

Widener University   
Delaware Law School

Environmental & Natural Resources Law Clinic  
Kenneth T. Kristl, Professor of Law and Director

April 28, 2022

Mr. Benjamin Singer, P.E.  
EEP Project Manager  
Pennsylvania Department of Transportation  
Engineering District Eight  
2140 Herr Street  
Harrisburg, PA 17103

Mr. Johnathan Crum  
U.S. Department of Transportation  
Federal Highway Administration  
Pennsylvania Division  
228 Walnut Street  
Harrisburg, PA 17101

Re: Eisenhower Drive Extension Project (EEP)

Dear Messrs. Singer and Crum:

I have been asked by my clients, Lower Susquehanna Riverkeeper Association and various individuals, to write to you in connection with the draft Environmental Assessment (EA) issued by you concerning the EEP. My clients are concerned that, based on the draft EA, you may be preparing a FONSI and will not seriously consider the necessity for an Environmental Impact Study (EIS) before you complete the process under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA). I write to express my client's deeply-held conviction that an EIS is appropriate and needed for the EEP, and that the failure to perform one will violate NEPA.

There are numerous reasons why my clients' concerns are well-founded. As you well know, NEPA requires you, in performing an EA, to take a "hard look" at whether or not there will be a significant impact on the human environment. *Raymond Proffitt Found v. U.S. Army Corps of Engineers*, 175 F. Supp. 2d 755, 770 (E.D. Pa. 2001); *Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1246 (M.D. Pa. 1992). The designated "preferred option" involves the construction of miles of new highway, covering or extensively degrading acres of active prime farmland, increasing pollutant-laden runoff into nearby streams, negatively and permanently impacting wetlands, and adversely affecting historic properties. My clients believe these significant environmental impacts have not been adequately or seriously analyzed. Only an EIS could achieve the analysis necessary to understand these impacts completely. Here is a quick summary of those effects:

## **1. Topography/Physiography & Geotechnical Risks**

- a. The EA states that the “karst like” physiographic characteristics of the landscape have caused numerous noted closed depressions and sinkholes throughout the project area and that a potential exists for sinkholes and groundwater contamination to occur during construction. This suggests that the project will have a significant impact on the regional landscape and affected communities. My clients believe it to be arbitrary and capricious to conduct subsurface investigations during the final design phase of the project to define areas of concern; rather, such investigations should begin during the conceptual design phase, or more appropriately, completed during preparation of an EIS so that these issues and locations can be identified, evaluated, and alternatives considered to properly mitigate concerns. It is prudent to assess and perform subsurface infiltration and boring studies prior to the final design. Since this project is funded in part by taxpayer dollars, a high priority should be afforded during the baseline data collection and conceptual level design phase to avoid excess spending and future increased tax hikes on affected communities on a project that may be deemed inappropriate for construction if this issue is not fully vetted early in the process. Furthermore, since karst features are confirmed across the project area, stormwater issues are highly concerning as those best management practices will absorb that water, allowing it to percolate through the karst features and create further sink holes and depressions. Studies have confirmed that increased stormwater to an area with karst geology will further exacerbate the rate of sinkhole development and can result in increased rates and distances of contaminated water transport within the aquifer. It would be wise to be cognizant of the probability of sinkhole development and taking safety in account. Potential losses due to damages from bridge collapses, road cave-ins and vehicle accidents should be fully assessed now so that the design and alternatives can be properly evaluated.
- b. As also indicated in the Dawood Engineering, Inc. (Dawood) Geological Desktop Study, groundwater and water well contamination is a concern given the shallow depth to bedrock and static water levels. The community has suffered from groundwater and water-well contamination in the past, and as such, it is necessary to assess further contamination through a complete EIS given the karst geology which increases contaminant transport in groundwater. It makes much more sense to complete infiltration testing and borings now before moving forward so that all practicable alternatives are known and assessed.

## **2. Environmental Stream and Wetland Resources**

- a. My clients believe that another serious flaw in the draft EA is its failure to consider carefully the full range of the impacts on streams and wetlands. These streams and wetlands are a part of the watershed of the Lower Susquehanna River and Chesapeake Bay, both of which are ecosystems under severe environmental stress. The draft EA limits its focus to the direct impacts on nearby streams and wetlands without full consideration of the contribution to the cumulative effects of

this and many other proposed and ongoing activities on the Lower Susquehanna and the Chesapeake Bay. Such a cumulative impact analysis is also a requirement of the NEPA process. The State of PA is investing much needed time and effort into protecting its waters. Given the demands of the Chesapeake Bay Total Maximum Daily Load (TMDL), Pennsylvania (PA) counties are having an even more challenging time achieving the required reductions of pollutants to its waterbodies, especially with new loads proposed to be allocated to PA counties due to the failure of the Conowingo Watershed Implementation Plan.<sup>1</sup> It is prudent to assess how this project will affect both local TMDLs and the Chesapeake Bay TMDL reduction goals. An EIS can better evaluate potential cumulative impacts the project may have on water quality within the Lower Susquehanna River and Chesapeake Bay Watersheds.

- b. The streams that the preferred alternative will impact are listed as impaired under the State's Section 303(d) list based on Aquatic Life and Recreational uses. Sources of impairment are attributed to urban runoff/storm sewers and channelization and habitat alterations associated with surface mining and agricultural operations. Further degradation by altering stormwater patterns in an already impaired waterway will further exacerbate the goals of attaining their designated uses and removing that waterbody from the impaired list. The entire length of Plum Creek is impaired for aquatic life and recreational uses. The South Branch Conewago Creek is also impaired for similar uses. The no-build option would not cause further harm to our waterways and should be further assessed in light of cumulative water quality impacts outside of the project specific footprint. An EIS should be developed to demonstrate how the preferred alternative will not interfere with attainment of designated uses and any associated TMDLs.
- c. Furthermore, the project is in a critical water planning area. There are not a lot of water resources, and the extent of wetland impact is concerning. Wetlands improve water quality and can intercept runoff from surfaces prior to reaching open water and remove pollutants through physical, chemical, and biological processes. They are also beneficial for erosion control, flood abatement, habitat enhancement, water supply, recreation, partnerships, and education. The draft EA limits its focus to the direct impacts on nearby streams and wetlands without full consideration of the contribution to the cumulative effects of this and many other proposed and ongoing activities on the Lower Susquehanna and the Chesapeake Bay. This problem is exacerbated by what my clients believe is wishful thinking about possible mitigation efforts that are not described and about the availability of wetland banking credits. Furthermore, it also appears feasible to shift the road alignment to the north to avoid wetland impacts altogether, but this alternative has not been fully assessed and is a requirement (avoiding impacts) for obtaining a wetland or stream impact permit.

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<sup>1</sup> See [https://www.epa.gov/system/files/documents/2022-01/cover-letter-and-epa-evaluation-of-final-cwip\\_v1.24.2022\\_0.pdf](https://www.epa.gov/system/files/documents/2022-01/cover-letter-and-epa-evaluation-of-final-cwip_v1.24.2022_0.pdf)

- d. Compensatory mitigation is intended to be a last resort used only to compensate for those impacts that could not be practicably avoided or minimized. As mentioned above, avoidance of wetlands, which is the first option required by regulation to be evaluated, has not been fully assessed. Negotiations between permittees and state and federal agencies regarding offset ratios and requirements allows for existing degraded resources to be offset with less stringent mitigation requirements. Adverse impacts occurring to stream and wetland resources, regardless of the values and services they provide and only when they cannot be avoided, should be assessed and offset with the most stringent mitigation requirements as possible to ensure that impacted resources are properly mitigated for and that the mitigation efforts result in long-term, self-sustaining ecosystems that are protected in perpetuity.
- e. Additionally, if the project is not fully evaluated from an impact perspective, how can appropriate mitigation requirements be established? Due to unforeseen complications often experienced during the design phase of a development project, initially anticipated stream and wetland impacts increase, and therefore the need for compensatory mitigation also increases. This scenario leads to a fallacy in the EA reporting, especially if a FONSI determination is made. Consumption of mitigation banking credits, even if available (and this is not certain), is itself a significant impact given the inevitable demand for such credits for other projects. The EA explains that PennDOT has acquired wetland banking credits which can be used to mitigate for wetland impacts within the Lower Susquehanna River Watershed. However, given the scarcity of banking credits, purchasing credits from adjacent watersheds outside the impacted watershed is disingenuous to properly mitigate the short-term, and especially long-term, effects of the project and will further degrade the potentially impacted resources. The two mitigation banks located in the Lower Susquehanna River Subbasin which may provide offset credits for this project are located adjacent to Interstate 83 (I-83). Are there any guarantees that the ongoing I-83 widening projects will not have adverse impacts on the mitigation banks and if so, how are these banks ensuring long-term offset requirements? It makes much more sense that compensatory mitigation and alternatives that first avoid and then minimize wetland impacts be fully evaluated through an EIS.

### **3. Terrestrial Communities & Threatened & Endangered Species**

- a. The proposed project bisects apparent wildlife corridors along the impacted waterways. Proper planning for addressing the crossings has not been evaluated. The EA suggests that because of the extensive cover of croplands and developed properties within the project area, a detailed evaluation of project area wildlife species was not considered appropriate. My clients strongly believe that the lack of a detailed evaluation of impacts to project area wildlife is negligent and is required by the NEPA process.

- b. Of notable importance, the Least Shrew (*Cryptotis parva*), a PA Endangered Mammal Species, was not listed or identified under the EA's Threatened and Endangered Species reporting and should be included and studied. The mammalian species was listed as an endangered species in PA in 1990. According to the PA Natural Heritage fact sheet<sup>2</sup>, the critically imperiled farmland shrew inhabits meadows, pastures, old fields, and other non-forested habitats. These habitats have a high probability of being present within the project area and as such, intense habitat and presence/absence surveys must be conducted pursuant to PA law. The NEPA process at a minimum requires these impacts be considered and given the likelihood of adverse impacts, evaluation through the EIS process is warranted.
- c. Additionally, the Pennsylvania Natural Diversity Index (PNDI) receipt failed to list the Least Shrew as an endangered species, and since no study was performed on the prevalence around the preferred alternative project area, a habitat evaluation and presence/absence surveys are again, warranted. Survey records indicate that the species was identified within the project area. The greatest threat to the species is the continued loss of croplands to development. It is impossible to conclude that there will be no significant impacts without addressing appropriate wildlife crossings and evaluate habitats of the Least Shrew and confirm no further studies are required for other terrestrial species.
- d. The determination of potential effects letter from the U.S. Fish and Wildlife Service (FWS) regarding the federally listed endangered bog turtle should be updated to ensure validation, as the determination letter, dated July 9, 2019, has exceeded the two-year validation period and therefore is no longer valid (expiration date July 9, 2021). Updated correspondence is necessary.

#### 4. Aquatic Communities

- a. When fish run into man-made barriers, such as roads or bridges, they must be able to pass through. To get from one side of a road or bridge to another, fish typically pass-through culverts. Obstructions like bridges and culverts can disrupt typical migration and passage to spawning grounds or more available food sources. Also, many culverts can be easily overwhelmed by rain or other weather-related events creating velocity barriers for fish migration. Culverts that are too small can create fast-moving water, harming juvenile fish that are not yet strong swimmers. Culverts can also become sedimented and create physical barriers to fish passage, particularly during low flow periods. Culvert installation is proposed as part of the project and detailed in the EA, and such, fish passage and survival are important considerations. A detailed report

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<sup>2</sup> NatureServe. 2007. NatureServe Explorer: An online encyclopedia of life [web application]. Version 6.2. NatureServe, Arlington, Virginia. Accessed on March 8, 2022. Available at <https://www.naturalheritage.state.pa.us/factsheets/11444.pdf>

identifying how PennDOT plans to support fish communities and limit adverse impacts is needed. More natural designs should be explored, and culverts should be avoided. The no-build option would not cause further harm to fish passage and should be pursued. An EIS would allow for exploring options that would assure proper fish passage and limit harm to fish and other aquatic species. Furthermore, at a minimum, PennDOT should consult with the Pennsylvania Fish and Boat Commission to determine the best fish passage alternatives at each stream crossing, a process which should be completed during the EIS process.

## **5. FEMA & Floodways**

- a. The EA claims no increase in the FEMA floodplain. It may be assumed that planning to oversize culverts/bridges would drive this finding but there are other potential concerns as it is unclear on how the project was determined to have no effect. The project is proposed to cross streams with FEMA flood zones classified as both A and AE. These zones are highly likely experience flood events. Extensive modeling to identify upstream and downstream FEMA floodplain impacts should be evaluated, particularly considering the high-density residential areas downstream whose homes and communities have a high probability of being adversely impacted by any watercourse and drainage feature changes.
- b. Also, the EA explains that the preferred alternative will not result in an increase in the potential for flood damage in the project area. What the EA does not factor in is climate change, a requirement for the NEPA process reinstated in Executive Order 13990. Climate change will certainly impact flood damages as time continues and increased run off from the highway would worsen flooding circumstances. An EIS is necessary to address the effects of climate change on the project area pursuant to the NEPA process and Executive Order 13990—especially considering the long-time horizon of once-built project's existence. The EIS process can require details of how PennDOT plans to counter potential impacts from climate change, and how mitigative measures proposed will avoid or reduce excessive future maintenance, as well as alternatives considered in light of this impact.

## **6. Infrastructure Development & Expansion**

- a. In addition, the establishment of highway and associated infrastructure in areas outside the existing developed area has the distinct potential to (and, indeed, may be designed to) spur property development activities, such as residential housing tracts or commercial construction. These direct and predictable consequences of the project would themselves cause additional impacts to farmland, streams, and wetlands. Such real estate development activities would also trigger significant socio-economic impacts. Increased suburban development by constructing the highway fuels more pollution (both water and air) but also puts strains on current resources and infrastructure. Many schools are at or approaching capacity. This is not just a highway that will

cut through farm fields, historical properties, and water features—it will be the force behind a suburban sprawl that many residents of the surrounding communities have vocally opposed. In any event, the NEPA process requires a cumulative impact analysis that considers these likely indirect impacts, and the EA does not fully assess this cumulative impact analysis. These should be evaluated through preparation of an EIS.

## 7. Agricultural Landscape

- a. Alternative 5C would directly impact 40.0 acres of productive agricultural land across twelve farming operations. Specific impacts of concern are as follows
  - i. 2.9 acres of preserved farmland spanning two farming operations,
  - ii. 23.8 acres of agricultural security areas,
  - iii. 32.4 acres of clean and green parcels, and
  - iv. 21.2 acres of agriculturally zoned land.
  
- b. The farmland in the project area and the precious soil that is present has enormous benefits for human and livestock consumption, among other values. To alter or impact prime agricultural land and already preserved farmland impacts our food supply and quality of life. A series of studies by the American Farmland Trust shows that agricultural land is increasingly being converted, fragmented, or paved over – threatening the integrity of local and regional food systems. Of special concern, is the loss of farmland to low density residential development at the edge of urban and suburban areas. *“The United States is home to 10 percent of the planet’s arable soils—the most of any country on Earth. Yet even here, in what appears to be a vast agricultural landscape, only 18 percent of the continental U.S. is Nationally Significant land. As we face growing demand for high quality food and environmental protection along with increasingly complex challenges from epidemics, extreme weather, and market disruptions, it is especially important to protect the land best suited to intensive food and crop production, including fruits, nuts, vegetables, and staple grains.”*<sup>3</sup> Currently, only few states require administrative review of eminent domain actions. Pennsylvania for example, empowers *“authorities to prevent takings of enrolled land through eminent domain.”*<sup>4</sup> My clients believe that we must continue to protect the land that is fertile which provides sustenance for our society. These effects have not been adequately considered in the EA. Given that the no-build alternative would have no impact on agricultural lands, careful analysis of these impacts should be more thoroughly evaluated through the EIS process.

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<sup>3</sup> Freedgood, J., M. Hunter, J. Dempsey, A. Sorensen. 2020. *Farms Under Threat: The State of the States*. Washington, DC: American Farmland Trust. p.51. Accessed in CY 2022 at [https://s30428.pcdn.co/wp-content/uploads/sites/2/2020/09/AFT\\_FUT\\_StateoftheStates\\_rev.pdf](https://s30428.pcdn.co/wp-content/uploads/sites/2/2020/09/AFT_FUT_StateoftheStates_rev.pdf)

<sup>4</sup> *Ibid*, p. 44

Second, as part of the “hard look,” NEPA requires all Federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflict concerning alternative uses of available resources.” *Soc’y Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 182-83 (3d Cir. 2000). EAs shall include a brief discussion of the need for the proposal, of alternatives as required by § 102(2)(E) of NEPA, and of the environmental impacts of the proposed actions and alternatives. *Id.* at 183. Regulations propose no fewer than nine alternate means. *Fund For Animals v. Norton*, 281 F. Supp. 2d at 224. My clients believe that the alternatives discussion in the EA was truncated and, therefore, inadequate. It appears to them that several alternatives—though listed—were not seriously considered in the draft EA. From their perspective, it appears that the single “preferred alternative” was pre-ordained, in part because of its benefits for project proponents, designers, and builders but not for the community at large. A “hard look” requires opportunity to compare the merits and demerits of authentic alternative designs, especially regarding environmental impacts. The absence of authentic design alternatives renders the NEPA process inadequate.

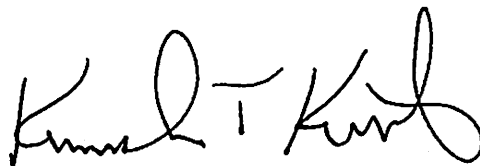
Finally, my clients have concerns about the public process used here. Although some outreach was performed as the draft EA was developed, this process was not appropriately advertised to the public and did not allow for public involvement and thus did not create an equal opportunity for participation by interested parties. Yet, despite the fragmentary nature of the outreach efforts, a premature decision was made to eliminate project alternatives except the most preferred and grandiose option. Although a range of alternatives were initially prepared, the draft EA limits itself to the legally required “no action” alternative and the preferred alternative, leaving only an “all or nothing” choice. Such a decision deprives interested parties of the opportunity to discuss in depth a full range of choices and the varied environmental impacts of those choices. If carried through to the decision phase, this restriction of alternatives will negatively impact the ability of decision-makers to make a fully informed choice, a requirement of the NEPA.

I hope that you will consider my clients’ concerns carefully before making a final decision on the adequacy of the EA. A failure to address these concerns may lead my clients to file a challenge to any FONSI issued on this record.



Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth T. Kristl". The signature is written in a cursive style with a large initial "K" and a distinct "T" in the middle.

Kenneth T. Kristl, Esq.

CC: See Attached List

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*List of CC recipients*

1. Federal Highway Administration, Attn: Alicia Nolan, Division Administrator, 228 Walnut Street, Room 508, Harrisburg, PA 17101-1720
2. Federal Highway Administration, Attn: Thomas D. Everett, Executive Director, 1200 New Jersey Avenue, SE, Washington, DC 20590
3. U.S. District Court, Middle District of Pennsylvania, Attn: Peter J. Welsh, Clerk of the Court, 228 Walnut Street – P.O. Box 983, Harrisburg, PA 17108
4. Pennsylvania Department of Transportation, Attn: Secretary Y. Gramian, Keystone Building, 400 North St., Fifth Floor, Harrisburg, PA 17120
5. PennDOT Engineering District Eight, Attn: Executive Kevin Keefe, P.E., 2140 Herr Street, Harrisburg, PA 17103
6. U.S. Army Corps of Engineers, Baltimore District, Attn: Dave Morrow, Deputy District Engineer for Program and Project Management 2 Hopkins Plaza, Baltimore, MD 21201
7. Johnson, Mirmiran, & Thompson, Inc., Attn: Neil Beach, 220 St. Charles Way, Suite 200, York, PA 17402
8. Lower Susquehanna Riverkeeper Association, Attn: Executive Director Ted Evgeniadis, 2098 Long Level Rd, Wrightsville, PA 17368
9. Adams County Pennsylvania, Attn: Andrew Merkel, Transportation Planning Office (ACTPO), 117 Baltimore Street – Room 201, Gettysburg, PA 17325
10. Adams County Planning Commission, Attn: Sherri Clayton-Williams, Director, 670 Old Harrisburg Road Suite 100, Gettysburg, PA 17325
11. York County Planning Commission, Attn: Mike Pritchard, Chief of Transportation Planning, 28 E Market St # 216, York, PA 17401
12. Conewago Township, Board of Supervisors, 541 Oxford Avenue, Hanover, PA 17331
13. Conewago Township, David Arndt Jr., Zoning Code Enforcement Officer, 541 Oxford Avenue, Hanover, PA 17331
14. McSherrystown Borough Council, 338 Main St., McSherrystown, PA 17344
15. Adams County Pennsylvania, Attention: County Commissioners Jim Martin, Randy Phiel, and Marty Qually, 117 Baltimore Street, Room 201, Gettysburg, PA 17325
16. Hon. Dan Moul, Pennsylvania State Representative, 91st Legislative District, 30 West Middle Street, Gettysburg, PA 17325
17. Hon. Kate Klunk, Pennsylvania State Representative, 169th Legislative District, 118 Carlisle Street, Hanover, PA 17331
18. Hon. Senator Kristen Phillips-Hill, District 28, 6872 Susquehanna Trail South, PO Box 277, Jacobus, PA 17407-0277
19. Hon. Senator Doug Mastriano – District 33, 37 South Main Street, Suite 200, Chambersburg, PA 17201
20. Borough of Hanover PA, Office of the Mayor, 44 Frederick Street, Hanover, PA, 17331