

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

LOWER SUSQUEHANNA RIVERKEEPER)
ASSOCIATION,)
)
Plaintiff,)
)
v.)
)
FEDERAL HIGHWAY ADMINISTRATION,)
U.S. Department of Transportation, SHAILEN)
BHATT, Administrator, Federal Highway)
Administration, and COMMONWEALTH OF)
PENNSYLVANIA, DEPARTMENT OF)
TRANSPORTATION,)
)
Defendants.)

Civil Action No. 1:23-CV-00343
Judge Jennifer P. Wilson

**STATEMENT OF UNCONTESTED MATERIAL FACTS
IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Lower Susquehanna Riverkeeper Association (“LSRA” or “Plaintiff”), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, hereby set forth what it believes are the uncontested material facts which support its Motion for Summary Judgment:

Background Facts

1. The Eisenhower Drive Extension Project (“EEP”) is a proposed transportation project in Adams and York counties in Pennsylvania. It involves extending Eisenhower Drive from its current terminus at High Street in Hanover, PA via a new roadway through Conewago Township to a terminus at State Road 116 (Hanover Road) west of McSherrystown, PA. Eisenhower Drive Extension Project Environmental Assessment (“EA”) at 5 (AR25035¹).

¹ All references in this Statement and Plaintiff’s filings to the Administrative Record include citation to the precise page and Administrative Record (AR) production number.

2. The EEP consists of a two-lane collector roadway with associated stormwater management facilities and roundabouts at Oxford Avenue, Church Street, Centennial Road, and near the intersection of Hanover Road. EA at 5 (AR25035).

3. The project area in which the EEP is to be built encompasses mixed land uses that include residential, agricultural, commercial and industrial uses. EA at 6 (AR-25036). The project area transitions from densely developed in the south and east to rural/agricultural in the north and west, and its terrain overall consists of rolling lowlands with shallow valleys separated by rounded, isolated low hills. EA at 21 (AR25051).

4. Floodplains and floodways associated with project area streams and tributaries occur primarily through the central and western portions of the project area. EA at 22 (AR25052).

5. There is a large band of productive agricultural lands extending through the middle of the project area that includes 30 active agricultural operations ranging in size from a couple of acres to more than 200 acres. Many of these operations are enrolled in various programs that are designed to protect productive agricultural lands and soils in Pennsylvania. EA at 22 (AR25052).

The EA

6. On or about January 18, 2022, Defendants Federal Highway Administration and Shailen Bhatt (collectively, “FHWA”), in consultation with Defendant Commonwealth of Pennsylvania’s Department of Transportation (“PennDOT”), issued the EA. (AR25027-25300).²

7. The EA describes the primary purpose of the EEP as being “to facilitate safe and efficient travel within the project area to meet both the current and future transportation needs of the area.” EA at 15 (AR25045). It also identifies a secondary purpose of the project as being “to provide a functional and modern roadway that maximizes current design criteria within and

² The signature page for the EA can be found at AR7128.

surrounding the project area.” *Id.* The EA identifies the project needs for the EEP as (1) “traffic congestion results in poor levels of service; (2) poor traffic safety along Hanover Road and Carlisle Street;” and (3) limited mobility and poor roadway connectivity/linkages.” *Id.*

8. The EA describes a Conceptual Alternatives Analysis phase in which it considered a No Build Alternative, a Traffic Systems Management (TSM) Alternative it called “Alternative 1,” six Build Alternatives (Alternatives 2 through 7) that each “start at the western terminus of Eisenhower Drive at High Street and extend westward on various alignments to a single location on Centennial Road,” and three “sub-alignment alternatives” to extend from Centennial Road to Hanover Street (Alternatives A, B, and C). EA at 24-25 (AR25054-55).

9. The EA indicated that, after a “high-level corridor analysis relative to potential impacts and the ability to meet the need and purpose of the project,” Alternatives 2, 6, 7, and A were dismissed from further study. EA at 25 (AR25055). The TSM Alternative, and Build Alternatives 3, 4, 5, B and C were “advanced for alternatives development and evaluation.” *Id.* The No Build Alternative also carried forward “for comparison purposes.” *Id.*

10. The EA dismissed Build Alternative 3 from further analysis because it “would have substantially more impacts on agricultural resources compared to Alternatives 4 and 5.” EA at 31 (AR25061). The EA stated that Alternative 3 would impact approximately 26.8 acres of Productive Agricultural Land (PAL) on five agricultural operations, *id.*, although it stated that this amount “is not substantially greater than the amount of PAL impacted by Alternatives 4 or 5.” *Id.* It noted that Alternative 3 would “bisect at least seven fields on four of the five agricultural operations,” leaving “remnant lots ranging in size from 2 and 5 acres, which may be considered unusable by the property owners.” *Id.*

11. The EA dismissed Build Alternative 4 from further analysis because it “would have substantially more impacts on agricultural resources compared to Alternative 5.” EA at 31 (AR25061). It stated that “the amount of PAL impacted by Alternative 4 is comparable to Alternative 5, but this alignment would bisect four distinct fields on two of the five agricultural operations, leaving each with an approximately 2- to 6-acre lots that may be considered unusable by the property owners.” EA at 31-32 (AR25061-62). It stated that Alternative 4 would impact approximately 21.5 acres of PAL on five agricultural operations. EA at 32 (AR25062).

12. The EA dismissed Build Alternative B and the TSM Alternative because they did not meet project need. EA at 32 (AR25062).

13. As a result of the dismissal of the TSM Alternative, Build Alternatives 2 – 4, 6, 7 and Alternatives A and B, the EA only “advanced for evaluation in the EA” Build Alternative 5 and C (which it referred to as Alternative 5C), and the No Build Alternative. EA at 37 (AR25067).

14. The EA identifies 16 watercourses in the project area, EA at 42 (AR25072), with the primary streams identified as including Plum Creek, the South Branch of Conewago Creek, and Slagles Run. *Id.* The EA described these impacts as follows:

Based on the current Limits-of-Disturbance (LOD) for Alternative 5C, there would be 1,311 linear feet of stream impact to eight watercourses (Table 2). Five new stream crossings are anticipated along the proposed Alternative 5C. They include an UNT [Unnamed Tributary] to Slagles Run (WUS-8) in the eastern portion of the project area, Plum Creek (WUS-2) and an UNT to Plum Creek (WUS-1) in the west-central portion of the project area, and two UNTs to South Branch Conewago Creek (WUS-6, WUS-7) in the southwestern portion of the project area. Three additional streams (WUS-2A, WUS-5, WUS-8B) are situated adjacent to the proposed roadway and will be impacted by fill placement and pipe enclosures. Direct impacts to watercourses will be adjusted during final design as additional avoidance and minimization efforts are evaluated and erosion and sediment controls are established.

ESA at 43-44 (AR25073-74). The EA notes that the No Build Alternative would result in no impacts to project area watercourses. EA at 44 (AR25074).

16. The EA's discussion of impacts of Alternative 5C to watercourses does not include any discussion of impacts to the water quality of the 16 streams located in the project area. EA at 42-44 (AR25072-74).

17. In its discussion of the environmental impacts of Alternative 5C to rivers, streams and watercourses, the EA states that "PennDOT is currently in the process of considering mitigation options for unavoidable permanent impacts to watercourses associated with the proposed project." EA at 44 (AR25074). While the EA states that erosion and sedimentation controls during construction will include protective fencing, and post construction stormwater management will include linear swales along the roadway, the EA identifies mitigation concepts that PennDOT will consider but does not identify what options will in fact be used or whether those options will in fact mitigate all impacts.

18. In fact, the EA states that "Should on-site mitigation options not fully compensate for the impacts, off-site mitigation locations within the Lower-Susquehanna River Watershed will be considered, as well as potential mitigation banking opportunities." EA at 44 (AR25074).

19. The EA's discussion of off-site mitigation and potential mitigation banking opportunities does not identify off-site locations, does not indicate if mitigation banking credits are available, and does not discuss effects of eliminating such credits for other projects. EA at 44 (AR25074).

20. The EA identifies 17 palustrine wetlands totaling approximately 26 acres within the project area. EA at 45 (AR25075). The EA describes the impacts to wetlands as follows:

Based on the LOD in the current design, Alternative 5C would result in impacts to three (3) palustrine wetlands totaling 1.3 acres of impacts (Table 4) . . . The majority of the acreage of wetland impact will occur along the Plum Creek corridor as a result of fill placement and construction of the new roadway. Due to the large wetland complexes along the Plum Creek corridor and other site constraints, full avoidance of wetland resources in this portion of the project area is not feasible.

EA at 46 (AR25076). The EA notes that there will be no wetland impacts to the No Build Alternative. EA at 47 (AR25077).

21. The EA's discussion of impacts to wetlands does not include any discussion of impacts to the water quality of the 17 wetlands located in the project area. EA at 45-47 (AR25075-77).

22. In its discussion of the environmental impacts of Alternative 5C to wetlands, the EA states that

PennDOT is currently in the process of considering mitigation options for unavoidable permanent impacts to wetlands associated with the proposed project. These options include mitigation banking opportunities, as well as on-site or off-site mitigation. PennDOT has acquired wetland banking credits which can be used to mitigate for wetland impacts within the Lower-Susquehanna River Watershed area. Due to the number of large improvement projects occurring in District 8-0, it is uncertain how many of these credits will be applied to this project versus another at this time. Therefore, if the credits do not fully compensate for the impacts, both on-site and off-site mitigation activities will be considered. Remnant upland parcels of low habitat value adjacent to existing streams and wetlands will be evaluated as potential wetland mitigation areas.

EA at 47 (AR25077).

23. The EA states that Alternative 5C “would impact agricultural resources within 12 farming operations,” EA at 59 (AR25089), and “would directly impact 40.0 acres of PAL” at those operations. EA at 61 (AR25091). The EA further states that “11.4 acres of farmland, from seven operations may be deemed un-farmable as a result of Alternative 5C. These remnant parcels could either be too small to farm or access to the parcel could be severed” and that “PennDOT will make every effort to maintain access to these parcels where applicable and will attempt to reduce the project's footprint so that parcels are still viable to farm.” EA at 60 (AR25090). The EA calls these impacts to PAL as a result of Alternative 5C “unavoidable.” EA at 61 (AR25091). The EA also notes that the No Build Alternative would have no impact on agricultural lands. EA at 62 (AR25092).

24. The EA discussed impacts to air quality as a result of the EEP. EA at 83-84 (AR25114-15). The EA stated that “an air quality assessment was not completed for this project.” Id at 83 (AR25114). The EA, without discussing what the impacts on air quality of Alternative 5C would be, nevertheless concluded that Alternative 5C “would not cause or contribute to a new violation, increase the frequency or severity of any violation, or delay timely attainment of NAAQS [National Ambient Air Quality Standards].” EA at 84-85 (AR25114-15).

25. The EA states that, although “Hazardous Waste studies identified both confirmed and potential groundwater contamination at multiple sites throughout the project area” (EA at 55 (AR 25085), “Phase II/III investigations will be completed during final design” (EA at 82 (AR25112).

26. The EA states that, although “karst like features in this area have caused numerous noted closed depressions and sinkholes throughout the area” and “there is a potential for sinkholes during construction along the proposed Alternative 5C,” “subsurface investigations to identify karst features and groundwater investigations . . . will occur in final design,” EA at 56 (AR25086).

27. The EA identified Alternative 5C as the Preferred Alternative. EA at 135 (AR25165).

28. Ted Eygeniadis, on behalf of LSRA, provided public comments on the EA (AR25735-40). Among the issues raised in these comments, Mr. Evgeniadis:

* noted the EA’s recognition of “karst like” physiographic characteristics of the landscape, and that “LSRA believes it to be arbitrary and capricious to conduct subface investigations during the final design phase of the project to define areas of concern . . .” and that “[t]he 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 . . . ,” (AR25736);

* noted that “[t]he 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, (AR25736);

* noted that “[t]he 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 water bodies, especially with new loads proposed to be allocated to PA counties due to the failure of the Conewago Watershed Implementation Plan’. It is prudent to assess how this project will affect both local TMDLs and the Chesapeake Bay TMDL reduction goals. LRSA again demands that an EIS be completed to evaluate potential cumulative impacts the project may have on water quality within the Lower Susquehanna River and Chesapeake Bay Watersheds,” (AR25736-37);

* noted that “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 runoff/storm sewers and channelization, and habitat alterations associated with surface ruining and agricultural operations. Further degradation by altering stormwater pattern 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,” (AR25737);

* noted that “[t]he 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 can only be called wishful thinking about possible mitigation efforts that are not described and about the availability of wetland banking credits . . . if the project is not frilly 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. LRSA also understands that 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? LRSA demands that compensatory mitigation and alternatives that first avoid and then minimize wetland impacts be fully evaluated through an EIS,” (AR25737-38); and

* noted the impacts of Alternative 5C on PAL. (AR25739-40).

29. On behalf of LSRA, on April 28, 2022 Kenneth Kristl submitted public comments on the EA. (AR26145-26154). Among the issues raised in the comments, Mr. Kristl:

* noted that it would 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” and that “[t]he 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,” Letter at 2 (AR26146);

* noted 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,” Letter at 2-3 (AR26146-47); and

* echoed Mr. Evgeniadis' concerns about TMDLs, Letter at 3 (AR 26147), the availability of mitigation credits and the impact of their use, Letter at 3-4 (AR26147-48), and the impacts of Alternative 5C on PAL. Letter at 7 (AR26151).

The FONSI

30. On or about January 3, 2023, FHWA issued a Finding of No Significant Impact ("FONSI") in connection with the EEP. (AR12540-48).

31. The FONSI indicated that it is based on the EA. FONSI at 3 (AR12542).

Respectfully submitted,

LOWER SUSQUEHANNA RIVERKEEPER ASSOCIATION

By: /s/ Kenneth T. Kristl
Kenneth T. Kristl, Esq. (Bar #207825)
Environmental & Natural Resources Law Clinic
Widener University Delaware Law School
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2053
ktkristl@widener.edu

Counsel for Plaintiff