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**RE: Consulting Party Comment Letter re: Historic Skinners Falls Bridge
PennDOT District 4-0**

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I. Introduction

Damascus Citizens for Sustainability (“DCS”) submits this comment letter, once again objecting to PennDOT’s proposed destruction of the National Register-listed Skinners Falls Bridge (“Bridge”), which is also part of the National Register-listed Milanville Historic District.

DCS notes that the present comment period was announced for the purposes of comment on mitigation measures under Section 106 of the National Historic Preservation Act (“Section 106”, “NHPA”), and the NY SHPO’s request for HAER II. PennDOT has made it extremely difficult to respond to that request for comments for the reasons set forth in this comment and DCS’s prior comments. While DCS has comments to offer regarding mitigation, it is premature to provide those for the reasons stated in this comment.

In short, PennDOT and the Federal Highway Administration (“FHWA”)’s persistent refusal to follow established statutory and regulatory environmental and historic preservation review processes, including information disclosure for the purposes of meaningful comment, prevents DCS from even considering what mitigation is appropriate. Mitigation is supposed to come *after* attempts to avoid and minimize impacts, and both PennDOT and FHWA have thrown those stages of the process out the window.

The process here cannot continue to advance as it presently stands. PennDOT and the FHWA have deliberately ignored extensive statutory and regulatory requirements, precluding meaningful and informed public commenting. Both agencies are fast-tracking the proposed Bridge demolition in a bad faith effort to evade public input and required legal procedures designed to protect the environment and historic resources. The relevant laws and regulations are clear: if PennDOT and the FHWA want to destroy the Skinners Falls Bridge, they must follow established legal processes. Because they have not, those processes must be restarted, formally initiated (in the case of NEPA and other related federal mandates) and/or supplemented to remedy the flagrant violations of practically every applicable standard from federal and state law.

PennDOT presents this situation as an emergency and the FHWA and Governor Shapiro have rubber-stamped this approach. DCS continues to contest this so-called “emergency”, as emergencies are the result of unexpected events. In contrast, purposeful neglect, such as PennDOT’s conduct toward the Bridge, produces expected outcomes such as what we are presently faced with. Even if the so-called “emergency” were true, which DCS disputes, the legal reality is that PennDOT and the FHWA have



failed to comply with mandated procedural and substantive requirements of the numerous laws, including but not limited to: the Endangered Species Act (“ESA”), the National Environmental Policy Act (“NEPA”), Section 4(f),¹ the NHPA, and the Article I, Section 27 of the Pennsylvania Constitution (“Environmental Rights Amendment”).

PennDOT and the FHWA have deliberately obstructed and/or refused to provide Section 106 consulting parties and the public with necessary information for informed comment and participation, including but not limited to: (1) the nature, scope, and extent of the Bridge demolition; (2) whether there will be a new Bridge; (3) the environmental impact of the proposed Bridge demolition (e.g., the impact of operations on endangered species, water quality, and long-term impacts to the Upper Delaware River); and (4) PennDOT’s full, unredacted inspection reports. Many of these documents have been provided to other agencies without redactions, and with far more detail while illegally excluding the information from the public for no justifiable reason. Meanwhile, the non-governmental (“NGO”) Section 106 parties and the public have not been given the respect the law demands and their participation/comments have been treated as perfunctory at best.²

Due to the numerous violations of state and federal laws designed to afford meaningful public input in PennDOT and the FHWA’s decision-making, and that are intended to ensure that environmental and historic resources impacts are avoided, minimized, and mitigated, PennDOT and FHWA must: (1) enlarge the commenting period (for at least thirty days); (2) disclose the full administrative record for the public to review; and (3) start the comment period only *after* the full record is disclosed for review. Enlarging the time is the only way to afford the public a meaningful opportunity to be informed and comment, which is the core intent of NEPA and Section 106. The Pennsylvania Constitution also prevents PennDOT from acting contrary to the rights protected by Article I, Section 27, including by taking ill-informed actions that harm public natural resources and fail to avoid, minimize, and mitigate environmental harm. Pa. Env’tl. Def. Found’n v. Com., 161 A.3d 911 (Pa. 2017); Robinson Twp. v. Com., 83 A.3d 901 (Pa. 2013). Further, the FHWA and PennDOT must immediately and formally initiate NEPA and Section 7 ESA formal consultation, in order to preclude PennDOT from making a decision on its preferred alternative before the federal processes have even started (i.e., predetermined outcome before NEPA and Section 7 formal consultation has occurred). Finally, PennDOT and the FHWA must provide all information the public and Section 106 consulting parties need in order to provide meaningful, informed comment.

¹ 49 U.S.C. § 303(c).

² For example, PennDOT has not bothered to create comment/response documents, and has failed to formally respond to Section 106 consulting party comments, contrary to law.



II. Brief Review of How We Got Here

DCS will not reiterate the timeline of over two decades of purposeful deferred maintenance and Bridge inspection reports from its January 2, 2025 comment; however that timeline remains important and DCS's comment letter discussing those issues is included with this letter for reference.

In 2021, PennDOT restarted the Section 106 process for MPMS³ #9983, which was a proposal on how to address the Bridge's condition, including whether to rehabilitate or replace the Bridge. PennDOT developed a purpose and need statement, ostensibly to incorporate into a later NEPA document, and conducted a "People, Environment, and Linkages" ("PEL") study. During this process, in 2023, PennDOT released a Historic Bridge Rehabilitation Analysis ("HBRA") Phase I report prepared by AECOM. The HBRA Phase I report identified several options for bridge rehabilitation. In April 2024, PennDOT released its draft PEL study. At no point, however, was any formal NEPA process initiated by the FHWA. Throughout this entire period, UDC and others expressed concern to PennDOT that it was spending extensive amounts of money on studies, but making no progress toward stabilizing the Bridge's condition.

In August 2024, several months after PennDOT released the draft PEL Study, the UDC informed PennDOT that debris was falling from the Bridge. A PennDOT inspection that same month found debris on the riverbank consisting of paint, laminar rust, a "J-hook" from the bridge deck, and a piece of horizontal tubing from the Bridge's steel railing. PennDOT planned to install bridge netting, but never did.

On November 4, 2024, according to U.S. Fish and Wildlife Service ("FWS") records, PennDOT began to discuss with agencies options to address the Bridge's condition. On November 7-8, 2024, PennDOT created MPMS #122260, separate from #9983, to govern the processes for addressing the Bridge's condition in a more short-term manner. In November, PennDOT proposed to dismantle the Bridge and store all Bridge parts until it made a final decision on whether to rehabilitate or replace the Bridge. DCS commented at that time regarding the lack of information provided by PennDOT regarding proposed Bridge storage and disassembly, among other issues.

On December 6, 2024, PennDOT District 4-0 executives decided to demolish the Bridge. This was not announced to the public and NGO Section 106 consulting parties until December 17, 2024, even though PennDOT and the FHWA discussed demolition with other agencies and even obtained an emergency declaration from Governor

³ "Multi-modal Project Management System" - <https://www.pa.gov/agencies/pennidot/programs-and-doing-business/online-services.html>



Shapiro prior to December 17, 2024. The demolition announcement on December 17 came with multiple documents dumped onto the PATH system at the same time, along with a requirement for expedited commenting. This gave the public and NGO Section 106 consulting parties an unreasonably short period of time to review and attempt to meaningfully comment on all the new information dumped on them by PennDOT. Additionally, PennDOT, at the time of the December 17 notice, failed to provide any of the permit applications or consultation requests submitted by PennDOT and FHWA. Consequently, the public and NGO Section 106 consulting parties did not have the necessary information to provide meaningful and informed comments within PennDOT's "expedited" timeframes. The submission of such documents to other agencies on the same day that the public learned of demolition shows that PennDOT and FHWA did not intend to follow the requirements of NEPA, Section 4(f), Section 106, and other relevant laws because they had already predetermined the outcome before federal review was completed or even formally initiated.

Despite the stark shift from dismantling/storage (which would have allowed for rehabilitation and preservation, as discussed in the MPMS #9983 process) to complete Bridge destruction, neither PennDOT nor the FHWA initiated any new or supplemental NEPA process, and have not apparently initiated any Section 4(f) process either.

III. Withholding Information from the Public and NGO Section 106 Consulting Parties has Made Meaningful and Informed Comment Impossible, Including on Proposed Section 106 Mitigation

PennDOT has failed to clarify to agencies, to Section 106 consulting parties, and the public just *exactly what* new conditions or facts justify demolition of the Bridge. Instead, PennDOT, and FHWA by extension, have only provided conclusions without meaningful information to support said conclusions. For example, District 4 Executive Richard Roman has claimed that the abutments are rotating,⁴ without disclosing supporting reports, data, or other material. From a review of the redacted October 2024 inspection report that DCS obtained, DCS cannot find such supporting evidence either. DCS still lacks the unredacted inspection report because PennDOT claims it can continue to withhold it despite a Pennsylvania Superior Court case to the contrary.⁵

PennDOT's game of "hide and seek" challenges the public to find the needle in the haystack as to what the facts are regarding the condition of the Bridge that

⁴ <https://www.brctv13.com/news/local-news/30431-skinners-falls-bridge-may-be-demolished>

⁵ The ability to file a Right-to-Know-Law ("RTKL") request is not a substitute for a proper Section 106, NEPA, and Section 4(f) process. Most agencies still invoke a 30-day extension to respond to RTKL requests, and take further time after that to provide records. PennDOT went from proposing to dismantle the Bridge to choosing to destroy it in less time than it takes to get records out of PennDOT.



PennDOT is relying upon for the proposed demolition. Such “hide and seek” is not the intent of the NEPA, the NHPA, or the Environmental Rights Amendment. It is not DCS’s job to go hunting through the “haystack”, comparing the October 2024 inspection report to compare it to all prior reports over the last two or more decades to find just exactly what *has* changed.⁶ It is PennDOT’s job to identify what new information it is relying on, and to inform the public of that, or at least provide the information in a manner that facilitates understanding rather than concealment. PennDOT has not.

Even worse, it has become clear that PennDOT and the FHWA have withheld from the public and NGO Section 106 consulting parties crucial data not just about the Bridge’s condition, but also about the proposed demolition and its effects on the human environment (e.g., water quality, recreation, historic values, and endangered species). This prevents the public from analyzing whether the project will comply with, *inter alia*, the Clean Streams Law; the Clean Water Act; Article I, Section 27 of the Pennsylvania Constitution; and other laws, in addition to NEPA, Section 4(f), and the ESA.

A few examples of information that PennDOT and the FHWA have purposefully⁷ failed to share with the public and NGO Section 106 consulting parties include the following:

- Unredacted October 2024 inspection report
- Information submitted to U.S. Fish and Wildlife Service for informal consultation, including regarding freshwater mussels
- Permit application materials for a Nationwide Permit 3 – submitted to USACE on December 17, 2024, and presently pending review
- “an extensive list of plans, specification, mitigation tables, and other documents”, which were given to the Upper Delaware Council (“UDC”), who noted that “[o]f

⁶ DCS has done a review anyway, as detailed in its January 2, 2025 Comment Letter, and found overwhelmingly that the October 2024 inspection report has presented old conditions known for years or decades as “new” conditions, rather than existing matters that PennDOT failed to fix. DCS has included additional comparisons with this comment letter.

Despite DCS’s January 2025 analysis, agencies have continued to support PennDOT’s conclusion that there are somehow new conditions warranting the Bridge’s destruction, yet cannot point to what those conditions are. The downgrading of the Bridge’s substructure from 2 to 0 was a choice by PennDOT, as its consultant identified the ability to mitigate the 0 rating to a 1 because the Bridge is closed to traffic. Such “mitigation” of a 0 rating to a 1 has been used by PennDOT on this Bridge before. Thus, the 0 rating of the substructure is not an excuse for demolition. Such a rating also seems to rely on the faulty assumption that many of the issues reported in the October 2024 report are new.

⁷ PennDOT and/or the FHWA provided this information to other agencies.



particular usefulness were the following:

- Alternatives Analysis
- Project Plan and Cross Section
- Hydrology and Hydraulics Memorandum
- Mitigation Commitments
- Schedule
- Plans
 - Construction
 - Erosion and Sediment Control, and
 - Structure Plans
- Specifications
 - Removal of Existing Bridge
 - Pre/Post Blast Survey
 - Temporary Causeway
 - PA Abutment Masonry Repair
 - PA Abutment Masonry Repointing
 - Post Demo Waterway Survey
 - PA Abutment Cap and Railing
 - Handling and Disposal of Asbestos Containing Materials”

UDC Substantial Conformance Review, p.4.

PennDOT and the FHWA have also failed to provide the following information (again, as examples) which is necessary for informed comment and thus required to be disclosed by law:

- How the demolition is being funded, and more specifically, which type (or “pot”) of federal and/or state funds are being allocated for the demolition and cleanup (i.e. what is the full nature of the federal action, in terms of federal funds, associated with PennDOT’s resolution of the Bridge situation)⁸
- Attempts to secure funding for bridge stabilization and long-term rehabilitation

⁸ Today, while DCS was completing this comment, counsel for DCS received an answer from FHWA that the funding for the Bridge is “federal-aid Surface Transportation Block Grant Program Off-System Bridge funds.” Federal funding is one of the reasons why NEPA is even relevant here, and yet that information was only confirmed the day of this comment.

Given the funding source, DCS has many questions, including the fact that such funds can be used for rehabilitation and bridge preservation, and do not appear to be allowed to be used solely for bridge destruction. This again goes back to the NEPA problem highlighted in this comment – is there going to be a new bridge? Or nothing? There is no clear project defined, and the fast-tracking of this project as if it were eligible for federal Emergency Relief disaster aid (which it is not) has pushed demolition at the expense of the original NEPA process under MPMS #9983.



- Whether PennDOT has consulted with historic bridge experts
- Correspondence with other agencies (e.g. USACE, FWS, etc.) regarding the project
- Alleged PennDOT weekly inspection reports over the course of October-December 2024⁹
- A clear identification of the data on which PennDOT is relying to claim, *inter alia*, that the bridge and/or its abutments are rotating, and/or has “rapidly deteriorated” during 2024, and an explanation of how this is new, as opposed to data that has been known for years and ignored by PennDOT.
- An analysis informed by historic bridge experts comparing alternatives to managing the Bridge’s current state, needed for, *inter alia*, Section 106, NEPA, and Section 4(f) analyses
- Bid packages, bid qualifications, engineering documents, and any other information posted to PennDOT’s ECMS¹⁰ system, most of which cannot be accessed by the public
- Locations of wetlands and critical habitat for endangered and threatened species
- Duration of impact of demolition operations (including cleanup and causeway construction/removal) to local businesses (e.g. Lou’s Tubes,¹¹ located directly next to the NY abutment) that rely on the River for revenue
- Duration of causeway construction, use, and removal; how the causeway will be installed and removed
- Whether any flood protection for the partial causeway will be installed to prevent flooding of local properties, which previously occurred with the PennDOT causeway used for the Pond Eddy Bridge work

⁹ <https://www.tricountyindependent.com/story/news/local/2024/12/24/penn-dot-skinners-falls-bridge-doomed-failing-new-york-abutment/77141680007/>

¹⁰ “Engineering and Construction Management System” - <https://www.pa.gov/agencies/penn-dot/programs-and-doing-business/online-services.html>

¹¹ Also a Section 106 consulting party.



- Impact of the partial causeway on migratory fish including American shad
- Reasoning for installing eleven buoys with long chains and anchors around the Bridge's center pier in December 2024
- When does PennDOT plan to recover the 9 buoys that have flowed downstream and are now a danger to boating traffic
- What boating traffic does PennDOT anticipate before May that requires the Bridge to be demolished before that time

Such deliberate and extensive withholding of information from the public and NGO Section 106 consulting parties is contrary to the point of public commenting and demonstrates bad faith. This is exacerbated by the fact that PennDOT and FHWA have practically ignored NEPA, NHPA, and Section 4(f) requirements, including failing to treat the addition of a new, preferred alternative (demolition) as a significant change in circumstances mandating supplemental reporting, consultations, and public commenting. Meeting with consulting parties on December 17, 2024¹² to announce that PennDOT is advancing toward a final agency action to demolish the Bridge and disregard all other alternatives is not “tak[ing] a hard look” at the impacts to the human environment. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). It also is not consistent with the intent behind public participation in agency decision-making, or the strictures of the Environmental Rights Amendment. This circumvention of a meaningful public commenting process was augmented by PennDOT's decision to release five separate documents allegedly justifying its demolition choice on the same day PennDOT announced its demolition decision (making it impossible for the public to comment on the unexpected change in agency action at the time of the announcement). Further examples of PennDOT's efforts to circumvent and/or undermine public participation include: sending out a public email announcing a 5 day comment period on bridge dismantling, then changing it to bridge destruction 3 days into the comment period, giving the public two weekend days right before Christmas for public comments. None of this is a proper public process and it is not a faithful review by PennDOT or the FHWA. It's an ambush and dereliction of duty and public trust.

DCS further notes that the “public meetings” held by PennDOT and the FHWA are little more than Powerpoint presentations followed by severely limited public questioning or commenting filtered by the agencies (i.e., no one can ask a question, and

¹² To be clear, the public notice (dated December 8, 2024) did not say anything about bridge destruction. It said the meeting was “to provide an update on the dismantling of the Skinners Falls Bridge.” PennDOT's decision to destroy the bridge had already been made two days prior to this notice.



no one else on the “meeting” can hear the comments or responses from others). The public and NGO Section 106 consulting parties essentially are commenting in a vacuum, with PennDOT and the FHWA ensuring the public cannot hear from each other and cannot timely reinforce comments from others on the record. The foregoing has the effect of silencing the public. This method of “public interaction” resulted in the rejection of one of DCS’s questions by PennDOT’s consultant because the consultant considered the question to be a statement.

The point of public participation and commenting is not limited to asking questions but also explicitly encourages and allows for the public to make statements of fact, opinion, or otherwise. It is contrary to the purpose of public participation for an agency or agency representative to silence public input to the detriment of the public and the process. Filtering everything through PennDOT and not providing the public with actual information, documents, and data is how the process has been the entire time, and thus has been fatally flawed for months. It flies in the face of informed, meaningful comment and public participation required by Section 106, NEPA, and Section 4(f) along with complementary state laws.

If the data that PennDOT is relying on has been redacted from inspection reports, PennDOT is asking every agency, Section 106 consulting party, and member of the public to take its conclusions on the Bridge’s condition, and the need for its preferred alternative (destruction) at face value without clear support. Such blind faith is what NEPA, Section 106, and other complementary federal and state laws were designed to avoid. Their central tenets include meaningful and informed public comment and participation. How can the public and Section 106 consulting parties comment in an informed and meaningful manner, when PennDOT and the FHWA have deliberately avoided or failed to disclose relevant information from the public and Section 106 consulting parties?

“Trust us” is not the lexicon of NEPA, Section 106, Section 4(f), the ESA, or Article I, Section 27 of the Pennsylvania Constitution. Conclusions unsupported by substantial evidence in decision documents cannot support agency action. Public comment is not a mere box to be checked on the way to PennDOT and the FHWA’s predetermined outcome.

PennDOT and FHWA’s handling of the public participation has illegally rendered the public and Section 106 consulting parties as superfluous, contrary to the laws that govern the proposed destruction of the historic Skinners Falls Bridge. This is not the first time either that DCS has told PennDOT that its processes do not comply with the law. DCS raised practically the same objections in 2021 regarding the PEL study process and “SurveyMonkey” method that PennDOT used to gather comments



under MPMS #9983.¹³ Those same objections apply here.

IV. The Bridge Situation Is Not An “Emergency” and Classifying it as such to Avoid Public Scrutiny and Comment, and to Potentially Use Federal Emergency Relief Funds is Illegal and Wasteful

DCS has heard repeatedly that this situation is an emergency. There is a difference between what PennDOT and the FHWA consider an emergency, and what the law treats as an emergency. This situation is not, legally, an emergency under the relevant environmental and historic preservation laws. Further, Governor Shapiro’s emergency declaration was invalid from the moment it was signed, thus any action taken in reliance on it – including the extension granted by the ACHP under 36 C.F.R. 800.12 – are likewise invalid.

A. Foreseeable Consequences of Agency Actions and Neglect are Not Emergencies

As noted in DCS’s January 2, 2025 comment letter, which is included with this letter, the Bridge’s deteriorated condition is not new or a surprise. There are major issues stretching back years, if not decades. These include, *inter alia*,: frozen (rusted) bridge bearings; the abutments and wingwalls having to manage lateral forces as a result of the frozen bearings; voids and cracks in the abutments and wingwalls that have been measured at least twice a year for over a decade; and more.

A cursory review of the applicable laws reveals that “disasters” and/or “emergencies” are, by definition, unexpected circumstances. These two terms do not encompass situations created over decades by a government agency. Purposeful neglect is not an “emergency” or “disaster” situation and to allow such action to proceed would encourage PennDOT to repeat woeful dereliction of duty without accountability. PennDOT should not be rewarded for its neglect and dereliction of duty. Likewise, DCS, local businesses and residents, and the people of Pennsylvania and New York should not bear the punishment for PennDOT’s failures.

It appears, however, that when PennDOT presented and/or reviewed the October 2024 inspection report, it and other reviewing agencies interpreted what was in that report as new problems, when almost the entire report contains, almost verbatim, language on the Bridge’s condition from prior inspection reports. As noted in DCS’s January 2, 2025 comment letter, the abutments and wingwall monitoring points showed no changes over 2024, if not earlier. Yet, in conversation after conversation with agencies, the response has been “this looks bad” or “we don’t know what the bridge

¹³ DCS August 24, 2021 Comment Letter



will do,” as if both modern engineering analysis and historic bridge experts do not exist. Looks and conjecture are not the same as data and analysis, and they are not substantial evidence to support conclusions and final agency action.

DCS doesn’t disagree that the Bridge is in a deteriorated condition, and needs stabilization and rehabilitation. Indeed, DCS has presented recommendations from historic bridge experts for stabilizing the Bridge, protecting recreational boaters, and working toward phased rehabilitation. What DCS *does* disagree with is that the deteriorated condition is new or an emergency, and that the only option is destruction. The October 2024 inspection report is substantially old data, or new data showing no changes. Any review of prior inspection reports – which DCS has done – would have made this obvious.

The Bridge’s deterioration is no surprise. Its condition has been known for over two decades, to such a point that PennDOT, until late 2024, was engaged in processes to evaluate rehabilitation of the Bridge and, less popularly, bridge replacement. Also not a surprise are PennDOT’s years of deferred maintenance on items that should have been addressed in six (6) months time. Failure to maintain the Bridge, and the consequences that come from that, are neither unexpected or shocking. This situation is thus not an emergency within the meaning of the ESA, NEPA, NHPA, federal highway statutes, the applicable regulations under those statutes, and Section 4(f), as examples.

Under the applicable ESA regulations, 50 C.F.R. § 402.05 specifies what qualifies as an emergency in which alternative procedures may be used. The regulation states: “This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.” 50 C.F.R. § 402.05(a).

Applying *ejusdem generis*, the “etc.” in the regulation clearly means “situations” on the scale of what the regulation specifies. Courts have agreed, distinguishing between surprise or unexpected “situations,” and circumstances that are expected and planned for and/or routine. Forest Serv. Employees for Env’tl. Ethics v. U.S. Forest Serv., 397 F. Supp. 2d 1241, 1257 (D. Mont. 2005). “The emergency exception is meant for unexpected exigencies. The use of fire retardant by the USFS is not unexpected but guaranteed; the only question is when and where it will be used. There is no reason why the USFS cannot conduct formal consultation with FWS and no reason to find that the ESA requires anything less.” Id.

If Hurricane Helene had washed out the Bridge, that might count as an emergency. If a plane had crashed into the River and cleanup was needed, that too might count as an emergency. An agency’s failure to do its job, and the foreseeable consequences of that failure, is not an emergency that qualifies under 50 C.F.R. §



402.05.¹⁴ PennDOT and the FHWA requesting that FWS treat this as an emergency is an impermissible expansion of FWS's regulations and the strictures of the ESA.¹⁵

PennDOT and FHWA cannot use dereliction of duty as a means to circumvent the ESA's full evaluation and formal consultation requirements. Further, PennDOT's dereliction of duty does not and should not exempt PennDOT and FHWA from its obligation to avoid jeopardizing listed species.

Turning to NEPA, this same concept applies.

Where emergency circumstances make it necessary to take an action with significant effects without observing the provisions of the regulations in this subchapter, the Federal agency taking the action *shall consult with the Council [on Envtl. Quality] about alternative arrangements* for compliance with section 102(2)(C) of NEPA. *Agencies and the Council shall limit such arrangements to actions necessary to control the immediate impacts of the emergency*; other actions remain subject to NEPA review consistent with this subchapter. Alternative arrangements do not waive the requirement to comply with the statute, but establish an alternative means for NEPA compliance.

40 C.F.R. § 1506.11 (emph. added). To DCS's knowledge, no such alternative arrangements exist here. Rather, it appears that PennDOT and the FHWA are proceeding as if NEPA does not exist in emergencies. An emergency does not make NEPA disappear, and does not automatically mean a categorical exclusion applies.

¹⁴ Even if this were a proper emergency, 50 C.F.R. § 402.05(b) requires formal consultation and a biological opinion "as soon as practicable after the emergency is under control." The FHWA initiated informal ESA consultation on *December 17, 2024*, the same day that PennDOT announced to the public and NGO Section 106 consulting parties that it was pursuing bridge destruction and not disassembly. The Pennsylvania FWS field office responded on *December 20, 2024*, notably stating, "PennDOT has not provided a final proposed alternative", but apparently had been discussing the matter with agencies since *November 4, 2024*, at least two weeks before PennDOT or FHWA provided the public with actual details about proposed bridge dismantling (not demolition). To the best of our knowledge, the FHWA has not pursued formal consultation and no biological opinion has been issued.

There has never been any "emergency" such as a terrorist attack or massive flooding that has needed to be "under control." In any event, even if it were an emergency, there has been sufficient time for formal consultation and a biological opinion, yet that still is incomplete. It must be completed before Bridge demolition proceeds.

¹⁵ The FWS's Section 7 Handbook has this same fatal flaw as well. Also, technically, the ESA concerns itself with emergencies pertaining to species, not property or structures, raising questions about the ESA emergency regulation under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).



The only FHWA categorical exclusion that discusses emergencies is inapplicable. That categorical exclusion applies to “only some emergencies,” 23 C.F.R. § 771.131. More specifically, the categorical exclusion applies to expressly-listed activities¹⁶ for “transportation facilities *damaged by an incident* resulting in an emergency declared by the Governor of the State and concurred in by the [federal] Secretary [of Transportation], or a disaster or emergency declared by the President pursuant to the Robert T. Stafford Act (42 U.S.C. 5121).” 23 C.F.R. § 771.117(c)(9) (emph. added).

What is the incident by which the Bridge was damaged? It certainly was not “natural disaster over a wide area, such as by a flood, hurricane, tidal wave, earthquake, severe storm, wildfire, or landslide; or . . . catastrophic failure *from any external cause.*” 23 U.S.C. § 125(a) (emph. added).

No, the Bridge’s damage is a direct result of PennDOT’s over two decades of neglect and deferred maintenance. Like the ESA, again, the foreseeable consequences of an agency’s actions (or neglect) are not an emergency that justify circumventing established environmental review procedures.¹⁷ Thus, it is not surprising that Governor Shapiro’s alleged “emergency declaration” did not rely on his actual emergency declaration powers, as explained later in this comment letter. Even the Governor’s office appears to admit that the Bridge’s condition is not of the type of emergency that

¹⁶ Those activities also exclude the proposed demolition, as the FHWA emergency categorical exclusion applies only to:

(i) Emergency repairs under 23 U.S.C. 125; and

(ii) The repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility (such as a ferry dock or bus transfer station), including ancillary transportation facilities (such as pedestrian/bicycle paths and bike lanes), that is in operation or under construction when damaged and the action:

(A) Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and

(B) Is commenced within a 2-year period beginning on the date of the declaration.

23 C.F.R. § 771.117(c)(9).

¹⁷ The definitions and eligibility standards for federal-aid highway emergency relief funds likewise exclude the proposed Bridge demolition from qualifying as an emergency. This is addressed separately in this letter.



he can affect with his emergency powers.

Second, even if the FHWA's emergency categorical exclusion were to apply, FHWA regulations specify:

Any action that normally would be classified as a CE *but could involve unusual circumstances* will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:

- (1) *Significant environmental impacts*;
- (2) *Substantial controversy* on environmental grounds;
- (3) *Significant impact on properties protected by Section 4(f) requirements or Section 106* of the National Historic Preservation Act; or
- (4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

23 C.F.R. § 771.117(b) (emph. added); see also *id.* (c)(28)¹⁸, (e). Such "unusual circumstances" apply here – indeed, the central feature of the proposed action will be significantly impacted, and is protected both by Section 4(f) and Section 106. The environmental impacts of the proposed demolition are very likely to generate substantial controversy – of course, that is if PennDOT and the FHWA had released such information to the public, which they have not.

Relatedly, it appears that the FHWA is proceeding under Section 4(f) as if this were an emergency of the type covered by 23 C.F.R. § 771.117(c)(9). In communication with the FHWA, the agency stated that, due to the "emergency" situation, "the Individual Section 4(f) Evaluation will be prepared as the project progresses per the FHWA's Section 4(f) Policy Paper." 1-30-2025 email from FHWA. This generally follows what would occur in an actual emergency under Section 117(c)(9); however, again, that does not apply. The FHWA's Section 4(f) Policy Paper states:

¹⁸ Technically, because the proposed action is bridge destruction/removal, the action does not qualify under (c)(28), which does not specify bridge destruction as an action covered by the regulation.



Under the ER Program, *repairs* are categorized either as “emergency” or “permanent.” Emergency repairs are made during and immediately following a disaster *to restore essential traffic, to minimize the extent of damage, or to protect the remaining facilities*. Permanent repairs to restore the highway to its pre-disaster condition normally occur after the emergency repairs have been completed.

Section 4(f) compliance occurs during the “implementation of projects” stage for both emergency repairs and permanent repairs. For emergency repairs, Section 4(f) compliance is undertaken after the emergency repairs have been completed. For permanent repairs, Section 4(f) compliance is undertaken as part of the normal NEPA project development process, just as it would be for any other type of Federal-aid or Federal lands project (i.e. it must be completed prior to the authorization of right-of-way and construction).

FHWA Policy Paper (emph. added).

Although FHWA apparently is proceeding in the manner specified above, it is wrong in doing so. It is clear from FHWA’s own discussion of Section 4(f) that the proposed demolition of the Bridge: does not involve repairs; is not occurring *after* a disaster, and is not being done to restore the Bridge. Indeed, arguably PennDOT is creating a disaster including to local businesses, property owners, and the local environment in order to demolish the Bridge.

B. Invalidity of Governor Shapiro’s “Emergency Declaration”

On December 16, 2024, Governor Shapiro issued a letter to Alicia Nolan at the FHWA entitled “Declaration of Emergency in Relation to Skinners Falls.” This letter has formed part of the basis on which PennDOT crammed in an abnormally short comment deadline – even for a purported emergency – right before Christmas. That comment period was important because the public and consulting parties needed to review and address PennDOT’s sudden decision to explosively destroy the Bridge instead of pursuing its proposal of several weeks before (Bridge dismantling) or other less destructive alternatives.

The Governor’s letter, despite claiming to declare an emergency, expressly stated the following: “This declaration is *not* a Proclamation of Disaster Emergency made under the authority vested in me pursuant to the Pennsylvania Constitution and Title 35 of the Pennsylvania Consolidated Statutes.”(emph. added).



For context, Article IV, Section 20 of the Pennsylvania Constitution, entitled “Disaster emergency declaration and management” sets forth the Governor’s authority and limitations on such authority, to declare a “disaster emergency.” Pa. Const. art. IV, § 20. In 2021, Pennsylvania voters agreed to amend this provision of the Constitution to add, *inter alia*, a 21-day time limitation on any disaster emergency declaration issued by the Governor. Corman v. Acting Sec’y of the Pa. Dep’t of Health, 266 A.3d 452, 457-459 (Pa. 2021). Title 35 of the Pennsylvania Consolidated Statutes houses the Emergency Code, which “vests” the Governor “with broad emergency management powers.” Friends of DeVito v. Wolf, 227 A.3d 872, 885 (Pa. 2020).

Thus, the Governor’s letter was not issued under these established authorities,¹⁹ and the Governor has not cited any applicable authority for his declaration. A review of the Pennsylvania Constitution reveals no other authority. A reasonable review of Pennsylvania statutory law has the same result – other than the Emergency Code (which the Governor disclaimed as the basis for his declaration), there is no authority authorizing the Governor’s letter as a formal or other declaration of emergency sufficient to trigger state and federal emergency protocols/procedures.

The invalidity of the Governor’s letter as an “emergency declaration” means that PennDOT and the FHWA wrongly truncated the required NHPA Section 106 process. Thus, it must be restarted from the beginning. PennDOT used the Governor’s letter to short-circuit scrutiny of its alternatives analyses, and to abnormally shorten the comment period for consulting parties and the public. Confusing communications from PennDOT’s cultural resources team resulted in many consulting parties and the public having only two weekend days to comment on material that had been released to consulting parties and the public merely days before.²⁰ Further, the comment deadline of December 22 was, at the risk of stating the obvious, right before the Christmas holiday.

¹⁹ Had it been, it would have expired on January 6, 2025, and the Governor would not have been able to extend, or reissue, it due to the 2021 amendments that require a concurrent resolution from the General Assembly. Pa. Const., art. IV, § 20(c), (d).

This would have interfered with the more permissive Section 106 regulations, which gave PennDOT 30 days for its “undertaking,” and an additional 30 days if extended by the Advisory Council on Historic Preservation (“ACHP”). 36 CFR 800.12(d). PennDOT and the FHWA are presently operating under a 30-day extension from ACHP. However, because the Governor’s declaration of emergency was never valid in the first place, none of that matters at this point.

²⁰ As explained further in DCS’s January 2, 2025 comment, included as part of the documents that DCS is submitting for the administrative record.



The lack of scrutiny of PennDOT's after-the-fact²¹ and inadequate alternatives analysis based on very few details has led too many agencies and members of the public accepting PennDOT's bold conclusion that the Bridge is somehow lost. The Bridge is very much still standing, and is not in fact lost to us yet. It is capable of being properly stabilized and rehabilitated by experienced historic bridge professionals. It is clear, however, that the illegal circumventing of the Section 106 and NEPA processes has had the effect of forcing PennDOT's choice of Bridge destruction through without the level of review required.

V. Emergency or Not, PennDOT and the FHWA Violations of the Law Governing Historic Preservation and Environmental Impact Review, Avoidance, and Mitigation Are Harmful

Statutes like NEPA, the Clean Water Act, NHPA, and the ESA have a sequencing of resolution of impacts: (1) identification of impacts; (2) avoidance of impacts; (3) minimization of impacts; and (4) mitigation of impacts. The lead agency is required to follow this sequencing in this order. Article I, Section 27 of the Pennsylvania Constitution imposes many similar obligations, and goes further, as PennDOT, *inter alia*, is a trustee of public natural resources, such as the water quality of the Delaware River, migratory fish, and other aspects of the riverine environment.

The FHWA's NEPA regulations emphasize: "Early coordination with appropriate agencies *and the public* aids in determining the type of environmental review documents an action requires, the scope of the document, the level of analysis, and related environmental requirements. These activities contribute to reducing or eliminating delay, duplicative processes, and conflict . . ." 23 C.F.R. § 771.111(a) (emph. added). Also, any use of funds from the federal-aid highway program requires multiple rounds of public hearings and public involvement, including, *inter alia*, "[c]oordination of public involvement activities and public hearings with the entire NEPA process; and [e]arly and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions." 23 C.F.R. § 771.111(h). That certainly has not occurred.

At no point in this process has anyone taken a "hard look" at the significant effects on the human environment of the proposed Bridge demolition, or offered "early and continuing" public involvement. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); 42 U.S.C. § 4332; 23 C.F.R. § 771.111(h). Instead, PennDOT and FHWA excluded the public. Further, PennDOT's executive decision to demolish the Bridge has made the ongoing NEPA process in MPMS #9983 pointless, if not

²¹ See prior footnote 20.



predetermined, because the proposed Bridge demolition removes from consideration Bridge rehabilitation and possibly Bridge replacement, given that PennDOT has publicly stated that it does not know if it is building a new Bridge.²² Due to the substantial divergence in outcomes that occurred when PennDOT chose demolition, a NEPA process needed to be initiated, restarted, or supplemented for MPMS #122260. It has not been. Even if MPMS #122260 is considered “part” of the larger Bridge project, the last-minute addition of demolition justified supplementation and further evaluation and a much longer commenting period.

The Upper Delaware River is a known habitat for freshwater mussels, including the federally-endangered dwarf wedgemussel (*Alasmodonta heterodon*). The Delaware River is also the longest free-flowing river in the eastern United States and an important habitat and pathway for migratory fish such as American shad, the American eel (which has a symbiotic relationship with some freshwater mussel larvae²³), and striped bass. The river communities around the Bridge rely on the River’s “pure water, and . . . [its] natural, scenic, historic and esthetic values” for recreation, scenic enjoyment, business, and other pursuits. Just downriver from the Bridge are rapids (Skinners Falls) popular with boaters.

One aspect of the proposed Bridge demolition that requires a “hard look” is the construction and use of a partial stone causeway. PennDOT used a similar method when it demolished and replaced the Pond Eddy Bridge. On that project, PennDOT was warned that its causeway increased the risk of flooding, which would adversely impact surrounding landowners. PennDOT proceeded anyway. As warned, the causeway resulted in flooding as the River spread laterally onto neighboring properties.

These are just some examples of what the law requires PennDOT and the FHWA to address, but they have not.

Likewise, Section 4(f) review is important because it requires a *substantive*, not merely procedural, determination of whether “(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 park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.” 49 U.S.C. § 303(c)(emph. added).

“A feasible and prudent avoidance alternative avoids using Section 4(f) property

²² <https://www.brctv13.com/news/local-news/30431-skinners-falls-bridge-may-be-demolished>

²³ <https://www.nps.gov/upde/learn/nature/migratory-fish-species.htm> (“Eastern *Elliptio* larvae, known as glochidia, attach to the gills of the American Eel and remain there until they metamorphose into juvenile mussels.”)



and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property.” 23 C.F.R. § 774.17(1).

By refusing to conduct a proper NEPA review, withholding information from the public and NGO Section 106 consulting parties, and falsely classifying the situation as an emergency of the type that gets faster (but not no) review, PennDOT and the FHWA have blocked any actual discussion or public commenting of whether there is no “prudent and feasible alternative” to the proposed demolition. As noted above already, the demolition creates substantial environmental impacts, in addition to removing a significant component of the Milanville National Register Historic District, a National Register bridge of a rare kind, severing the river community into two, affecting tourism and recreation, and harming local businesses that rely on the River community as it presently is – with the Bridge (and hopefully one day, with a rehabilitated, open Bridge). PennDOT’s proposed action actually may *cause* “[s]evere social, economic, or environmental impacts; [s]evere disruption to established communities; . . . [and] severe impacts to environmental resources protected under other Federal statutes,” in contrast to other options such as installation of a temporary portage, along with Bridge stabilization and phased Bridge rehabilitation by qualified historic bridge experts. 23 C.F.R. § 774.17(3)(A)(B) & (D).

DCS has presented recommendations for Bridge stabilization and rehabilitation, which is an alternative that must be considered as part of the Section 4(f) process. However, because no such process has been done, PennDOT and the FHWA have prevented an actual dialogue on this, and have not formally responded to DCS’s proposed alternative as a consulting party.

PennDOT’s summary rejection of temporary bracing in its December 17 “alternatives analysis” document was both incorrect and not grounded in knowledge of historic bridge rehabilitation. It appears that PennDOT lacks such expertise, and failed to consult with historic bridge experts in developing its options. It appears the alternative analysis (which is more of an “evolution of engineering options”) was created *after* PennDOT District 4 executives decided to demolish the bridge. Thus, the analysis is one that appears to have been done to affirm the predetermined Bridge destruction outcome. Regardless, PennDOT could have easily, with the assistance of the PA SHPO, consulted with appropriate historic bridge experts. It did not, at least not based on any information available to the public or DCS. Therefore, PennDOT, and by extension FHWA, have failed to sufficiently evaluate all the alternatives, especially Bridge stabilization by historic bridge professionals.

Last but not least, Pennsylvania’s Environmental Rights Amendment guarantees each Pennsylvanian’s right to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” Pa. Const. art. I, § 27,



cl.1. PennDOT likewise is a trustee of Pennsylvania's public natural resources for present and future generations. Pa. Const. art. I, § 27, cls. 2 & 3. DCS will not belabor the point here, as it should be clear that Bridge demolition does not preserve the "scenic [and] historic . . . values of the environment," and, based on the sparse information DCS has regarding demolition operations, the operations are not consistent with PennDOT's trustee obligations. The Amendment also requires PennDOT to engage in informed decisionmaking, and to ensure that the beneficiaries of the trust have information about how the trust corpus will be impacted by proposed activities such as Bridge demolition. Robinson Twp. v. Com., 83 A.3d 901, 983 n.60 (plurality) (Pa. 2013); Pa. Env'tl. Def. Found'n. v. Com., 161 A.3d 911 (Pa. 2017).

In taking its destruction approach, PennDOT is weighing its fears and lack of historic bridge expertise against a massive upheaval to local communities and harm to the historic, scenic, esthetic, ecological, and economic values that the Bridge provides – which is not only contrary to Section 4(f), but also to Article I, Section 27 of the Pennsylvania Constitution. PennDOT has chosen its "no-risk" approach against the following: (1) eliminating a Historic Register Bridge; (2) removing an anchor point for the Milanville Historic District and permanently harming the District; (3) disturbing the riverine environment with the causeway, which has both ecological and potentially recreational impacts because of the rapids that attract people to the area; (4) introducing flooding concerns with its causeway method; (5) severing PA and NY river communities without any guarantee of a new bridge; (6) severely impacting river businesses around the bridge; and (7) interrupting recreation for however long it takes for PennDOT to remove the bridge debris from the river, to remove its causeway, and to "restore" the river environment that it disrupted (which cannot be fully restored). This isn't even a full list. It's no wonder at this point that PennDOT and FHWA have avoided necessary analyses and public disclosures because it would make clear just how much impact the proposed demolition would have in contrast to the recommendations offered by DCS and others.

VI. Discussion of Mitigation is Premature

Despite the fact that mitigation discussion is premature, as noted earlier, DCS offers the following initial thoughts.

First, there are two types of mitigation needed here: mitigation for bridge destruction, and mitigation for bridge neglect.

One easy way to mitigate the bridge's destruction is to, well, not destroy it. DCS has offered recommendations by historic bridge professionals on how to stabilize and rehabilitate the Bridge. If this path is taken, a portage for boaters can also be installed while the Bridge is being rehabilitated. Other mitigation involves removing the buoys



PennDOT installed that now pose a hazard to boaters because most of them have washed downstream, and contain long chains with anchors.

As for persistent neglect of historic bridges, DCS has an extensive list of recommendations. DCS looks forward to providing these at the appropriate time after PennDOT and the FHWA have complied with the laws they have brushed aside in order to fast-track demolition of the Bridge.

Thank you for your time and consideration.

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

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