaucratic processes that do not change the outcome. In this case, their definition of “feasible and prudent” is designed so that there never will be a “feasible and prudent alternative.”

For DEP, defending the Green Commons is the job, so it is essential to set precedents, which will make the environmental process meaningful and change the outcome to preserve and enhance the Green Commons. The genuine thoughtful consideration before defining the problem, actually considering alternatives, along with any adverse environmental consequences and choosing options which reasonably solve the problem with lesser adverse impacts, and mitigating those adverse impacts that are unavoidable, is a fundamental shift in the decision-making process that DEP must encourage CONNDOT to embrace.

(2) At the same time, DEP needs to recognize that many of the tendencies towards sprawl are embedded in other government institutions such as zoning and tax policy, beyond the direct control of CONNDOT and unlikely to change because of the simple denial or approval of this one permit. To impact institutional elements beyond the direct control of CONNDOT requires strengthening the overall political will to change these deeply embedded perverse policies. This entails responding to and supporting the constituencies that have committed themselves to support stricter environmental laws and their enforcement (which inevitably includes elements of both NIMBY and NOPE) while at least attempting to not so inflame the growth machine that anti-environmental backlash actually weakens the overall political will to protect the Green Commons and possibly lead to weakening of environmental powers and/or the appointment of environmental officials who are afraid to enforce the law. This cannot mean failing to enforce the law out of fear that the backlash will lead to the removal of either the law or the commissioner whenever the “growth machine” is well-organized and energized; that is a slippery slope that leads to bad precedents and continued bad practice everywhere by CONNDOT and other institutions, and actually incentivizes political organization to circumvent the implementation of the law. But it does mean using such high visibility cases to not only enforce the law but do so in a manner that builds the political will of environmentalists and converts some of the opponents to the support of Green Commons by strategies which actually help and respect the Concrete Commons as well, so that support for both environmental law and the strict enforcement of the law and the support and survival of the commissioner who seriously enforces the law is an essential part of the job. Both blind and narrow enforcement of the law in a manner that leads to loss of support for environmental principles, or flamboyant enforcement of the law in a sort of romantic heroic image of intentionally courting dismissal, weaken the overall political strength of environmental protection, so the objective needs to be a decision which sets good precedent, supports the pro-environment constituencies, and is reasonable enough in tone and process to encourage those who may disagree to stay within the process.

(3) In deciding on a course of action, it is essential to have a clear understanding of the relative strength and power of both CONNDOT and DEP, and find ways to use CONNDOT's power and resources to augment those of DEP in achieving good environmental outcomes. This cannot mean DEP becoming the transportation planning agency, or "collaborating" on every project. DEP doesn't have the resources to participate across the board at that level. DEP does have the power to establish clear precedents and enforce them, and to require mitigation on any unavoidable adverse impacts, and it can use these powers both to achieve reasonable outcomes on the specific case and to set robust precedent. Keeping these three primary general considerations in mind, what are some of the most salient factors in this case?

B. Factors in Super 7 Case

(1) Overall Context.

(A) This case raises the issue of how to define the "commons."

- (1) If it is the "concrete commons," is the CONNDOT definition too narrow? Essentially it looks at conditions on Route 7 up to Grist Mill Road. What about conditions north of Grist Mill Road? It appears that these will be exacerbated. What about the constraints on east-west roadways? Will these constraints inhibit projected growth? Will they cause greater congestion than predicted on Route 7 itself?
- (2) Beyond the "concrete commons," what about the general environment; in this particular case, the wetlands and rivers, both those directly threatened by the construction of the road and the later impacts caused by increased sprawl and development?

(B) How should we view the “mutually agreed-upon coercion” of the wetlands protection laws, in particular, the recent legislative action strengthening these laws?

(1) Does CONNDOT’s definition of “feasible and prudent” reflect this growing concern?

(2) Does DEP have the power and responsibility to play an advocacy role, forcing a different interpretation of “feasible and prudent”?

(3) A particular problem of environmental regulations arises when a government agency is causing an action that may adversely affect the environment. Self-regulation does not usually work well. Dividing the responsibility between two different agencies may be more effective, but is often adversarial. To make it more complex, the governor is the “boss” of both agencies. How the DEP commissioner sorts this out is key. The most likely pragmatically feasible path, without abandoning the responsibility to protect the environment, if the commissioner believes the right answer is “no,” is to say “no” on procedural grounds, allowing CONNDOT to come back with a better definition of “feasible and prudent”, and a modified project.

(2) “Feasible and Prudent” Alternatives

(A) By looking at the numbers, the project clearly induces growth, notwithstanding CONNDOT’s assertions. Also, the impact of Merritt Parkway constraints on the performance of Super 7 is not examined, so it is not clear whether congestion relief actually will occur. It actually seems more likely that it will exacerbate congestion, particularly on Merritt and north of Grist Mill Road.

(B) In order to interpret the project as not being a “segmentation” of Super 7, we have to look at the outcome of building the new expressway to Grist Mill Road in Norwich, and not

beyond. That seems to load an additional 840 peak hour vehicles onto old Route 7 north of Grist Mill Road, severely worsening conditions. (Capacity = 1500; no-build = 2100; reduced build = 2940.)

- (C) The option proposed by some of the opponents, of extending the expressway to the Merritt Parkway, was not analyzed, and could be “feasible and prudent.”
- (D) The widening of the existing Route 7 north of Grist Mill Road will be at the same time forced by the expressway but severely inadequate, tending to force still further expressway construction.
- (E) The option of building a differently designed expressway (fewer lanes, no breakdown lane, built on structure instead of fill in sensitive areas) does not seem to have been evaluated. It might avoid some wetland impacts and be a “feasible and prudent” alternative.
- (F) The option of combining mass transit with road widening or a partial build to the Merritt may be “feasible and prudent” but was not seriously considered. Public transportation could mean much more frequent bus service, instead of or in addition to rail, in order to provide “local” public transportation access to coastal communities as well as long-distance rail service to New York.
- (G) The option of CONNDOT buying development rights on land adjacent to Route 7, with or without widening Route 7, to control the sprawl commercial development, and prohibiting the left-turn movements that cause accidents and capacity reduction was apparently not considered.
- (H) Wetlands are not quite as scarce as parkland, but arguably have less political strength, so it may be reasonable to take as strong a procedural position as does Section 4(f).

In summary, there may be “feasible and prudent” alternatives, but CONNDOT did not prepare or consider them. The alternative CONNDOT proposes appears to exacerbate problems north of Grist Mill Road and on the Merritt. One could even argue that a longer (possibly narrower) expressway to Wilton, and a bypass section in Ridgefield, or the entire Super 7 (possibly narrower) is superior, and might allow existing 7 to not need widening. There seems to be considerable room for the commissioner to rule, that the permit should be denied based on lack of adequate exploration of alternatives. (Moreover, opponents could use their citizen’s right of action, and challenge a pro-build decision, which would embarrass the commissioner -- especially if they win.)

(3) Long-term precedent-setting guidance. This is the first major highway project to be evaluated under the “feasible and prudent” standards.

(A) CONNDOT’s definition of “feasible and prudent” denies any meaningful role for the DEP commissioner, denies any serious weighting of environmental objectives, and cannot be allowed to stand. Even if the Highway 7 segment is ultimately to be built, the commissioner needs to deny this permit and force CONNDOT to use a more balanced standard and consider a broader range of alternatives. CONNDOT has much more staff and consultant resources than DEP. The commissioner needs to set a precedent that forces CONNDOT to internalize environmental values into their real decision-making.

(B) Avoidance of wetland destruction is far preferable to mitigation. (Mitigation by creating new wetland is itself controversial as to its effectiveness, and the amount of replacement problematic because you are destroying upland undeveloped land.) The possibility of a narrower road and leaving out breakdown lanes and/or building on structure in sensitive areas should be put into play.

- (C) DEP should force CONNDOT to develop a better range of options and better decision criteria, but needs to avoid too much involvement with CONNDOT's process, which can compromise its own ability to objectively hear public testimony, etc. DEP doesn't really know if widening Route 7 has worse adverse impacts than the present proposal, or if building a limited piece of Super 7 to the Merritt will relieve or exacerbate congestion. DEP does know that there are reasonable possibilities that CONNDOT failed to consider. It is important that DEP not embrace any specific solution prematurely, but instead force CONNDOT to do the necessary analysis.

- (4) Mitigation is an important element of the DEP toolbox, and CONNDOT is proposing less than full replacement of wetlands destroyed.
 - (A) Whatever wetland destruction is unavoidable must be mitigated
 - (B) Mitigation might preferably be reclaiming and improving existing wetlands, rather than building new wetlands.

- (5) Political Realities of the Situation
 - (A) The Governor's position is ambiguous, Senator Ribikoff is clearly against, several mayors are taking inconsistent positions, and the referenda in the towns show negative grass roots sentiment, so the political situation is uncertain enough that the commissioner has options.
 - (B) The legislative action strengthened the priority of environmental considerations, since the legislative action (1987) occurred after the 1981 Connecticut Supreme Court Stockton Case, it means the standard is now higher. At the same time, there is danger in the legislative use of the term "reasonable use of property," which could be used by private

owners to argue against enforcement on private land. It is important to be very careful to consider any precedent of weak enforcement against a public agency to be used by private parties in the future.

- (C) The inconsistency of the CONNDOT proposal with DEP's plan for the area makes approval questionable.
- (D) If the commissioner approves the permit, she will be severely criticized by environmentalists, probably sued, and possibly lose a pro-build decision. The commissioner has a range of viable choices to deny the permit, ranging from denial for narrow technical reasons (failure to develop and consider adequate options) to more aggressive advocacy positions.
- (E) The affordable housing argument is nonsense, given the snob zoning prevailing in these towns. The roadway improvement, by reducing travel time, will increase property values and make affordable housing less feasible (even improved rail transit would have this effect)! Given the desirability of job-hosing balance, it may be important to push all the towns on inclusionary zoning.
- (F) There is a confluence of NIMBY, anti-tax and environmental political strength that might be channeled into open space acquisition, cluster zoning, and even exclusionary zoning in the towns that profess environmental concern. The commissioner could take a strong leadership position by asking CONNDOT to organize the towns to prepare serious plans for consideration in the next permit application by CONNDOT, assuming she rejects this application and requires CONNDOT to prepare and consider more alternatives.
- (G) The accident rate is probably a false issue, but needs to be dealt with. Most accidents are probably at night, involving alcohol and speed. But the commissioner needs to deal with the issue through forcing CONNDOT to do a more careful analysis.

- (H) If the permit is denied for lack of adequate analysis of alternatives, particularly if the door is left open to a small build to the Merritt Parkway, accompanied by development controls on existing 7, and/or a widening of 7, the commissioner can tell the pro-build forces that CONNDOT needs to do a better job in the future, and if they do, there may be an approval, shifting the political pressure onto CONNDOT to do a better job.
- (I) The strongest, potentially unifying factor in the case is congestion, which degrades transportation and the environment. DEP does not want to appear to be pro-congestion. One of the most fundamental problems with CONNDOT's proposal is that it seems likely to worsen the bottleneck at Merritt, spur more growth in the north, exacerbating the cut-through traffic avoiding the Merritt. The likelihood is that a combination of partial build to Merritt, combined with acquisition of development rights along Route 7 to reduce sprawl, and improved bus public transportation, and real affordable housing and jobs/housing balance, or even a full build with such mitigating factors and special design features, would be superior in terms of reducing congestion, and that can broaden the political support for enforcement of environmental law.

C. How do these “core issues” and “factors” get used in grading your papers?

- (1) You all did a serious amount of work and generally write well, making it tougher to grade.
- (2) The key issues most important to include are:
 - (A) How to interpret the finding of “no feasible and prudent alternative” in a meaningful way. This is the language of Section 4(f), the first “Green” victory in forcing more thoughtful process than lowest dollar cost on the advocates of the Concrete Commons expansion. It is a key part of Federal Section 404 Permits, and many state laws, and is often (deliberately) misinterpreted to imply that the test is that the proposal is “feasible and

prudent.” The test is whether the proponent of the project has demonstrated that there is not a feasible and prudent alternative, a very tough standard that can be met only by serious consideration of alternatives. In the Super 7 case, there are alternatives such as the partial build to Merritt, serious transit improvements, and/or mitigated designs that CONNDOT did not even pretend to consider, so the permit cannot be legitimately issued.

- (B) How has the proponent defined the problem, and does the proposed solution really contribute to solving the problem better than alternative possibilities? If CONNDOT had bothered to seriously consider alternatives, how the problem is defined can make all alternatives unfeasible and imprudent. The CONNDOT definition of feasible and prudent cannot be allowed to stand; the DEP standard must be upheld.
- (C) How has the proponent analyzed the effectiveness of the proposal in solving the problem? Is the methodology credible? To the degree that CONNDOT is defining the problem as reducing congestion, the failure to analyze the increased traffic generated by land use expansion stimulated by the road, and the likely impacts on east-west congestion on Merritt, the potential for gridlock at the Merritt interchange, and the increased congestion likely north of Grist Mil Road, is a serious flaw. That is not to say the potential to increase congestion in some areas, while decreasing it elsewhere, is necessarily wrong; indeed, it may be appropriate, but the failure to analyze it is a serious flaw.

To the degree that the affordable housing argument is proposed as a project purpose, that is absurd. The towns are not zoned for affordable housing, improvements in travel time will increase land prices and make affordable housing less feasible, and the road proponents really should not get away with this (probably cynical) argument. The only transportation initiative that improves affordability of housing is high-quality public transportation, which allows reduced auto expenditures so people can afford more

housing, or a transportation/land use zoning change to provide inclusionary zoning and/or jobs/housing balance.

- (D) The level of congestion is already severe. This is the strongest pro-road argument and it is not successfully dealt with by Altshuler and Gakenheimer. The severity of current congestion should lead to a somewhat conciliatory “no, but willing to reconsider based on further analysis,” quickly for the section to Merritt, and under more complex conditions, further north.
- (E) The context of the two Commons problem with the “head start” of the Concrete Commons advocates, and the need to build and maintain political support including NIMBY, while attempting to mitigate backlash, is always important. The strong popular vote in the town election, the recent legislative strengthening of wetland law and conversion of the previously pro-build organization are important to reinforce.
- (F) Recognizing the greater financial strength of CONNDOT, and the need to force them to do the analysis, and avoid assuming an excessive analytical burden on DEP is essential.
- (G) Mitigation is an important issue, within context, and after all reasonable steps to avoid and minimize harm.
- (H) Precedent is extremely important. This decision will affect not only this segment of roadway, but all CONNDOT projects in the future, and private-sector wetland permits. The sprawl-style growth stimulated by the road construction would put pressure on wetlands and uplands throughout the zone, so long-range impacts will compound the precedent issue. Conversely, a good decision can set a good precedent and reduce sprawl and its impacts.
- (I) Finally, citing of sources, providing reasonable alternatives to your boss, and clear writing are always important.