



**For Immediate Release:**

July 27, 2017

**Contacts:**

Maya van Rossum, the Delaware Riverkeeper, Delaware Riverkeeper Network, 215-801-3043 (cell)

## **Delaware Riverkeeper Network files lawsuit to protect the historic Headquarters Road Bridge and the Tinicum Creek in Bucks County**

**Philadelphia, PA**—The Delaware Riverkeeper Network filed a lawsuit in U.S. Federal Court in Philadelphia today seeking to block PennDOT and the Federal Highway Administration (FHWA) from demolishing and replacing the historic Headquarters Road Bridge in Tinicum Township, Bucks County. The FHWA recently issued a Final Individual Section 4(f) Evaluation under the Department of Transportation Act for the project. The Act requires agencies to consider all prudent and feasible alternatives and mitigate any potential adverse effects to historic resources – something the lawsuit said they failed to do.

A 2003 historic bridge survey conducted by PennDOT found that there were only eight working bridges built in Pennsylvania before 1812 that are still standing today. Also known as the “Burnt Mill Bridge,” the Headquarters Road Bridge was constructed in 1812. Historians say it is the oldest surviving pier-to-pier bridge of this type in the country. The Keeper of the National Register of Historic Places determined the bridge is eligible for listing on the National Register of Historic Places as a contributing resource to the Ridge Valley Rural Historic District and that its replacement would likely result in an adverse effects to the historic area.

In the lawsuit, the Delaware Riverkeeper Network says that as early as 2004, PennDOT predetermined a final course of action to replace the structure long before any consideration of whether the structure could be rehabilitated was conducted. Residents have expressed overwhelming support for rehabilitating the current structure. In the filing, the organization alleges that the agencies failed to engage in all possible planning to minimize harm to a historic resource. “At every step PennDOT has refused to consider expert testimony from engineers and transportation experts who have provided information showing the bridge could be rehabilitated while providing a safe crossing for residents and emergency vehicles, and ensuring critical protections for the Tinicum Creek” said **Maya van Rossum, the Delaware Riverkeeper**.

The lawsuit also alleges that PennDOT failed to conduct necessary maintenance on the bridge, leading to deterioration of the structure.

The Headquarters Road Bridge crosses the Tinicum Creek, a Pennsylvania designated Exceptional Value waterway within the Lower Delaware Wild and Scenic River District. The Tinicum Creek watershed is home to hundreds of plant and bird species. “Even with safeguards, bridge and road construction projects put more sediments in streams degrading water quality and harming aquatic species,” said **van Rossum**.

DELAWARE RIVERKEEPER NETWORK  
925 Canal Street, Suite 3701  
Bristol, PA 19007  
Office: (215) 369-1188  
fax: (215) 369-1181  
dm@delawareriverkeeper.org  
www.delawareriverkeeper.org

“We’ve seen PennDOT bridge projects increase the flow of streams and increase erosion as well as flooding. We have provided expert evidence that their proposal for the Headquarters Road bridge would inflict significant and unnecessary harms on the Tinicum Creek, but PennDOT is simply not interested in such concerns.”

Residents living near the current bridge say they already experience flooding during heavy rains and high waters near the bridge. An engineering consultant for the Delaware Riverkeeper Network has noted that PennDOT’s preliminary plans to move the entire bridge 15 feet sideways, west of the current location, could lead to the loss of the stream bank for 500 feet downstream of the bridge and push the creek into a nearby property.

The Delaware Riverkeeper Network is seeking a judgment finding the 4(f) Evaluation was not conducted in accordance with the law. The suit also seeks to prevent PennDOT from conducting any site clearance, construction activities or preparation of construction activities.

#####

[Delaware Riverkeeper Network \(DRN\)](#) is a nonprofit membership organization working throughout the 4 states of the Delaware River Watershed including Pennsylvania, New Jersey, Delaware and New York. DRN provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects, public education, and legal enforcement of environmental protection laws.

**U.S. DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

DELAWARE RIVERKEEPER )  
NETWORK, and the DELAWARE )  
RIVERKEEPER, MAYA VAN ROSSUM, )  
 )  
Plaintiffs, )

v. )

PENNSYLVANIA DEPARTMENT )  
OF TRANSPORTATION, )  
FEDERAL HIGHWAY )  
ADMINISTRATION, GREGORY )  
G. NADEAU, FHWA )  
Administrator, in his official capacity, and )  
LESLIE RICHARDS, PennDOT Secretary, )  
in her official capacity )  
 )  
Defendants. )

COMPLAINT FOR DECLARATORY  
JUDGMENT

CASE NO. \_\_\_\_\_

-----

1. Plaintiffs Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya van Rossum, (“Plaintiffs”) challenge the Pennsylvania Department of Transportation’s (“PennDOT”) and the Federal Highway Administration’s (“FHWA”) Final Individual Section 4(f) Evaluation on the Headquarters Road Bridge Project (“Project”), also known as Sheephole Bridge (“Bridge”), in Tinicum Township, Bucks County. The Evaluation concludes that the Bridge will be destroyed and replaced with a new 2-lane concrete structure.

2. The Bridge is more than 200 years old, and one of the last surviving examples of stone masonry bridge construction in the country.

3. This is an action for Declaratory Judgment pursuant to 5 U.S.C. 706, and 42 U.S.C. § 4321 *et seq.* to declare that their approval of the Project, PennDOT and FHWA have failed to comply with Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303.

4. Plaintiffs respectfully request this Court to annul as arbitrary and capricious the agencies' issuance of the Final 4(f) Evaluation for the Project, and remand this matter for the agencies' consideration of alternatives to bridge replacement – in particular, rehabilitation and repair – consistent with federal law.

5. The Final Section 4(f) Evaluation's conclusion to replace the Bridge constitutes a final agency action which has an immediate threatened effect.

6. There is a substantial and continuing controversy between Plaintiffs and Defendants, and a declaration of rights is both necessary and appropriate to establish that Defendants failed to follow statutorily mandated procedures and substantive determinations and thus cannot destroy and replace the Bridge.

7. At risk is the survival of a unique historic bridge, one of the last of its kind, which has stood for over 200 years and still contributes immeasurable value to the surrounding community, including

8. Also at risk is Tincum Creek, a pristine Pennsylvania Department of Environmental Protection categorized "Exceptional Value" waterway within the designated Lower Delaware National Wild and Scenic River system.

9. Federal laws and regulations require that the Bridge be rehabilitated, not destroyed.

### **PARTIES**

10. Plaintiff Delaware Riverkeeper Network ("DRN") is a Pennsylvania non-profit organization with its principal place of business at 925 Canal Street, 7th Floor, Suite 3701, Bristol, Pennsylvania. It was established in 1988 and has more than 19,000 members. DRN's mission is to protect and restore the Delaware River, and its tributaries, habitats and resources. To achieve these goals, DRN organizes and implements stream bank restorations, a volunteer

monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River watershed – an area which includes portions of Pennsylvania, New York, New Jersey and Delaware.

11. DRN members include individuals concerned about the protection and restoration of the Delaware River, and its tributaries, habitats and resources. DRN's members are dedicated to preserving and improving the cultural, historic and environmental resources of the Delaware River watershed.

12. DRN had a pivotal role in obtaining Special Protection Waters status for the Upper and Middle Delaware Wild and Scenic River segments by petitioning the Delaware River Basin Commission in 1992. In 2001, DRN again petitioned the Commission to classify the Lower Delaware as Special Protection Waters. As a result of DRN's efforts, the Commission permanently designated the Lower Delaware as Significant Resource Waters, a type of Special Protection status, in July 2008. DRN played a significant role in advocating for, advancing, and securing wild and scenic status of the lower Delaware River, including the Tinicum Creek. In fact Maya van Rossum personally testified before congress in support of this designation.

13. DRN's thousands of members, and Maya van Rossum, all enjoy the water quality and bucolic surroundings of the Delaware River. DRN members boat, fish, canoe, bird watch, hike and participate in other recreational activities throughout the watershed, including the areas near and immediately surrounding the Bridge. DRN's members will be adversely affected by the anticipated changes in atmosphere, water quality and flow around the Bridge and to areas downstream, and by subsequent impacts to habitat, boating, fishing, hiking, and other recreational and aesthetic uses of the waters within the Delaware River watershed because of

Defendants' decision to replace the Bridge. DRN, DRN's members, and the Delaware Riverkeeper will also be adversely affected by the loss of the historic Bridge, which has stood for over 200 years, and contributes to the beauty and cultural value of the local community and the Ridge Valley Rural Historic District.

14. The laws of Pennsylvania and DRN's articles of incorporation, bylaws, and Board of Directors authorize it to bring this action on behalf of itself and its members.

15. Plaintiff the Delaware Riverkeeper, Maya van Rossum, is a full-time privately funded ombudsman responsible for the protection of the waterways in the Delaware River Watershed. Maya van Rossum advocates for the protection and restoration of the cultural, historical, ecological, recreational, commercial and aesthetic qualities of the Delaware River and its tributaries, habitats and resources.

16. Maya van Rossum regularly visits the Delaware River for personal and professional reasons, and her use and enjoyment of the River will be significantly diminished by PennDOT's and FHWA's decision to replace the Bridge, and by the impacts to Tinicum Creek, and areas downstream resulting from this Project.

17. Personally and professionally the Delaware Riverkeeper, Maya van Rossum, is a regular visitor to Tinicum Township, the Tinicum Creek, and locations at and around the proposed Bridge site that would be adversely affected by the final actions taken. Her use, enjoyment, and appreciation of the Creek and the Tinicum community will be reduced and degraded by the replacement of the Bridge and resulting environmental impacts.

18. Defendant PennDOT is an agency and instrumentality of the Commonwealth of Pennsylvania created in 1970, with its principal place of business at 400 North Street,

Harrisburg, Pennsylvania. It oversees programs and policies affecting highways, urban and rural public transportation, state and local bridges, airports, railroads, ports and waterways.

19. Under the *Programmatic Agreement Among the Federal Highway Administration, the Pennsylvania Department of Transportation, the Pennsylvania State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Implementation of Minor Transportation Projects* (“Programmatic Agreement”), FHWA delegated to PennDOT the authority to administer the Federal-Aid Highway Program and ensure compliance with the National Historic Preservation Act, 54 U.S.C. §§ 300101 *et seq.* (NHPA) in Pennsylvania. FHWA remains responsible for compliance with Section 106 of NHPA with respect to the Bridge Project.

20. Defendant FHWA is an agency within the U.S. Department of Transportation with its principal place of business at 1200 New Jersey Avenue SE, Washington, DC. It was created in 1966, and provides stewardship over the construction, maintenance and preservation of the nation’s highways, bridges and tunnels.

21. FHWA has the authority to take the lead on consultation in accordance with the Programmatic Agreement and 36 C.F.R. §§ 800.3-800.6.

22. PennDOT acts as the lead agency on the Bridge Project.

23. FHWA was named as the lead agency on the Bridge Project for purposes of the Section 4(f) Evaluation, and maintained the authority to give final approval to PennDOT’s consultative process and decisions.

24. Defendant Gregory G. Nadeau is the Administrator of FHWA. Administrator Nadeau is responsible for the administration, operations, and activities of FHWA and its Divisions. In his

official capacity, Administrator Nadeau resides in Washington, DC. Administrator Nadeau is being sued in his official capacity.

25. Defendant Leslie Richards is the Secretary of PennDOT. Secretary Richards is responsible for the administration, operations, and activities of PennDOT and its regional offices, including District 6 which covers Bucks County. In her official capacity, Secretary Richards resides in Harrisburg. Secretary Richards is being sued in her official capacity.

### **JURISDICTION AND VENUE**

26. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 (federal question) because the action arises under the laws of the United States, including Section 4(f) of the Department of Transportation Act (49 U.S.C. §§ 301 *et seq.*) (the “Act”).

27. The Court may grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202.

28. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because it is the judicial district within which the Bridge at issue is located, and within which PennDOT’s and FHWA’s actions giving rise to this Complaint occurred.

### **FACTUAL ALLEGATIONS**

#### **A. Historical, Cultural, and Environmental Values of the Bridge**

29. The Bridge was built in 1812 and historically known as the Burnt Mill Bridge. It is one of the oldest bridges of its type left in Pennsylvania, and one of only a few spans in the entire nation over 200 years old.

30. The Bridge is an integral contributing resource of the Ridge Valley Rural Historic District – which is a protected 4(f) resource – with an extremely rare pier-to-pier design.



31. According to a bridge survey conducted by PennDOT in 2003, there were only eight working bridges in Pennsylvania built before 1812. All were of the more common stone arch construction design. The Bridge is one of the oldest surviving pier-to-pier bridges left in Pennsylvania, as there is only one other known surviving bridge of this type in the country.

32. The Bridge was partially modernized in 1919 during the early automobile era with a new concrete deck with railings, designed by noted engineer and architect Oscar Martin, to replace the earlier wooden deck that once spanned the piers. The design of the surviving 1812 abutments and piers uniquely mirrors the designs used on covered bridges, particularly the numerous Delaware River crossings between Pennsylvania and New Jersey.

33. The Bridge itself is subject to the protections and regulatory requirements of Section 4(f).

34. The Bridge is considered significant in the Ridge Valley Rural Historic District due to its age, design, and rarity. The water flowing down the Tincum Creek and its tributaries – combined with nearby site of Christian Fretz’s grist mill, built in the eighteenth century – creates a sense of place, a feeling of arrival, and provides the visitor with an experience little changed in over two centuries.

35. The Bridge is also subject to the protections and regulatory requirements of Section 4(f) because it is a contributing element to the Ridge Valley Rural Historic District.

36. When PennDOT completed its scoping field view in 2005, it treated the Bridge as not eligible for inclusion on the National Registry of Historic Places.

37. The NHPA requires that agencies comply with Section 106 when National Register-eligible properties are involved. 36 C.F.R. § 800.4(c)(1),(2).

38. By letter dated April 26, 2006, the Keeper of the National Register of Historic Places issued a Determination of Eligibility for the Bridge, stating that the Bridge is eligible for the

National Register as a contributing element to the Ridge Valley Rural Historic District and that its replacement would most likely result in an “Adverse Effect” on the District.

39. The Ridge Valley Rural Historic District is nationally significant. It encapsulates the rise of upper Bucks County from a farming region with distinctive English and Quaker vernacular architecture into a region colonized by artists and celebrities in the 1930s. The district has been home to humorist Dorothy Parker, writer James Michener, sculptor Charles Rudy, screenwriter John Wexley, actress Miriam Hopkins, songwriter Jerome Kern, and playwright S.J. Perelman.

40. Wexley and Rudy lived on Sheephole Road near the Bridge and along Tinicum Creek. Charles Rudy’s widow Lorraine Rudy spoke of the rural beauty and simple living of the region as the main impetus for buying a farm in the area. She also explained that the rural countryside of the Ridge Valley Rural Historic District allowed a lifestyle that informed and made possible her husband’s creative endeavors.

41. Bucks County has a national reputation as a sanctuary for artists. The Ridge Valley Rural Historic District is the single best example of a surviving remnant landscape that continues to look and feel like the Bucks County landscape of nearly one hundred years ago that attracted creative people to settle on the back roads of a rural area rich in stone vernacular architecture and a landscape of fields, forests and streams. The Bridge, with its associated roadways and the motorist experience that can still be had traveling through that portion of the Historic District, retains historic integrity and reveals the power of place that all of Bucks County was once known for.

42. Furthermore, the Bridge is part of a collection of bridges found in Tinicum Township that represent a unique historical collection of crossings from fords to modern day spans. The loss of the Bridge would result in a permanent gap in this distinctive collection of bridges.

43. The Bridge is also environmentally valuable. It crosses over Tincum Creek, a Pennsylvania Department of Environmental Protection categorized “Exceptional Value” waterway within the designated Lower Delaware National Wild and Scenic River system under the Wild and Scenic Rivers Act (16 U.S.C. §§ 1271, *et seq.*) and a state-listed Exceptional Value watershed (25 Pa. Cons. Stat. § 93.4b).

44. Tincum Creek contains a wide variety of uncommon plant communities, large numbers of rare plant and animal species, and exceptional-quality water. It is estimated that four hundred plant species and over one hundred nesting bird species inhabit the watershed.

45. Replacing the Bridge with new construction would have direct adverse effects on the surrounding aquatic ecosystem, posing a risk to both the physic-chemical and ecological quality of Tincum Creek water quality, as well as to waterway hydraulics and aquatic organisms.

46. One of the most significant threats to Tincum Creek during construction will be fine sediment pollution which can result in direct mortality, reduced reproductive success, and reduction in the food base. Additionally, the chosen proposed Project would also result in an alteration of stream flows in ways detrimental to waterway health, and causing adverse downstream impacts.

47. A study conducted in Pennsylvania found that even with sediment control techniques, streams impacted by highway construction carried five to twelve times more sediment.

48. For over 200 years the solid rock structure of the Bridge has controlled the flow of Tincum Creek, particularly downstream of the Bridge, and made possible the stable agricultural fields that flank the stream and contribute to the National Register listing. The proposed Bridge replacement alters this flow regime by changing the direction and velocity of the flow exiting the Bridge. Such a fundamental modification in the physical features of the creek threatens damage

to Tincum Creek and the adjoining historic properties. To date, both PennDOT and FHWA have failed to offer any studies of potential effects downstream.

## **B. Procedural Background**

49. FHWA's and PennDOT's discussions and procedures regarding the Bridge have been going on for over a decade, beginning in or around October 2002, when engineering funding for the Project first appeared on Delaware Valley Regional Planning Commission's Transportation Improvement Program ("TIP"). According to the Commission, "[t]he TIP is the regionally agreed upon list of priority transportation projects, as required by federal law."

50. Initial efforts to identify historic properties, to assess the integrity and historic value of the Bridge, and to scope the Project, began in 2003. Various entities inspected the Bridge and discussed options for handling the Project.

51. In September 2005, a public meeting was held and members of the public who attended the meeting expressed concerns about the loss of the historic structure, environmental consequences, and asked PennDOT to use the existing substructure to preserve piers and abutments, or to move the new bridge downstream to allow preservation of the stone abutments, piers and face of the existing Bridge. Also in September 2005, PennDOT issued the first round of Consulting Party ("CP") invitations.

52. In April 2006, the Keeper of the National Register of Historic Places issued a Determination of Eligibility for the Bridge, stating that the Bridge is eligible for the National Register as a contributing element to the Ridge Valley Rural Historic District, and that its replacement would most likely result in an "Adverse Effect" on the District.

53. During this time period the PennDOT allowed the Bridge's condition to deteriorate. A hole in the deck was repaired with a steel plate in December 2008, and the condition of the superstructure worsened.

54. In 2010, due to PennDOT's continued failure to maintain the Bridge, the Bridge further deteriorated and the load limit was reduced from nineteen to ten tons, and the historic width of the Bridge was reduced to ten feet, eight inches.

55. On or about March 2, 2011, PennDOT closed the Bridge to all traffic.

56. In January 2013, federal money was set aside for the Bridge Project.

57. DRN has been engaged with PennDOT for several years regarding the Bridge Project, going so far as to contract a historic bridge rehabilitation engineering specialist to draft rehabilitation plans that were submitted to the agencies. Additionally, over this time period, DRN sent letters, comments, and numerous other expert reports to PennDOT and FHWA providing information about – among other critically important subjects – estimated costs, predicted permitting procedure, environmental impacts, the approach to the Section 4(f) evaluation, purpose and need statement, core drilling and other test results, discussions surrounding installation of a temporary bridge, mitigation policies, categorical exclusions, rehabilitation construction plans, and other matters. PennDOT and FHWA replied to some of these communications and not to others.

58. DRN's consultants on engineering, historical, and environmental issues consistently advised PennDOT and FHWA to rehabilitate the Bridge. DRN's expert consultants cited, *inter alia*, the lower costs and shorter timeline of rehabilitation, feasibility of rehabilitation, the Bridge's status as an irreplaceable historic and environmental resource, and the damage to the

watershed and the Ridge Valley Rural Historic District that replacement would cause as reasons to save the Bridge.

59. DRN spent considerable time and resources in securing and submitting expert reports to FHWA and PennDOT from bridge rehabilitation specialists, civil engineers, environmental engineers, transportation consultants, and architectural historians showing the agencies' numerous failures to follow the statutory and regulatory mandates of the Department of Transportation Act by choosing Bridge replacement.

60. Despite these concerted efforts, in May of 2017 in FHWA approved a Final Individual Section 4(f) Evaluation, a copy of which was transmitted to the Delaware Riverkeeper Network on June 14, 2017.

#### **THE DEPARTMENT OF TRANSPORTATION ACT**

61. The Department of Transportation Act (the "Act"), 49 U.S.C. §§ 301 *et seq.*, became law on October 15, 1966.

62. Pursuant to the Act, a Section 4(f) evaluation must be prepared for each location within a proposed project before the use of Section 4(f) land is approved. *See* 23 CFR 771.135(a).

63. For projects processed as categorical exclusions, the individual Section 4(f) evaluation should be included as a separate Section 4(f) evaluation document.

64. Section 4(f) of the Act imposes a substantive mandate on an agency's actions. *See North Idaho Community Action Network v. U.S. Dept. of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008).

65. Specifically, section 303(c) of the Act states that:

[T]he Secretary may approve a transportation program or project ... requiring the use of ... land of an historic site of national, State, or local significance ... **only if — (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the ... historic site resulting from the use.**

49 U.S.C. § 303(c) (emphasis added).

66. Section 4(f) thus requires agencies to reasonably consider all “prudent and feasible” alternatives and mitigate any potential adverse effects to historic resources.

67. “An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.” 23 C.F.R. § 774.17.

68. The Act’s regulations state: “[a]n alternative is not prudent if: (i) it compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need.” 23 C.F.R. § 774.17(3).

69. An applicant’s purpose must be “legitimate.” *Friends of the Earth v. Hintz*, 800 F.2d 822, 833 (9th Cir. 1986). “Obviously, an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable.” *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989).

70. If the agency determines that there is no feasible and prudent avoidance alternative, it may seek approval for one of the remaining alternatives that causes the least overall harm to Section 4(f) resources. The least overall harm is determined by balancing several factors, one of which is “[t]he degree to which each alternative meets the purpose and need for the project.” 23 C.F.R. § 774.3(c)(1).

71. An agency’s Section 4(f) evaluation “shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property.” 23 C.F.R. § 774.7(a).

72. Section 4(f) further requires agencies to engage in all possible planning to minimize harm to historic properties. 23 C.F.R. § 774.3.

73. Section 4(f) governs not simply the direct use of protected resources, but also “constructive” use, which occurs “when the transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.” *Id.* § 774.15(a).

74. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), made the first substantive revision to Section 4(f) since the 1966 Act. Section 6009 amended existing Section 4(f), allowing approval of projects that have only *de minimis* impacts on lands governed by Section 4(f).

75. With respect to historic sites, “the Secretary may make a finding of *de minimis* impact only if—

(A) the Secretary has determined, in accordance with the consultation process required under section 306108 of title 54, United States Code, that—

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).”

49 U.S.C.A. § 303(d)(2).

76. Historic properties will be affected by the Project and the Bridge replacement does not qualify for a finding of *de minimis* impact.

77. FHWA and PennDOT acknowledge that the Bridge Project is governed by Section 4(f) of the Act.



78. A Court considers whether the agencies' decision to use Section 4(f) property was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (quoting 5 U.S.C. § 706(2)(A)).

79. In addition, the Court must decide "whether the Secretary acted within the scope of his [or her] authority" and "whether the Secretary's action followed the necessary procedural requirements." *Id.* at 415, 417.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **DEFENDANTS' "PURPOSE AND NEED" DETERMINATION PROVIDED IN THE FINAL SECTION 4(f) EVALUATION WAS ARBITRARY, CAPRICIOUS, OR OTHER OTHERWISE NOT IN ACCORDANCE WITH LAW**

80. The above paragraphs are incorporated as if fully set forth herein.

81. The Final 4(f) Evaluation document issued by the FHWA for the Project was required to make a "purpose and need" determination to guide its "prudent and feasible" alternatives analysis. *See* 23 C.F.R. § 774.17(3).

82. Here, the FHWA violated Section 4(f) of the Act and its implementing regulations by accepting a "purpose and need" determination from PennDOT for the Section 4(f) Evaluation that necessarily relied on verifiably false and inaccurate data regarding, *inter alia*, the safety and geometric design of the bridge.

83. Additionally, record evidence shows that PennDOT pre-determined its final course of action regarding bridge replacement as early as November 2004, long before any consideration of whether rehabilitation of the Bridge could meet the purpose and need of the Project.

84. The “purpose and need” statement was also defined so narrowly as to exclude from consideration rehabilitation construction plans provided by a certified historic bridge rehabilitation specialist.

85. As a result of the fatally flawed “purpose and need” determination, the FHWA improperly found that rehabilitation of the bridge was not prudent or feasible in its Section 4(f) Evaluation.

## **COUNT II**

### **DEFENDANTS’ FAILURE TO CHOOSE A “PRUDENT AND FEASIBLE” ALTERNATIVE VIOLATES 49 U.S.C.A. § 303(c)**

86. The above paragraphs are incorporated as if set forth herein.

87. Pursuant to 49 U.S.C.A. § 303(c), the Secretary of Transportation may only approve a transportation project requiring the use of properties that are of national, State or local historic significance if: (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the historic site resulting from the use.

88. Both the Bridge individually and as part of the Ridge Valley Rural Historic District, and Tincum Creek meet the requirements of being considered 4(f) resources.

89. Defendants violated Section 303(c) of the Act by approving the Bridge Project despite the fact that there is a prudent and feasible alternative – bridge rehabilitation.

90. Defendants also violated Section 303(c) by approving the Project despite the fact that the Project did not include all possible planning to minimize harm to the historic site resulting from the use.

91. The administrative record fails to demonstrate that rehabilitating the existing bridge was either prohibitively costly or infeasible from an engineering perspective.

92. Rather, the record shows that rehabilitation, rather than replacement, of the historic Bridge is a “feasible” alternative.
93. The record also shows that Bridge rehabilitation is “prudent” because it would not compromise the Project in light of its stated purpose and need.
94. The approved plan for the destruction of the National Historic Register eligible Bridge does not constitute a *de minimis* impact under 49 U.S.C.A § 303(d).
95. Defendants failed to adequately consider the “prudent and feasible” alternative of Bridge rehabilitation for its Section 4(f) Evaluation, and failed to engage in all possible planning to minimize harm prior to completing the 4(f) Evaluation.
96. As such, Defendants’ decision to issue a Final Section 4(f) Evaluation is arbitrary, capricious, or otherwise not in accordance with law.
97. Defendants’ approval of the Project must be annulled as a matter of law.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs request:

- A. A declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202 that Defendants’ decision to issue a Section 4(f) Evaluation regarding the Headquarters Road Bridge Project was arbitrary, capricious, and otherwise not in accordance with law;
- B. A declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202 that Defendant PennDOT’s failure to perform mandatory maintenance on the Bridge was arbitrary, capricious, and otherwise not in accordance with law;
- C. An Order to stop commencement or continuation of any site clearance (i.e., tree felling) or construction activities or preparation of construction activities pending the

- Defendants' reevaluation of the Project under 42 U.S.C. § 4321 *et seq.*, the regulations promulgated in accordance therewith, and 49 U.S.C.A § 303;
- D. An Order to provide additional and appropriate mitigation for the impacts to Section 4(f) properties to the extent the Project is allowed to proceed as proposed;
  - E. An award to Plaintiffs of reasonable attorneys' fees and expert fees in bringing and maintaining this action pursuant to 28 U.S.C. § 2412; and
  - F. An award to Plaintiffs of any other relief that the Court deems appropriate.

Respectfully submitted,

*s/ Aaron Stemplewicz*

Aaron Stemplewicz (Pa. Bar No. 312371)

**Delaware Riverkeeper Network**

925 Canal Street

7th Floor, Suite 3701

Bristol, PA 19007

aaron@delawareriverkeeper.org

*s/ Eden Burgess*

L. Eden Burgess

**Cultural Heritage Partners PLLC**

2101 L Street NW

Suite 800

Washington, DC 20037

eden@culturalheritagepartners.com

*Attorneys for Plaintiffs*

DATED: July 27, 2017

**FED. R. CIV. P. 7.1 DISCLOSURE**

I am the senior attorney with Delaware Riverkeeper Network, having offices at 925 Canal Street, 7th Floor, Suite 3701, Bristol, Pennsylvania 19007, and am familiar with the proceedings and documents related to the above-captioned matter, and declare that the following is true and accurate to the best of my knowledge: the Delaware Riverkeeper Network is a non-profit organization. There is no corporation or parent corporation that owns stock in the Delaware Riverkeeper Network.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

*s/ Aaron Stemplewicz*

Aaron Stemplewicz (Pa. Bar No. 312371)  
Senior Attorney  
Delaware Riverkeeper Network  
925 Canal Street  
7th Floor, Suite 3701  
Bristol, PA 19007

*Attorney for Plaintiffs*

DATED: July 27, 2017

## CERTIFICATE OF SERVICE

I hereby certify that, on July 27, 2017 I filed the original of the foregoing Complaint with the Clerk's Office, and also served via First Class Mail the parties below:

Leslie Richards, Secretary  
Pennsylvania Department of Transportation  
Keystone Building  
400 North St., Fifth Floor  
Harrisburg, PA 17120

Josh Shapiro  
Attorney General of Pennsylvania  
Strawberry Square – 16th Floor  
Harrisburg, PA 17120

Gregory G. Nadeau, Secretary  
Federal Highway Administration  
1200 New Jersey Ave., SE  
Washington, DC 20590

United States of America  
Attorney General's Office  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dated: July 27, 2017

*s/ Aaron Stemplewicz*

Aaron Stemplewicz (Pa. Bar No. 312371)  
Senior Attorney  
Delaware Riverkeeper Network  
925 Canal Street, Suite 3701  
Bristol, PA 19007  
TEL: 215-369-1188  
FAX: 215-369-1181  
aaron@delawareriverkeeper.org

*Attorney for Plaintiffs*