



CULTURAL HERITAGE PARTNERS, PLLC
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September 23, 2014

VIA EMAIL

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Re: *Categorical Exclusion Designation for Headquarters Road Bridge*

Dear Ryan:

Delaware Riverkeeper Network has learned from the CE Expert System that PennDOT has already classified the Headquarters Road Bridge project ("Bridge") as a Class II, Action 03 Categorical Exclusion (CE). Also, a telephone log from April 19, 2005 – to which you recently referred Dr. Amleto Pucci – indicates that PennDOT decided to approach the environmental review process for the Bridge as a Class II CE at that time. Finally, we understand that although PennDOT discussed this classification with select participants at the July 25, 2014 Open House, the Delaware Riverkeeper Network was not among them, despite its vocal participation in the public process and strong interest in the Bridge. We write to address and strongly object to the CE determination.

I. PennDOT's Failure to Share CE Designation with Consulting Parties

PennDOT's decision not to discuss its CE decision with the CPs is particularly distressing in light of plans for PennDOT and Delaware Riverkeeper Network to sit down and discuss options for rehabilitation of the Bridge, a meeting derailed by PennDOT's stringent limitations. The Delaware Riverkeeper Network remains open to a meeting if PennDOT confirms in writing that the decision for this project is not final and that it is withdrawing the CE designation, and agrees to the Delaware Riverkeeper's reasonable requests for limited ground rules. If, indeed, PennDOT has already decided its approach to the Bridge, we are at an impasse, given this pre-determined and undisclosed decision.

II. No Grounds for CE Designation

We have reviewed documents relevant to the CE designation and do not see any reasonable grounds for PennDOT classifying the Bridge project as a CE.

A. NEPA

NEPA regulations and guidance provide for certain categories of exempt actions, including those which do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; and do not otherwise, either individually or cumulatively, have any significant environmental impacts. The impacts of a Bridge replacement on natural, cultural and historic resources and on water quality and the environment clearly prevent the Headquarters Road Bridge project from being classified as a CE under these definitions. Additionally, when it is believed that a CE classification is proper and a project has significant impact on any property protected by Section 106 of the NHPA, appropriate environmental studies must be conducted in order to determine the validity of the CE classification. It is unclear whether these studies have been conducted as required under NEPA.

B. Guidelines for BRPA (Bridge and Roadways Programmatic Agreement between FHWA and PennDOT)

These Guidelines state that CEs are set forth in Stipulation 1 of Part A, Stipulations 1, 2, and 4 of Part B, and Stipulation 1 of Part C of the BRPA, and that for the purposes of the BRPA, it is assumed that "replacement of structures will occur within the same approximate footprint of the existing structure except for any widening that is required." PennDOT's plan to replace the Bridge with a wider and longer bridge requiring additional rights-of-way would not be on the same footprint, thus is not covered by the BRPA.

C. BRPA

The BRPA sections that address CEs are Stipulation 1 of Part A, Stipulations 1, 2, and 4 of Part B, and Stipulation 1 of Part C (see BRPA Guidelines, above).

- Part A is pertinent only to roadways.
- Part B addresses Bridge Replacement, Rehabilitation, Preservation and Removal projects. Stipulation 1 of Part B addresses Bridge Replacement/Rehabilitation and lists ten categories of exempted bridge replacement/repair projects. Exempted bridge replacements must be in-kind and in the same footprint, which clearly does not apply here.
- Part B Stipulation 2 addresses bridge preservation.
- Part B Stipulation 4 covers bridge removal.

- Part C Stipulation 1 addresses non-complex projects. There are 10 categories exempted here; none cover bridge replacement.

Part D is also relevant, as it sets forth stipulations relevant to all projects in the preceding sections, that is, all projects for which PennDOT seeks a CE must meet the Stipulations in Part D. Part D Stipulation 2 says that exempted projects must meet Appendix C of the Section 106 Delegation PA or there must be a finding of No Adverse Effect under the Section 106 Delegation PA (discussed below #4).

Part D Stipulation 4 says that if other federal permits or approvals are required, the BRPA is not applicable. Because Tinicum Creek and the Lower Delaware River are included within the Wild and Scenic River System, Section 7 of the Wild and Scenic Rivers Act (WSRA) requires the National Park Service (NPS) to determine whether the Bridge project will have a “direct and adverse effect on the values for which the [Tinicum Creek and the Lower Delaware] River was established” within the Wild and Scenic River System. 16 U.S.C. § 1278(a). NPS is currently fulfilling its obligations under Section 7 of the WSRA; given that NPS must undertake this review and provide approval, the BRPA is not applicable.

Finally, BRPA projects must satisfy the Applicability Matrix included as Appendix A to the BRPA. We are not aware that PennDOT had completed this document. If it has, please provide a copy to us as soon as possible.

D. Programmatic Agreement with Advisory Council for Historic Preservation (ACHP), FHWA and PennDOT (“Section 106 Delegation PA”), Appendix C

As noted above, the BRPA requires exempted projects to comply with Appendix C of the Section 106 Delegation PA (entitled “Exempted Projects”) or there must be a finding of No Effects on Historic Properties or of No Adverse Effects. The Section 106 Delegation PA contains various lists of criteria and activities. The undertaking must be on existing transportation facilities, and cannot involve known public controversy. Even on this short list, it would not be possible for a Bridge replacement to be exempt. There are other limitations here, as well (e.g., the bridge to be replaced must be less than 50 years old; the bridge is must be replaced on existing alignment) that prohibit a Bridge replacement from being eligible for a CE.

E. PennDOT Design Manual Part 1B Post-TIP NEPA Procedures

This design manual incorporates much of BRPA. It also lists CEs that are available even where the BRPA does not apply, divided into various categories. While it may first appear that this project falls under the “bridge rehabilitation, reconstruction, or replacement” exclusion, because there is substantial public controversy on environmental grounds and the project affects historic places and properties, the exclusion criteria are not met.

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F. Programmatic Agreement for CEs

FHWA and PennDOT have a Programmatic Agreement for CEs. If there is public controversy on environmental grounds, historic resources that are on or eligible for the NR, or federally listed Wild & Scenic Rivers, the project must be submitted to FHWA as a Level 2 CE under the Design Manual (above), which requires additional documentation and review. We have not seen any "additional documentation" indicating that this Agreement and Design Manual have been followed.

* * *

We urge PennDOT not to classify a Bridge replacement project as a Categorical Exclusion – which clearly is not supported by applicable laws, regulations and guidance documents as discussed above – and to share information fully and openly with Consulting Parties and residents. The preservation of the exceptional value Tinicum Creek and this interconnected historic bridge are deeply important to Delaware Riverkeeper Network, its members and much of the nearby community, many of whom value the ecological beauty and associated historic features so unique and integral to this rural and beautiful community that is also a highly valued part of the Wild and Scenic Delaware River. We expect that PennDOT will duly consider these important interests as it proceeds.

Regards,



L. Eden Burgess

cc (via email): Mike McAtee, Urban Engineers
Mike Caldwell, Director, NPS Northeast Region
Charles Barscz, NPS
Tinicum Township Board of Supervisors
Kenda Gardner, Esq., PennDOT