



LAW AND CONSULTING LLC

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August 24, 2021

Jason D. Sharp, Esq.  
Chief Counsel  
Office of Chief Counsel  
Pennsylvania Department of Transportation  
9th Floor, Commonwealth Keystone Building  
Harrisburg, PA 17120  
Via email: [jsharp@pa.gov](mailto:jsharp@pa.gov)

**RE: Milanville-Skinners Falls Bridge (Bridge #5) Project  
PA SHPO Project No. 2013-8011-127  
PennDOT District 4-0**

**PEL Study Faulty Public Comment Process**

Dear Chief Counsel Sharp:

We are writing on behalf of Damascus Citizens for Sustainability (“DCS”), a Section 106 consulting party, regarding PennDOT’s proposed work pertaining to the Milanville-Skinners Falls Bridge (“Bridge”).

DCS is writing out of great concern regarding PennDOT’s continued failure to engage in a real public participation process for the Skinners Falls Bridge “Planning and Environmental Linkages” (“PEL”) Study. Although PennDOT appears to seek to incorporate the PEL Study into a NEPA document in the future,<sup>1</sup> PennDOT has failed to adhere to the federal public and agency participation standards and requirements governing the incorporation of, or reliance on, other planning documents in NEPA<sup>2</sup>

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<sup>1</sup> “This PEL Study is being undertaken in accordance with 23 United States Code (USC) Section 168 as well as with 23 Code of Federal Regulations (CFR) 450.212. Under these authorities, analyses conducted during planning may be adopted and incorporated directly or by reference into subsequent environmental documents prepared in accordance with the National Environmental Policy Act (NEPA), provided that the studies are adequately documented; interested Federal, State, local, and Tribal agencies are involved; a reasonable opportunity for public review and comment on the PEL Study is provided; and the Federal Highway Administration (FHWA) is engaged.”  
<https://www.penndot.gov/RegionalOffices/district-4/PublicMeetings/Wayne%20County/Pages/Skinners-Falls-Bridge-Project.aspx>, last checked August 23, 2021.

<sup>2</sup> National Environmental Policy Act.



materials. PennDOT's process thus far fails to comply with not only NEPA, but also the standards for public participation under Section 106 and Section 4(f).

PennDOT cannot rely on the flawed SurveyMonkey method<sup>3</sup> ("Survey") to replace actual public notice, participation, comment, and agency response, as contemplated by NEPA. PennDOT has declared that it has specifically *excluded* comments submitted to PennDOT via email or otherwise sent to PennDOT without a digital or printed Survey, including emails from key agencies and organizations. Given the large volume of correspondence that PennDOT received outside the confines of the Survey, and that were sent to PennDOT without a Survey, PennDOT has arbitrarily excluded a significant amount of relevant information that would very likely alter the outcome of the PEL Study. DCS has in its possession a substantial amount of the comments submitted outside of PennDOT's Survey, which the commenters voluntarily provided to DCS. Based on DCS's review, these comments overwhelmingly support Bridge rehabilitation.

The statutory and regulatory standards that PennDOT references<sup>4</sup> confirm that the public process thus far is not sufficient.

Specifically, federal regulations allow incorporation of:

Publicly available documents or other source material produced by, or in support of, the transportation planning process described in this subpart *may* be incorporated directly or by reference into subsequent NEPA documents, in accordance with 40 CFR 1502.21, *if*:

(2) The systems-level, corridor, or subarea planning study *is conducted with*:

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<sup>3</sup> SurveyMonkey is also a third-party platform, which raises two issues. First, PennDOT lacks control over the SurveyMonkey platform aside from the limited set of items that SurveyMonkey permits a user account to alter. The material on SurveyMonkey, such as all material connected with PennDOT's user account, is subject *not* to PennDOT's terms and conditions, including state requirements on records retention, but to the policies of a private third party. It is unclear to what extent PennDOT has arranged with SurveyMonkey to ensure compliance with requisite state laws on records retention, Right-to-Know Law requests, and other open government standards. Second, as an account holder with SurveyMonkey, only PennDOT is able to directly access the information, which it may delete or change at will, in contrast to material on government servers, which is not so easily altered and must be preserved in accordance with state laws such as records retention standards.

<sup>4</sup> <https://www.penndot.gov/RegionalOffices/district-4/PublicMeetings/Wayne%20County/Pages/Skinners-Falls-Bridge-Project.aspx>, last checked August 23, 2021.



- (i) Involvement of interested State, local, Tribal, and Federal agencies;
- (ii) *Public review*;
- (iii) *Reasonable opportunity to comment* during the statewide transportation planning process and development of the corridor or subarea planning study; . . . .

23 C.F.R. § 450.212(b)(2) (emph. added).

Likewise, the following is a condition of incorporation or adoption of a “planning product” in the NEPA process:

During the environmental review process, the relevant agency has –

- (A) made the planning documents available for public review and comment by members of the general public and Federal, State, local, and tribal governments that may have an interest in the proposed project;
- (B) provided notice of the intention of the relevant agency to adopt or incorporate by reference the planning product; and
- (C) *considered any resulting comments*.

23 U.S.C. § 168(d)(5) (emph. added). Without a comment response document, PennDOT has no evidence that it has “considered any resulting comments.” 23 U.S.C. § 168(d)(5)(C).

PennDOT’s report on the Survey responses specifically *excludes* any comments or other information provided by the public that was not provided in the Survey format.<sup>5</sup> However, PennDOT failed to put the public on notice that emails, letters, and other correspondence sent to PennDOT without a Survey would be excluded from PennDOT’s consideration and that the Survey platform was the only means via which PennDOT would consider input. Nowhere did PennDOT state, in the information provided in advance of the Survey and public input deadline or during the commenting period, that any information *not* submitted via PennDOT’s predetermined format would be excluded from consideration. However, PennDOT provided at least two

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<sup>5</sup> “These results do not include comments submitted to the project email (Skinnersfallsbridge@aecom.com) without a completed survey.” <https://www.penndot.gov/RegionalOffices/district-4/PublicMeetings/Wayne%20County/Documents/Survey%20SummaryR7.pdf>, last checked August 23, 2021.



email addresses to contact regarding the Bridge, creating the presumption that sending emails to those addresses would be a viable comment avenue. Thus, PennDOT has deliberately and arbitrarily excluded public comment and failed to provide a “reasonable opportunity” for comment, contrary to the relevant NEPA standards. 23 U.S.C. § 168(d)(5); 23 C.F.R. § 450.212(b)(2).

Also contrary to the above-cited federal standards, there is a lack of evidence that PennDOT has considered and addressed comments submitted outside the Survey format, including important letters from the Upper Delaware Council, the National Park Service, and others, including DCS. In a statement from June 11, 2021 (posted to the PATH system), PennDOT stated, “It is the District CRPs understanding that a more robust response to [individual] emails will be forthcoming from the project team in the coming weeks,” and that the CRPs had not at that time responded to any individual emails either.<sup>6</sup> Over two months have passed since that posting, and there still has been no public comment/response document to the emails and other correspondence submitted by the public, government agencies, or individuals outside of the Survey platform. Any exclusion of information simply because PennDOT received it via a method other than SurveyMonkey is arbitrary and fails to adhere to, *inter alia*, 23 U.S.C. § 168(d)(5). PennDOT’s arbitrary exclusion of pertinent and crucial information submitted during public comment undermines the rationality and soundness of any PEL study findings, and, in turn, any analysis into which the PEL study is incorporated, such as a NEPA analysis. Thus, PennDOT must engage with the wealth of information provided to it regarding the need and ability to rehabilitate the Bridge; the local, regional, and national importance of the Bridge; and other data provided to PennDOT, but thus far arbitrarily excluded.

Beyond the NEPA process standards, Section 106 and Section 4(f) specifically require public notice and comment, including, for example, that “[t]he views of the public are *essential* to informed Federal decisionmaking in the section 106 process.” 36 CFR § 800.2(d)(1); *see also, e.g.*, 49 U.S.C. § 303(a), (e)(1). Although federal regulations on the Section 106 process allow an agency to use its NEPA process, that process is only permitted to be used “*if they provide adequate opportunities for public involvement consistent with this subpart.*” 36 C.F.R. § 800.2(d)(3) (*emph. added*). PennDOT’s procedures have not been consistent with Section 106 for the reasons already stated herein. Indeed, although PennDOT’s PATH page states that Section 106 consulting parties’ “input will be considered early in the design process and may affect PennDOT’s treatment of the historic property,”<sup>7</sup> PennDOT’s process thus far fails to do so given its wholesale exclusion of comments submitted outside of its Survey.

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<sup>6</sup> <https://path.penndot.gov/PostingDetails.aspx?ProjectID=4487&PostingID=31162>, last checked August 23, 2021.

<sup>7</sup> <https://path.penndot.gov/About.aspx>, last checked August 23, 2021.



PennDOT must consider and address the information in *all* public comments that it has received – not just the narrow slice of data it sought via its Survey – in order for the PEL Study to be a legally sufficient document for incorporation into a NEPA analysis. Presently, PennDOT has not done so, and thus the PEL Study will not be appropriate for later inclusion in a NEPA study on the Bridge, opening PennDOT’s process and any NEPA analysis up to legal challenge by entities such as DCS or other consulting parties.

We strongly encourage PennDOT to correct the flaws in its process promptly in order to give the overwhelming public input in support of Bridge rehabilitation proper consideration before the NEPA and other required processes continue forward. The public, as well as various government agencies and regional entities, took extensive time to comment and write to PennDOT about the Bridge. Those comments deserve to be addressed and included in the PEL Study. As a result, in the coming weeks, DCS will be providing PennDOT with copies of all public comments in DCS’s possession (given to DCS by the commenters) to ensure that PennDOT incorporates those comments into the PEL Study.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Lauren M. Williams', with a long, sweeping flourish extending to the right.

Lauren M. Williams, Esq.

For Greenworks Law and Consulting LLC

cc:

Kris Thompson and Heather Gerling, PennDOT Environmental Policy & Development Section - Cultural Resources Section, [hgerling@pa.gov](mailto:hgerling@pa.gov), [krthompson@pa.gov](mailto:krthompson@pa.gov)

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