



CULTURAL HERITAGE PARTNERS, PLLC
innovation for preservation

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PA Department of Transportation
Engineering District 6-0
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VIA EMAIL: c-rwhittin@pa.gov

Re: *Headquarters Road Bridge*

Dear Mr. Whittington:

Cultural Heritage Partners, PLLC is counsel to the Delaware Riverkeeper Network regarding the Headquarters Road Bridge. The Headquarters Road Bridge project requires regulatory review under the National Environmental Policy Act (NEPA), Section 106 of the National Historic Preservation Act (Section 106), and Section 4(f) of the Department of Transportation Act (Section 4(f)). Each of these statutes applies different criteria to project reviews. NEPA requires agencies to consider the environmental impacts of their proposed actions and assess reasonable alternatives to those actions. Section 106 requires agencies to consider the adverse effects of their undertakings on historic resources. Section 4(f) requires agencies to reasonably consider all prudent and feasible alternatives and engage in all possible planning to minimize harm to historic properties. Agencies are strongly encouraged to coordinate these three reviews to achieve better protection for impacted resources, more informed public participation, and a more streamlined process. We write to inquire about PennDOT's progress in carrying out these three regulatory reviews, and to ensure that the consulting parties participating in the Section 106 process are fully aware of the requirements of each statute and of opportunities to inform the agency's progress.

The Headquarters Road Bridge is Subject to NEPA Review

Documents prepared early in the review process suggest that PennDOT may be attempting to classify the Headquarters Road Bridge project as a categorical exclusion and thereby exempt the project from NEPA review. Due to the significance of the Bridge as a contributing resource in the Ridge Valley Rural Historic District and the potential for significant impacts to the Bridge and other cultural, natural, and recreational resources, this project should not be exempted from NEPA review.

Federal Highway Administration (FHWA) regulations provide a list of actions that may be categorically excluded only after FHWA approval at the Division level. 23 C.F.R. § 771.117(d) (2013). Examples of actions include but are not limited to "[b]ridge rehabilitation, reconstruction or replacement." *Id.* § 771.117(d)(3). However, the regulations also specify that

actions may only be classified as categorical exclusions if they “do not have a significant impact on any natural, cultural, recreational, historic or other resources” or “do not involve significant air, noise, or water quality impacts.” *Id.* § 771.117(a). Furthermore, projects that are normally classified as categorical exclusions must be reviewed by the FHWA if they involve unusual circumstances, such as “[s]ignificant environmental impacts” or “[s]ignificant impacts on properties protected by section 4(f) of the DOT Act or section 106 of the [NHPA].” *Id.* § 771.117(b).

The Headquarters Road Bridge is a contributing resource to the Ridge Valley Rural Historic District, and Tinicum Creek has received Federal Wild and Scenic and State Exceptional Value Waters designations. Consulting parties in the Section 106 process have indicated that the Bridge replacement will have significant impacts to these resources.

PennDOT Should Coordinate NEPA and Section 106 Reviews

PennDOT should coordinate the NEPA and Section 106 reviews in order to encourage public participation in the Section 106 process and successfully assess the impacts to all cultural and natural resources.

NEPA review ensures that agencies consider the natural, cultural, and historic environment in Federal project planning. Section 106 and NEPA reviews are most effective when agencies coordinate the processes and begin them simultaneously. That way, each process will fully inform the other, and public involvement can satisfy the requirements of both NEPA and Section 106. The Section 106 implementing regulations strongly encourage this coordination (36 C.F.R. § 800.8(a)(1)), and the Advisory Council on Historic Preservation and the Council on Environmental Quality have published a handbook on NEPA and Section 106 integration.¹

The regulations state, “Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.” 36 C.F.R. § 800.8(a)(1) (2013). Furthermore, consulting parties should be included early in the NEPA process when the “widest possible range of alternatives are under consideration.” *Id.* § 800.8(a)(2).

Because agencies consider a proposed action’s effects to historic properties under NEPA review, they may be able to inform the NEPA process through close coordination with Section 106. Resources identified under Section 106 then can be evaluated under NEPA. Additionally, an agency’s determination and resolution of adverse effects to historic properties under Section 106 may be considered in determining whether there are any potentially significant effects that require the preparation of an Environmental Impact Statement (EIS) under NEPA.

¹ See COUNCIL ON ENVTL. QUALITY & ADVISORY COUNCIL ON HISTORIC PRES., NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106 (2013), http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.

An agency must prepare an EIS “if it is proposing a major Federal action significantly affecting the quality of the human environment.” 40 C.F.R. § 1508.5 (2012). During the process of preparing the EIS, the agency must solicit and consider public comment and conduct further analysis as necessary based on the public feedback. The agency should begin coordinating the EIS with Section 106 review early in the process when the agency begins developing the project’s purpose and need statement and identifying parties for consultation. Similarly, the processes should be coordinated when the agency engages in the “scoping process,” seeking out interested parties and members of the public with whom the agency can consult and solicit comments. Scoping can help fulfill the Section 106 public notification and consultation requirements, and the information obtained from the Section 106 process can help define the project’s purpose and needs.²

Most importantly, the consultation and public participation components of NEPA and Section 106 should be closely aligned to avoid overlap and to ensure that the agency is considering the full range of potential impacts to historic resources and possible resolutions for those impacts.³

PennDOT Should Coordinate Section 4(f) and Section 106 Reviews

PennDOT should coordinate the Section 106 review with the Section 4(f) review, because the Section 4(f) review process provides an added layer of protection to the historic resources considered under Section 106.

Section 4(f) of the Department of Transportation Act requires agencies to reasonably consider all prudent and feasible alternatives and mitigate any potential adverse effects to historic resources. Unlike Section 106, which only mandates a process, Section 4(f) requires agencies to engage in *all possible planning to minimize harm to historic properties*. 23 C.F.R. § 774.3 (2013). As such, Section 4(f) provides an added layer of protection to historic properties assessed under Section 106 review. Agencies should closely coordinate these two processes because the Section 4(f) process can greatly affect the outcome of the Section 106 process.⁴ The agency should familiarize participants in the Section 106 process with the mandates of Section 4(f) so that all project participants will understand how 4(f) will influence the project decisions.

Identifying Historic Resources

Section 4(f) resources should be identified as early in the process as practicable. *Id.* § 774.9(a). Historic resources typically will be identified during the Section 106 process. Accordingly, the Section 106 process should be initiated and resources listed or eligible for

² *Id.*

³ *Id.*

⁴ See AM. ASS'N OF STATE HIGHWAY TRANSP. OFFICIALS, PRACTITIONER’S HANDBOOK: CONSULTING UNDER SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT (2006), <http://environment.transportation.org/pdf/PG06.pdf>.

listing in the National Register of Historic Places identified early enough in the project planning to determine whether Section 4(f) applies so that avoidance alternatives can be developed and assessed.⁵

Assessing Use of Section 4(f) Properties

Once the Section 4(f) properties have been identified in the study area, the agency can then determine if any of the properties will be “used.” *Id.* § 774.17. The most common type of use in 4(f) projects is when land is permanently incorporated into a transportation facility. *Id.* § 774.17(1). A historic bridge will be used when the action will impair the historic integrity of the bridge either through rehabilitation or demolition. However, agencies must also consider constructive use, which involves no *actual* use but considers proximity impacts from the proposed project. A constructive use occurs when “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.” *Id.* § 774.15(a). Like the indirect effects defined under the Section 106 process, constructive use often results in increased noise, vibrations, and aesthetic impacts to historic resources. *Id.* § 774.15(e).

Obtaining Project Approval

To obtain project approval, PennDOT must find either that: (1) there is no feasible and prudent alternative that completely avoids the use of the Section 4(f) property; and (2) the project includes all possible planning to minimize harm to the Section 4(f) property. *Id.* § 774.3(a).

The agency can use information obtained through the Section 106 process to guide the Section 4(f) analysis of alternatives under the “prudent and feasible” standard and plan for mitigation when avoidance of the 4(f) resources is not possible. The first step in determining whether a feasible and prudent avoidance alternative exists is to identify a reasonable range of project alternatives including those that avoid using the Section 4(f) property.⁶

Once the agency identifies each potential avoidance alternative, it must determine whether the options are feasible or prudent. A feasible and prudent avoidance alternative is one that avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property. A potential avoidance alternative is not feasible if it cannot be built as a matter of sound engineering judgment. *Id.* § 774.17(2).

An avoidance option is not prudent if: (1) it compromises the project to a degree that it is unreasonable to proceed in light of the project’s stated purpose and need; (2) it results in unacceptable safety or operational problems; (3) after reasonable mitigation, it still causes

⁵ See U.S. DEPT OF TRANSP. FED. HIGHWAY ADMIN., SECTION 4(F) POLICY PAPER (2012), <http://environment.fhwa.dot.gov/4f/4fpolicy.pdf>.

⁶ *Id.*

severe social, economic, or environmental impacts; severe disruption to established communities; severe or disproportionate impacts to minority or low-income populations; or severe impacts to environmental resources protected under other Federal statutes; (4) it results in additional construction, maintenance, or operational costs of extraordinary magnitude; (5) it causes other unique problems or unusual factors; or (6) it involves multiple factors as outlined above that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude. *Id.* § 774.17(3). The prudence determination requires an analysis of these six factors and documentation that describes the agency's efforts in this regard.⁷

The agency can use information obtained through the Section 106 process to guide the Section 4(f) analysis of alternatives under the "prudent and feasible" standard and plan for mitigation when avoidance of the 4(f) resources is not possible. The September 19, 2012 Section 106 Agency Coordination Meeting Minutes suggest that the alternatives were analyzed before the adverse effects were fully assessed under Section 106. Without a full understanding of the significance of the resources and how the alternatives will impact those resources, the agency cannot reasonably select the best possible outcome. The process of assessing alternatives and selecting the best possible outcome must involve input from the consulting parties.

Purpose and Need Statement

PennDOT should involve the public in drafting the purpose and need statement. Both NEPA and Section 4(f) require a purpose and need statement, which analyzes the proposed alternatives. Based upon information from consulting parties within the Section 106 process, it appears that PennDOT has not involved the public in drafting the purpose and need statement for the Headquarters Road Bridge, as required under both NEPA and Section 4(f), and has developed a statement that drives the analysis of alternatives toward PennDOT's preferred outcome.

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) provides additional standards for environmental review of federally funded transportation projects. 23 U.S.C. §§ 101-170 (2012). SAFETEA-LU requires public participation in defining a project's purpose and need, stating that "[a]s early as practicable during the environmental review process, the lead agency shall provide an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project." *Id.* § 139(f)(1). PennDOT presented its purpose and need statement at the June 17, 2013 Section 106 Consulting Party Meeting and focused on objectives already established in the statement.

If the June 17 meeting is merely a continuation of the previous Section 106 meetings that occurred in 2006, the previous Section 106 process should be re-evaluated because

⁷ *Id.*

additional consulting parties are now involved and new information is available that may help shape the project's purpose and need.

The purpose and need statement shapes the process of considering, analyzing, and selecting project alternatives. Under Section 4(f), the purpose and need statement is critical in assessing whether or not an alternative is feasible and prudent. Specifically, "[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). Furthermore, 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." *Id.* § 774.3(c)(1).

Because the purpose and need statement drives the process of considering, analyzing, and selecting project alternatives, it should be defined broadly enough so that it includes a discussion of a range of reasonable alternatives.⁸ PennDOT's purpose and need statement presents a well-defined purpose, but the statements of need indicate that PennDOT assessed the reasonable alternatives and pre-selected its preferred alternative before drafting the statement. For example, the statement that the bridge is "functionally obsolete" ("Purpose and Need, Headquarters Road (SR 1012) over Tinicum Creek") strongly suggests that rehabilitation is not a viable alternative and that replacement is the only option.

PennDOT Should Conduct the Section 106 Process in Good Faith

The Delaware Riverkeeper Network is concerned that PennDOT has not conducted its Section 106 consultation process in good faith. By restarting a process that began in 2006, the current consulting parties have not had the opportunity to participate in decisions that were made during the initial phase; consequently, decisions made during that phase were not in accordance with the law.

Section 106 requires agencies to consider the adverse effects of their undertakings on historic resources. More specifically, Section 106 requires that an agency establish that an undertaking exists, identify historic properties that may be affected by the proposed undertaking, assess the adverse effects of the undertaking on the historic properties, and consult with interested parties in an effort to resolve the adverse effects, a process that results in a Memorandum of Agreement that evidences the agency's compliance with Section 106.⁹

⁸ See AM. ASS'N OF STATE HIGHWAY TRANSP. OFFICIALS, PRACTITIONER'S HANDBOOK: DEFINING THE PURPOSE AND NEED AND DETERMINING THE RANGE OF ALTERNATIVES FOR TRANSPORTATION PROJECTS (2007), <http://environment.transportation.org/pdf/PG07.pdf>.

⁹ See *Section 106 Regulations Flow Chart and Explanatory Material*, ADVISORY COUNCIL ON HISTORIC PRES., <http://www.achp.gov/flowexplain.html> (last visited July 29, 2013).

Area of Potential Effects

The Area of Potential Effects (APE) is defined in the Section 106 implementing regulations as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.” 36 C.F.R. § 800.16(d). Determining the APE is one of the most critical steps in the Section 106 process and should not be confined to the project area. The APE may be much larger than the project area if the undertaking has the potential to directly or indirectly affect properties located outside this immediate area. In addition to direct physical effects on properties, an agency must also consider the full range of indirect visual and auidial effects that may impact these properties. Indirect effects may occur at a later date and may be cumulative. In road or bridge projects, these future or cumulative effects may manifest in increased traffic that causes noise or vibrations to nearby properties.¹⁰

Identifying Historic Properties and Assessing Adverse Effects

An agency is required to make a “reasonable and good faith effort” to identify historic properties within the APE that may be affected by the proposed undertaking. *Id.* § 800.4(b)(1). An agency makes a reasonable and good faith effort to identify historic properties by reviewing existing information on historic properties within the APE and seeking other information from individuals or organizations that have knowledge of properties within the area. *Id.* § 800.4(a). Section 106 regulations specify that a reasonable and good faith effort may consist of or include “background research, consultation, oral history interviews, sample field investigation, and field survey.” *Id.* § 800.4(b)(1). Once the agency has identified historic properties that may be affected by the proposed undertaking, the agency must consult with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) to assess the adverse effects the undertaking may have on the properties.¹¹ *Id.* § 800.4(b).

Public Participation

Once the agency has determined that its undertaking will have adverse effects on historic properties, the agency must consult with the SHPO, THPO and other interested parties to resolve those effects. Public involvement is essential to successful Section 106 consultation, and the views of the public should be solicited and considered throughout the process. *Id.* § 800.2(d). At a minimum, an agency must provide an opportunity for the public to examine the results of the agency’s efforts to identify historic properties, evaluate the properties’ significance, and assess the undertaking’s effects on the properties.¹² When an agency finds that the undertaking will have adverse effects on historic properties, it must make that information

¹⁰ See VA. DEP’T OF HISTORIC RES., DEFINING YOUR AREA OF POTENTIAL EFFECTS (2011), www.dhr.virginia.gov/pdf_files/Defining_Your_APE.pdf.

¹¹ See ADVISORY COUNCIL ON HISTORIC PRES., MEETING THE “REASONABLE AND GOOD FAITH” IDENTIFICATION STANDARD IN SECTION 106 REVIEW (2013), www.achp.gov/docs/reasonable_good_faith_identification.pdf.

¹² See *Section 106 Regulations Section-by-Section Questions and Answers*, ADVISORY COUNCIL ON HISTORIC PRES., <http://www.achp.gov/106q&a.html> (last visited July 29, 2013).

CULTURAL HERITAGE PARTNERS, PLLC

Mr. Ryan M. Whittington

July 30, 2013

Page 8 of 9

available to the public and provide the public an opportunity to express its views on resolving the adverse effects. As stated in the implementing regulations, “The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking... and *ensure that the public’s views are considered in the consultation.*” *Id.* § 800.6(a)(4) (emphasis added). Furthermore, parties who have officially applied and been approved for “consulting party” status have the right to share their views, receive and review pertinent information, offer ideas, and consider possible solutions.¹³

Although Section 106 is a process that does not mandate resolution of all adverse effects, an agency must make a reasonable and good faith effort to consider the public’s views. Additionally, the agency must justify its findings to the public so that the public has an opportunity to comment and suggest alternative solutions to any possible adverse effects. If PennDOT fails to consider public input, it will undermine this important component of the Section 106 process.

[continued]

¹³ See ADVISORY COUNCIL ON HISTORIC PRES., PROTECTING HISTORIC PROPERTIES: A CITIZEN’S GUIDE TO SECTION 106 REVIEW (2013), www.achp.gov/docs/CitizenGuide.pdf.

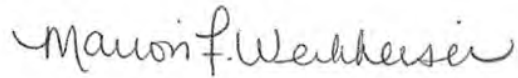
CULTURAL HERITAGE PARTNERS, PLLC

Mr. Ryan M. Whittington
July 30, 2013
Page 9 of 9

Conclusion

In sum, we write on behalf of the Delaware Riverkeeper Network to inquire about PennDOT's progress in carrying out its obligations under NEPA, Section 106 and Section 4(f). We recommend that PennDOT add to the next meeting agenda an informational session on the intersection of NEPA, Section 106 and Section 4(f), and a discussion regarding how the agency intends to carry out the three reviews. We wish to work with you to ensure that consulting parties and the general public have the opportunity to participate fully in each of these processes.

Sincerely,



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