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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Lower Susquehanna Riverkeeper Association ("LSRA") hereby submits this Memorandum of Law in Support of its Motion for Summary Judgment.[1]

This suit challenges actions of Defendants Federal Highway Administration and Shailen Bhatt (collectively, "FHWA") concerning the Eisenhower Drive Extension Project (EEP), a proposed highway construction project in York and Adams Counties, Pennsylvania. On or about January 3, 2023, FHWA issued a Finding of No Significant Impact ("FONSI") (Administrative Record ("AR") 12540-48) for the EEP based on a 2022 Environmental Assessment ("EA") (AR 25027-25300) prepared by FHWA.[2] LSRA believes the undisputed facts show the FONSI and EA were issued in violation of the National Environmental Policy Act, 42 U.S.C. § 4301 *et seq*. (NEPA), and thus FHWA's actions were arbitrary, capricious, and/or contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. (APA). LSRA is entitled summary judgment as a matter of law.

PROCEDURAL HISTORY OF THE CASE

Plaintiff filed its Complaint on February 27, 2023. The Court's Case Management Order mandated production of the Administrative Record by November 20, 2023, and briefing on cross-motions for summary judgment. FHWA produced the Record on November 17, 2023.

[1] LSRA has standing to bring this action. Attached are Declarations of Seth Smith and Ted Evgeniadis. Mr. Smith, an LSRA member, will suffer an injury-in-fact that is fairly traceable to the EEP that can be redressed by the relief sought here. Mr. Evgeniadis, Lower Susquehanna Riverkeeper and head of LSRA, establishes this action is germane to LSRA's purpose and that participation by individual members will not be required. Collectively, these facts show LSRA satisfies the requirements for standing. *See Thorne v. Pep Boys Manny Moe and Jack, Inc*., 980 F.3d 879, 885 (3rd Cir. 2020) (general elements); *Township of Belleville v. Federal Transit Admin.*, 30 F.Supp.2d 782, 789-90 (D. New Jersey 1998) (elements applied in NEPA case).

[2] To assist the Court, LSRA includes cited documents into an Appendix filed with this Memorandum.

STATEMENT OF FACTS

As detailed in Plaintiff's Statement of Uncontested Material Facts, EEP would extend 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. EA at 5 (AR25035). EEP's project area encompasses mixed land uses, including residential, agricultural, commercial and industrial. EA at 6 (AR25036). Productive Agricultural Land ("PAL") extends through the project area's middle, with 30 active agricultural operations ranging in size from a few to more than 200 acres, many of which are enrolled in programs designed to protect productive agricultural lands and soils in Pennsylvania. EA at 22 (AR25052).

On or about January 18, 2022, FHWA, in consultation with Intervenor Commonwealth of Pennsylvania's Department of Transportation ("PennDOT"), issued the EA. (AR25027-25300). The EA describes EEP's primary purpose as "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), with a secondary purpose "to provide a functional and modern roadway that maximizes current design criteria within and surrounding the project area." *Id*. The EA identifies EEP's project needs as (1) traffic congestion resulting 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*.

The EA identifies a No Build Alternative, a Traffic Systems Management (TSM) Alternative, and 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," with three "sub-alignment alternatives" to extend from Centennial Road to Hanover Street (Alternatives A, B, and C). EA at 24-25 (AR25054-55). The

EA dismissed Alternatives 2, 6, 7, and A, EA at 25 (AR25055), and Alternative B and the TSM Alternative, EA at 32 (AR25062), from further study. This left only Alternatives 3, 4, 5, and C.

The EA dismissed Alternatives 3 and 4 because of their "impacts on agricultural resources," EA at 31 (AR25061). The EA described Alternative 3 as impacting approximately 26.8 acres of PAL on five agricultural operations, *id*., bisecting "at least seven fields on four of the five agricultural operations," and leaving "remnant lots ranging in size from 2 and 5 acres, which may be considered unusable by the property owners." *Id*. Alternative 4 would impact approximately 21.5 acres of PAL on five agricultural operations, EA at 32 (AR25062), bisecting "four distinct fields on two of the five agricultural operations, leaving each with approximately 2- to 6-acre lots that may be considered unusable by the property owners." EA at 31-32 (AR25061-62). By way of comparison, the EA later detailed the impacts to agricultural resources of Alternatives 5 and C (referred to as Alternative 5C) this way: it "would impact agricultural resources within 12 farming operations," EA at 59 (AR25089), would "directly impact 40.0 acres of PAL," EA at 61 (AR25091), and 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." EA at 60 (AR25090). The EA calls these Alternative 5C impacts to PAL "unavoidable." EA at 61 (AR25091). Despite these numbers, Alternatives 3 and 4 were dismissed, but Alternative 5C and the No Build Alternative were "advanced for evaluation in the EA." EA at 37 (AR25067), with detailed discussion of the environmental consequences of only of those two alternatives. EA at 39 – 65 (AR25069-25095).

For Alternative 5C, the EA identified impacts to eight streams from stream crossings, fill placement, and pipe enclosures, EA at 43-44 (AR25073-74), but did not include any discussion of indirect or cumulative impacts to the water quality of the 16 streams located in the project area.

EA at 42-44 (AR25072-74). It identified 1.3 acres of impacts to 3 wetlands from fill placement and roadway construction, EA at 46 (AR25076), but did not include any discussion of indirect or cumulative impacts to the water quality of the 17 wetlands located in the project area. EA at 45-47 (AR25075-77). In its discussion of air quality impacts, EA at 83-84 (AR25114-15), the EA stated that "an air quality assessment was not completed for this project." EA at 83 (AR25114). Without discussing what the air quality impacts of Alternative 5C would be, the EA 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).

In identifying the various impacts to streams, rivers, watercourses, and wetlands, the EA indicated that PennDOT "is currently in the process of considering mitigation options for unavoidable permanent impacts," EA at 44 (AR25074) (watercourses), EA at 47 (AR25077) (wetlands), but did not identify (1) the options being considered, (2) what options would be implemented, or (3) whether those options will in fact mitigate all impacts. Likewise, the EA states that "off-site mitigation locations within the Lower-Susquehanna River Watershed" and "potential mitigation banking opportunities" will be considered, EA at 44 (AR25074), without indicating (1) whether such credits or opportunities in fact exist, or (2) how much effect they will in fact mitigate.

In discussing other Alternative 5C impacts, the EA stated that some impacts will be studied in later phases of the project. *See* Discussion of groundwater contamination (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)); Discussion of geology (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)).

The EA selected Alternative 5C as the Preferred Alternative for the EEP. EA at 135-36 (AR25165-66).

LSRA submitted comments on the EA. *See* AR25735-40 (Evgeniadis comments); AR26145-26154 (Kristl comments).

On or about January 3, 2023, FHWA issued the FONSI for the EEP. (AR12540-48). The FONSI was based on the EA. FONSI at 3 (AR12542). Although issued one year after the EA, the FONSI states that, as to "unavoidable permanent impacts to watercourses associated with the project," PennDOT is "currently in the process of considering mitigation options." FONSI at 5 (AR12544).

QUESTIONS PRESENTED

Question: Did FHWA violate NEPA and the APA when it issued the FONSI and EA?

Suggested Answer: Yes.

ARGUMENT

I. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT BECAUSE FHWA VIOLATED NEPA AND THE APA.

Under Rule 56(c) of the Federal Rules of Civil Procedure, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Based on the law and the administrative record, there is no genuine issue of material fact that FHWA violated NEPA and the APA. LSRA is therefore entitled to judgment as a matter of law.

A. The Legal Requirements Under NEPA and the APA

NEPA, as "the basic national charter for protection of the environment," *Env. Defense Center v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 872 (9th Cir. 2022), requires federal agencies to include an Environmental Impact Statement (EIS) in every "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Absent a categorical exclusion, the agency must prepare either an EIS or an EA to determine if an EIS is required. 40 C.F.R. § 1501.3(a)-(c). An EA shall "briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact . . . ," 40 C.F.R. § 1501.5(c)(1). A FONSI is appropriate "if the agency determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects." 40 C.F.R. § 1501.6(a). In determining the significance of a project's effects, the regulations require the agency to "analyze the potentially affected environment and degree of the effects of the action" by considering "the affected area (national, regional, or local) and its resources," the "short- and long-term effects," and "both beneficial and adverse effects." 40 C.F.R. § 1501.3(b). An EA is meant to help an agency decide if an EIS is warranted—not to replace or substitute for an EIS. *Env. Defense Center*, 36 F.4th at 872.

Because NEPA requires government agencies to "consider every significant aspect of the environmental impact of a proposed action," *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council,* 462 U.S. 87, 97 (1983), courts consistently require agencies performing an EA to take a "hard look" at environmental consequences to determine whether or not there will be a significant impact on the human environment. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Raymond Proffitt Found v. U.S. Army Corps of Engineers*, 175 F. Supp. 2d 755,

770 (E.D. Pa. 2001); *see also Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1246 (M.D. Pa. 1992). The agency responsible for the proposed action must "rigorously explore and objectively evaluate all reasonable alternatives." *National Audubon Society v. Dep't. of Navy*, 422 F.3d 174, 185 (3d Cir. 2005). *See Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). Additionally, the agency must state their reasons for rejecting the alternative proposals prior to moving forward with the project. *Sierra Club v. Watkins*, 808 F.Supp. 852, 871 (D.D.C. 1991).

Under the APA, courts may hold unlawful and set aside agency action, findings, and conclusions found to be "…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2). An action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

The administrative record here shows FHWA violated NEPA by failing to take the requisite "hard look," and thus both the EA and FONSI are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law so as violate the APA.

B. FHWA Failed To Take The Requisite "Hard Look" At Alternatives.

The EA's (and FONSI's) first legal problem lies in its analysis of alternatives. From numerous possible alternatives, EA at 24-25 (AR25054-55), the EA quickly narrowed down to Build Alternatives 3, 4, 5, and C. EA at 25 (AR25055). In rejecting Alternatives 3 and 4, EA at 31 (AR25061), the EA failed to take the required hard look.

The EA dismissed Alternatives 3 and 4 because they would "have more impacts on agricultural resources" than Alternative 5C, *id*., including the creation of "remnant lots" 2-6 acres in size "that may be considered unusable by the property owners." EA at 31 and 32 (AR25061-62). However, the EA's own data contradicts this conclusion, as shown in the summary chart:

	Acres of PAL impacted	**# of farming Operations impacted**	**Remnant Lots Impacts**
Alternative 3 (EA at 31 (AR25061))	26.8	5	2-5 acre lots on 4 operations
Alternative 4 (EA at 32 (AR25062))	21.5	5	2-6 acre lots on 2 operations
Alternative 5 (EA at 59-61 (AR25089-91))	40.0	12	11.4 acres on 7 operations

Thus, in terms of acreage and operations impacted, the EA shows greater impact for Alternative 5C than Alternatives 3 and 4. While all three Alternatives produce "remnant lots," Alternative 5C produces remnant lots on more farms than Alternatives 3 and 4. Based on the EA's own language, Alternative 5 appears worse than Alternatives 3 and 4 on agricultural impacts. In short, the claim that Alternatives 3 and 4 have more impacts on agricultural operations than Alternative 5C is not supported—indeed, refuted—by the EA's own data. Dismissing Alternatives 3 and 4 while retaining Alternative 5 was therefore arbitrary and capricious.

In addition, by dismissing Alternatives 3 and 4 (which meet EEP's purposes and needs by re-routing traffic in a manner similar to Alternative 5C), the EA did not analyze or consider their environmental impacts. This analytical shortcut violates NEPA and the APA in two ways. *First*, NEPA's "hard look" requires the analysis of alternatives that meet the needs and purpose of the

project. An EA must, at a minimum, include discussion of the environmental impacts of the proposed action *and the alternatives*. 40 C.F.R. § 1508.9(b) (emphasis supplied). While the range of alternatives is not infinite, "it does include all reasonable alternatives to the proposed action." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1166 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003); *Rocky Mountain Wild v. Bernhardt*, 506 F.Supp.3d 1169, 1185 (D. Utah 2020). Finding an EA inadequate, the Ninth Circuit stated "[t]he existence of a 'viable but unexamined alternative' renders the environmental review under NEPA inadequate," *Env. Defense Ctr.*, 36 F.4th at 877 (*quoting Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 868 (9th Cir. 2004)). The EA's failure to provide any meaningful analysis of the environmental impacts of Alternatives 3 and 4 falls short of the hard look required by NEPA.

Second, the impacts to agricultural resources basis for dismissing Alternatives 3 and 4 reflects arbitrary and capricious decision making. The number of agricultural operations, total acreage of PAL, and "remnant lot" issues of Alternative 5C are *greater* than Alternatives 3 and 4—yet Alternatives 3 and 4 were dismissed while Alternative 5C gets analyzed and becomes the Preferred Alternative. "The APA's reasonableness standard applies both to which alternatives the agency discusses and the extent to which it discusses them." *Utahns for Better Transp.*, 305 F.3d at 1166. Here, the EA offers an explanation that runs counter to the evidence that the EA itself presents. If the basis for dismissing an alternative is impacts on agricultural resources, the EA supports dismissal of Alternative 5C, not Alternatives 3 and 4. The fact that FHWA did the opposite is arbitrary and capricious under the APA. *See WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1233 (10th Cir. 2017). As a result, the EA's dismissal of Alternatives 3 and 4—and thus the failure to examine the environmental impacts of those alternatives—violates both NEPA and the APA.

C. FHWA Failed to Take The Requisite "Hard Look" At The Effects of Alternative 5C.

The EA's (and FONSI's) second legal problem is FWHA's failure to take the requisite "hard look" at several potential environmental impacts of Alternative 5C.

The EA identifies 16 watercourses, including Plum Creek, the South Branch of Conewago Creek, and Slagles Run, EA at 42 (AR25072), and 17 palustrine wetlands totaling approximately 26 acres, EA at 45 (AR25075), within the project area. While the EA identifies Alternative 5C road construction impacts from stream crossings and fill placement and pipe enclosures, *see* EA at 43-44 (AR25073-74) (1,311 linear feet of 8 watercourses), EA at 46 (AR25076) (1.3 acres of 3 wetlands),[3] nowhere does the EA analyze impacts to the water quality of the streams and wetlands from roadway or other pollutants (such as road salt, fuel, fluids, and brake pad particles) inevitably flowing into those waterways. In short, the EA looked at direct construction impacts, but failed to analyze such indirect and cumulative impacts.[4] "NEPA requires that agencies ask a broader question and consider the direct, indirect, and cumulative effects of proposed agency action." *350 Montana v. Haaland*, 50 F.4th 1254, 1272 (9th Cir. 2022) (*citing* 40 C.F.R. §§ 1508.7-8). Failing to consider foreseeable environmental consequences violates that requirement. *See Bark v. U.S. Forest Service,* 958 F.3d 865, 872-73 (9th Cir. 2020) (failure to consider cumulative impacts in EA violated NEPA); *Western North Carolina Alliance v. N.C. Dept. of Transportation*, 312 F.Supp.2d 765, 769 (E.D.N.C. 2003) ("the very purpose and protection afforded by NEPA is eradicated if a

[3] The EA states that "full avoidance" of these wetland impacts "is not feasible." EA at 46 (AR25076).

[4] The EA's Indirect (EA at 107-08 (AR25137-38)) and Cumulative (EA at 111-116 (AR25141-46)) Impacts sections epitomize this avoidance. Acknowledging theoretical risk of stream and wetland degradation from stormwater, EA at 107 (AR25137), the EA nevertheless claims no indirect impacts will occur because stormwater will be "contained and conveyed," EA at 108 (AR25138)—without explaining how "containing" and "conveying" removes roadway pollutants from stormwater entering streams and wetlands. The Cumulative Impacts section does not discuss water quality impacts at all.

federal agency makes a decision without proper consideration of the environmental impacts of the proposed project").

This matters because the EA identifies all project area watercourses as "impaired waters"—i.e., waters not meeting current water quality standards for their designated use—under § 303(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1313(d). EA at 42-43 (AR25072-73). The CWA requires states to establish Total Maximum Daily Loads for each impairing pollutant "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C). Thus, Pennsylvania must undertake actions to address these impaired waters. How EEP affects Pennsylvania's efforts to meet its legal obligations is an impact deserving a "hard look."[5] *See* 40 C.F.R. 1501.3(b)(2)(iv) ("significance" includes consideration of "effects that would violate Federal. . .[or] State … law protecting the environment").

The EA similarly fails on Alternative 5C's air quality impacts. It admits "an air quality assessment was not completed for this project." EA at 83 (AR25114). Without data, the EA nevertheless concludes 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). Of course, reaching conclusions without supporting data is, by definition, arbitrary and capricious. Nor does this conclusion mean there is *no* air quality impact—only that the unknown impact is not, in FHWA's unsupported view, severe enough to trigger a violation or loss of attainment. NEPA requires consideration of the *fact* of environmental impacts of an alternative (especially the Preferred Alternative) regardless of

[5] LSRA specifically pointed out these shortcomings via public comments. *See* Evgeniadis Comments (AR25736-37).

severity. NEPA requires "'high quality' information and 'accurate scientific analysis.'" *350 Montana v. Haaland*, 50 F.4th at 1272 (*quoting* 40 C.F.R. §1500.1). Having no data does not meet this requirement.

The EA also fails the "hard look" requirement when it leaves determination and resolution of some Alternative 5C environmental impacts to the future. For both waterways (EA at 44 (AR25074)) and wetlands (EA at 47 (AR25077) impacts, the EA states that PennDOT is in the process of "considering" mitigation options, without specifying what or where those options will be or even if they will work.[6] The FONSI repeats this. FONSI at 5 (AR12544).[7] The assumption that PennDOT will mitigate all the effects is speculative when one does not know what the mitigation will be.[8] While recognizing groundwater contamination, EA at 55 (AR 25085), and karst geology issues, EA at 56 (AR25086), the EA indicates that investigation of those impacts will not occur until "final design" stage. *See* EA at 56 (AR25086).[9] A FONSI rests on the notion that the agency has already determined what the impacts are and assessed their significance; when the agency admits that the nature and extent of impacts will not be determined until after the FONSI is issued, the FONSI's "finding" that there are no significant impacts is unsupported by the record and, therefore, arbitrary and capricious. *See Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) ("NEPA expresses a Congressional determination that procrastination on environmental concerns is no longer

[6] This appears to violate FHWA's regulations implementing NEPA, which require an EA to "identify alternatives and measures which might mitigate adverse environmental impacts." 23 C.F.R. § 771.119(b).

[7] Having failed to analyze water quality impacts, there is no indication that there will be mitigation efforts for those unspecified effects.

[8] Nor can FHWA necessarily count on "off-site mitigation," EA at 44 (AR25074), to solve the problem. LSRA noted no mitigation credits may be available, *see* Evgeniadis Comments (AR25737-38); FHWA never showed credit availability or how there is no significant impact if credits are unavailable. Further, credits used for EEP renders the credits unavailable for other projects—an impact not analyzed in the EA.

[9] LSRA also raised these timing issues in public comments. *See* Evgeniadis Comments (AR25736); 4/28/22 Kristl Comment Letter (AR26146).

acceptable," *quoting Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.,* 681 F.2d 1172, 1181 (9th Cir.1982)).

Quite simply, FHWA cannot have taken a "hard look" when it took ***no*** look at several foreseeable environmental impacts of its Preferred Alternative. "NEPA . . . aims . . .[to] ensure[] that the agency informs the public that it has indeed considered environmental concerns in its decision making process." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1236–37 (10th Cir. 2011). The public cannot weigh the merits of an agency decision when it is "not given any notice of the relative environmental effects of feasible alternatives." *Rocky Mountain Wild*, 508 F.Supp.3d at 1187 (*quoting Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 827 (D.C. Cir. 1976)). Given this record, there is no genuine issue of material fact that the EA—and the FONSI relying upon it—fail to provide a complete analysis of several foreseeable impacts of Alternative 5C. As such, there is no valid basis in the record for a finding of no significant impact. FHWA's actions violate NEPA and are therefore arbitrary and capricious under the APA.

The remedy for an inadequate EA is remand back to the agency to for a new EA, *see Center for Biological Diversity,* 538 F.3d at 1178-79, or an EIS.[10]

[10] LSRA believes an EIS is necessary here. The current EA—at 274 pages already more than 3 times the suggested 75-page limit for EAs (*see* 40 C.F.R. § 1501.5(f))—needs to add analyses of more direct, indirect, and cumulative impacts of EEP. These gaps raise substantial questions about the significance of impacts that are best explored in an EIS. *See Bark*, 958 F.3d at 870 ("When substantial questions are raised as to whether a proposed project may cause significant degradation of some human environmental factor, an EIS is required"). This court can and should remand for preparation of an EIS.

CONCLUSION

For the reasons set forth above, Plaintiff Lower Susquehanna Riverkeeper Association respectfully requests that the Court (1) grant Plaintiff summary judgment on its claims in the Complaint that FHWA violated NEPA and the APA, (2) vacate the EA and FONSI and remand the matter back to the Defendants for a proper analysis under NEPA, either a new EA or an EIS, and (3) for such other and further relief as the Court deems just and proper.

Respectfully submitted,

LOWER SUSQUEHANNA RIVERKEEPER ASSOCIATION

By: /s/ Kenneth T. Kristl

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CERTIFICATION OF WORD COUNT

Pursuant to Local Rule 56.1, the undersigned hereby certifies that the foregoing Memorandum of Law (from Cover through this Certification) contains 4,987 words as counted by Microsoft Office 365.

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DECLARATION OF SETH SMITH

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

DECLARATION OF SETH SMITH

I, Seth Smith, under penalty of perjury, do hereby declare:

1. I am over the age of eighteen (18) years and suffer from no legal incapacity. I have personal knowledge of the matters set forth herein.

2. I am currently a member of the Lower Susquehanna Riverkeeper Association (LSRA) and have been since 2022. As a member, I have supported the LSRA's efforts to protect the Lower Susquehanna River. I make this declaration in support of LSRA's Motion for Summary Judgment in the above-captioned matter.

3. I currently own property located at 509 Church St, Hanover, PA, and have owned this property since 2015. It is approximately 154 acres in size and is located in the watershed of the Lower Susquehanna River. I have used, and currently do use, this land for farming. In fact, my farmland is subject to a permanent restriction for agricultural use pursuant to an agricultural preservation program run by the Commonwealth of Pennsylvania.

4. The proposed Eisenhower Drive Extension project (Extension) that is at the heart of this litigation includes a portion of highway that will be built directly on my land. Based on the preliminary engineering design that was presented, I estimate that approximately 7% of my land will be taken for the Extension, which adversely affects the financial and economic viability of the operation. The farming operation is a generational farm, of which I am the fourth generation. Because of the adverse financial and economic impacts of the Extension, the viability of the farm for future generations becomes challenging. As a result, my interest as property owner will be directly and adversely affected by the placement of the Extension onto my property.

5. In addition to the direct impact of the Extension on my rights as property owner, the presence of the Extension on and close to my property will also mean that I and my property will be affected by the construction activity, traffic, and stormwater runoff from the Extension. These affects will include noise and pollution during construction and from traffic using the completed Extension, as well as stormwater that picks up pollutants from the construction and operation of the Extension and deposits those pollutants on my land. These noise, pollution, and stormwater impacts will adversely affect the value and utility of my farmland. These adverse effects will also lessen my enjoyment of the aesthetic of my farmland and rural setting and lifestyle.

6. The building of the Extension will also have adverse impacts on the environment and surrounding area. The farming practices incorporated at my operation include cover cropping and no-till farming, which has been shown to sequester carbon into the soil, thereby reducing the impact of climate change. Destroying this farmland for the Extension will remove the ability for the land to sequester carbon. In addition, this Extension will also encourage further destruction of prime farmland further to the West by means of development, thereby multiplying these adverse impacts.

I hereby certify that the facts set forth above are true and correct to the best of my knowledge, information and believe, subject to penalty of perjury, pursuant to 28 U.S.C. § 1746.

Dated: December 7, 2023

Seth Smith

DECLARATION OF TED EVGENIADIS

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

DECLARATION OF TED EVGENIADIS,
LOWER SUSQUEHANNA RIVERKEEPER

I, Ted Evgeniadis, under penalty of perjury, do hereby declare:

1. I live at 5050 North Sherman Street Ext. in Mount Wolf, Pennsylvania 17347. I have been involved with Lower Susquehanna Riverkeeper Association (LSRA) for over a decade. I began as a volunteer in 2010, joined the Board of Directors in 2015, and became the acting Lower Susquehanna Riverkeeper in 2017. My job as Riverkeeper is to educate the public on current issues regarding the ecological integrity of the Susquehanna River watershed and Chesapeake Bay, monitor the water quality and associated natural resources of the Susquehanna River and its tributaries, work with decision-makers to emphasize the economic and social benefits of protecting the Susquehanna River watershed, and when necessary, enforce laws protecting communities and natural resources of the Susquehanna River Watershed. I have personal knowledge of the matters set forth herein.

2. I am also the Executive Director of LSRA and have been a member of the Association for the past ten years. Among other tasks, I assist with fundraising, help to spread awareness of LSRA and its mission, and work to support and partner with local stakeholders, including LSRA's hundreds of dues-paying members—outdoorspeople, recreationists, and residents who care about preserving safe drinking water, protecting natural resources, and ensuring that the Lower Susquehanna River and its tributaries remain safe for fishing, swimming, and all forms of recreation.

3. In my capacity as Executive Director of LSRA, I am intimately familiar with its mission, membership, activities, and operations. I make this declaration in support of LSRA's Motion for Summary Judgment in the above-captioned matter.

4. The Association is a grassroots supporting organization for the Lower Susquehanna Riverkeeper. The office address of the Riverkeeper and the Association is the same, 2098 Long Level Rd., Wrightsville, PA 17368. The Association is an IRS § 501(c)(3) nonprofit that operates as a membership-based, mission-driven organization. LSRA is a regional, non-profit, environmental advocacy organization focused on the Lower Susquehanna River in Pennsylvania and Maryland and is dedicated to improving and protecting the ecological integrity of the Susquehanna River watershed and Chesapeake Bay. The organization oversees territory which covers over 8,500 square miles of the Lower Susquehanna Watershed including the Juniata Watershed from Selinsgrove to the Chesapeake Bay at Havre de Grace. LSRA has more than 500 members throughout this region. The primary purpose and mission of LSRA is to protect the River from adverse environmental impacts caused by pollution, development, and the inadequate enforcement of environmental laws and regulations. LSRA works to carry out its mission by protecting the Lower Susquehanna River watershed—including the creeks, streams, wetlands

hydrologically connected to the River—via monitoring, education, and both public and legal advocacy.

5. The Susquehanna River is the longest river on the East Coast of the United States and a very important tributary of the Chesapeake Bay which provides 50% of freshwater to the Bay and 90% of freshwater to the Upper Bay. LSRA and its members, who include local residents, outdoorsmen, recreationalists, and families, are dedicated to preserving safe drinking water, the sustainable use of natural resources, and the ability to fish, swim, and recreate safely in the Susquehanna River and her tributaries.

6. The proposed Eisenhower Drive Extension project (Extension) that is at the heart of this litigation lies within the Lower Susquehanna River watershed. Stormwater and other discharges related to the construction and/or operation of the Extension can enter creeks, streams, and other waterways that can carry the water and any associated pollution to the River. Thus, consistent with its mission and purpose, LSRA—by itself and through its members—was actively involved in the NEPA review process for the Extension in order to assure that all environmental impacts were identified and carefully considered during the review process so that those impacts could be avoided or minimized. As a result, LSRA submitted public comments and information for consideration by the Federal Highway Administration (FHA) and the Pennsylvania Department of Transportation during the NEPA process.

7. When the FHA issued its Finding of No Significant Impact (FONSI) on the Extension, LSRA believed that FHW had failed to properly consider important information concerning the environmental impacts of the Extension in general and on the Lower Susquehanna River in particular. Consistent with and germane to its mission and purpose of protecting the River,

LSRA authorized and initiated the filing of this litigation in order to assure that a properly-conducted NEPA review would be done and protect the River to the maximum extent possible.

7. Because this litigation seeks only to require the FHA to comply with NEPA and the federal Administrative Procedures Act, and is based solely on the administrative record that was before the FHA at the time of the FONSI, participation of LSRA members is not necessary for the prosecution of this litigation beyond establishing standing.

I hereby certify that the facts set forth above are true and correct to the best of my knowledge, information and belief, subject to penalty of perjury, pursuant to 28 U.S.C. § 1746.

Dated: February 7, 2024

Ted Evgeniadis