



To: Department of the Auditor General
From: Maya van Rossum, the Delaware Riverkeeper
Date: February 2016
Re: PennDOT's Disregard of NHPA, NEPA and DOTA, and of Public Policy

PennDOT District 6 has been working for years to select a preferred alternative for the Headquarters Road Bridge located in Tinicum Township, Bucks County. The Delaware Riverkeeper Network, its members, and local residents have voiced strong support for rehabilitating the Bridge and keeping it single-lane and provided strong evidence to document that rehabilitation is both prudent and feasible.

PennDOT's review of the Headquarters Road Bridge project is failing to properly comply with the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and the Department of Transportation Act (DOTA). These statutes are designed to work in concert; PennDOT, however, has focused almost exclusively on Section 106 of the NHPA rather than its concurrent obligations under NEPA and DOTA. In addition, PennDOT has stated its intent to claim a categorical exclusion in order to exempt this project from full NEPA review despite clear language that a categorical exclusion cannot apply in this situation. PennDOT has also stated its intent to demolish the Headquarters Road Bridge despite a prohibition against this option under the clear language of DOTA.

Section 106 and NEPA

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.

Section 106 regulations emphasize the need to coordinate Section 106 compliance with NEPA review. 36 C.F.R. § 800.8. 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). Moreover, in March 2013, the Council on Environmental Quality and the Advisory Council on Historic Preservation encouraged agencies to integrate their NEPA and Section 106 reviews and to do so early in the process.¹ Accordingly, PennDOT is required to coordinate the NHPA Section 106 and NEPA reviews to encourage public participation in the process, and accurately assess the impacts to all cultural and natural resources.

PennDOT has created a great deal of confusion regarding its approach to coordinating these statutory reviews. For example, PennDOT hosted an open house on October 28, 2013, during which (not prior to) PennDOT representatives informed the public that NEPA review of the project had begun, and that the open house was considered to be part of the NEPA public process and the Section 106 review. But PennDOT did not advertise the October 28 open house as being a part of the NEPA or Section 106 reviews. Similarly, after-the-fact, PennDOT claimed that its July 2014 open house satisfied NEPA. However, the open house did not meet regulatory requirements for a NEPA public meeting. See, e.g., 23 CFR 771.111; 40 CFR 1506.6(c)(1).

The Delaware Riverkeeper Network has repeatedly voiced its concern to PennDOT that the agency is not considering a sufficiently broad range of issues as required by NEPA, and is disregarding certain matters that clearly fall within NEPA claiming they are not pertinent as they are unrelated to Section 106. As a result, there has been no point at which the public, including the Delaware Riverkeeper Network, has been given the opportunity to submit information about environmental or community impacts of various alternatives in order to inform the decision being made – whenever we submitted such information or attempted to discuss such impacts we were told by PennDOT that the information was inappropriate given its failure to address the historic aspects of the project pursuant to Section 106.

Section 106 and DOTA Section 4(f)

PennDOT is obligated to coordinate the NHPA Section 106 review with the DOTA Section 4(f) review. Section 4(f) requires agencies to reasonably consider all prudent and feasible alternatives which involve the use of a 4(f) property, and mitigate any potential adverse effects to historic resources. It further requires agencies to engage in all possible planning to minimize harm to historic properties. 23 C.F.R. § 774.3. As such, Section 4(f) provides an added layer of protection to historic properties assessed under Section 106. Agencies should closely coordinate these two processes because the Section 4(f) process can greatly affect the outcome of the Section 106 process.² 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. PennDOT has acknowledged that Headquarters Road Bridge is a 4(f) property.

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.

² 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>.

PennDOT has failed to allow sufficient opportunity for public input into, or consideration of, the environmental impacts of the proposal. It has not followed any of the above regulations or guidance, declining to coordinate the three statutory reviews properly. As a result, the current process fails to assess environmental impacts and public input effectively.

NEPA and Section 4(f)

PennDOT must specifically coordinate its NEPA and 4(f) review processes. NEPA requires that if a proposed project will result in a significant impact on properties protected by section 4(f) of the DOT Act, then the project does not qualify for a Categorical Exclusion pursuant to NEPA. See 23 C.F.R. § 771.117 (b)(3). Therefore, the coordinated integration of these two processes is necessary in order to comply with the provisions of both the DOT Act and NEPA.

However, here PennDOT and the FHWA have explicitly authorized the NEPA Categorical Exclusion review process to proceed prior to a determination being made regarding whether the project will have a significant impact on a 4(f) property. A finding that a significant impact would result from the project would necessarily disqualify the project from being reviewed pursuant to a Categorical Exclusion.

NEPA and Categorical Exclusions

While PennDOT has already stated its intent to designate the project as a Level 2 Categorical Exclusion (CE) so as to avoid full and fair NEPA review, the specific facts applicable to the Headquarters Road Bridge make clear that a CE is not applicable.

Demolition and replacement of the Headquarters Road Bridge with a two lane structure, as proposed by PennDOT, would have a significant impact on natural, cultural, recreational and historic resources. It would significantly impact water quality, as well as inflicting other significant environmental impacts, and would impact travel patterns, causing increased speeds and perhaps increased traffic. As a result, 23 CFR § 771.117(a) clearly prohibits the use of a CE.

Even if FHWA were able to make a credible case for initial consideration of a CE, 23 CFR § 771.117(b) prevents its application. A number of circumstances make the application of a CE improper here, including that the PennDOT preferred option of demolition of Headquarters Road Bridge followed by construction of a 2-lane modern structure will have Significant environmental impacts; is substantially controversial on environmental grounds; will have a significant impact on properties protected by section 4(f) of the DOT Act and section 106 of the National Historic Preservation Act; and/or involves inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

In addition, a CE is inappropriate because to the extent CEs are generally applicable to bridge rehabilitation, 23 CFR § 771.117(e) mandates that reconstruction or replacement projects under § 771.117(c)(28) may not be processed as CEs if they involve, as is the case here:

(1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements;

...

(3) A finding of “adverse effect” to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in *de minimis* impacts, or a finding of “may affect, likely to adversely affect” threatened or endangered species or critical habitat under the Endangered Species Act;

...

(6) A floodplain encroachment other than functionally dependent uses (e.g., bridges, wetlands) or actions that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

A recent letter from FHWA indicates that the project is proceeding properly under a “d list” CE, referred to in Pennsylvania as a Level 2 CE, under 23 CFR 771.117(d). Under this regulation, a CE is still inappropriate because the demolition and replacement of the Headquarters Road Bridge with a 2-lane structure, as proposed by PennDOT, would have a significant impact on natural, cultural, recreational and historic resources; on water quality; on travel patterns, causing increased speeds and traffic as prohibited by 23 CFR § 771.117(a); and on other elements of the Bridge and its surrounding roadways, waterways, and local community and environment.

Moreover, 23 CFR 771.117(d) states, “The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that ***significant environmental effects will not result***” (emphasis added). In light of the data and analyses provided to PennDOT and FHWA by the Delaware Riverkeeper Network, other Consulting Parties, and many concerned local residents, it is quite plain that 23 CFR 771.117(d) does not support a CE determination. The Bridge is a contributing resource to the Ridge Valley Rural Historic District, and Tinicum Creek has received federal Wild and Scenic designation as well as state Exceptional Value designation. In addition, Consulting parties in the Section 106 process have demonstrated that any option other than rehabilitation will have significant impacts to these resources. For these reasons, and all those stated above, a Level 2 Categorical Exclusion is clearly neither appropriate nor legal.

DOTA Section 4(f)

DOTA Section 4(f), 49 U.S.C. § 303(c), states:

[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.

As such, pursuant to DOTA section 4(f), PennDOT is clearly prohibited from demolishing the Headquarters Road Bridge because there is clearly, as demonstrated on the record and even acknowledged by PennDOT, a “prudent and feasible alternative” that would accomplish the traffic goals of the project and protect the historic bridge.

In addition, there has been no demonstration that protection and rehabilitation of the historic structure would fail to meet the purpose and need of the project; in fact the record is filled with expert, factual, and scientific data to demonstrate that the purpose and needs of the project are well fulfilled by rehabilitation of the historic structure. There is also ample evidence that rehabilitation is both prudent and feasible as defined by the law.

Conclusion

PennDOT is violating the mandates of NEPA, DOTA and NHPA both procedurally and substantively. These violations are not being done out of ignorance or a lack of understanding; they are being undertaken intentionally and with due deliberation. The Delaware Riverkeeper Network and our representatives have notified PennDOT of these violations of law repeatedly, including at public and Consulting Party meetings, and in the following communications directed or copied to PennDOT:

- July 30, 2013: DRN Counsel Letter to PennDOT re Headquarters Road Bridge
- March 17, 2014: DRN Counsel Letter to PennDOT
- August 5, 2014: DRN Letter to PennDOT re Cumulative Impacts of Bridge Replacements
- August 18, 2014: DRN Letter to PennDOT re NEPA process
- August 29, 2014: DRN Letter to PennDOT re ecological, historical, and scenic impacts
- Sept 23, 2014: DRN Counsel Letter to PADOT re Categorical Exclusion
- May 13, 2015: DRN Counsel Letter to PennDOT re Tincum creek as a 4f resource
- August 13, 2015: DRN Letter to FHWA re 4(f)
- Dec 15, 2015: DRN comments on DOE
- Jan 11, 2016: DRN Letter FHWA re Bridge width evaluation
- Feb 16, 2016: DRN Response to FHWA

PennDOT’s intentional disregard of the law warrants an independent investigation by the Auditor General.