

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

THE NATIONAL ASSOCIATION FOR THE )  
ADVANCEMENT OF COLORED PEOPLE )  
ERIE UNIT 2262 and CITIZENS FOR )  
PENNSYLVANIA’S FUTURE, )

Plaintiffs )

v. )

CIVIL ACTION NO. 20-362

FEDERAL HIGHWAY ADMINISTRATION )  
and )  
PENNSYLVANIA DEPARTMENT OF )  
TRANSPORTATION, )

Defendants. )

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**BRIEF IN SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

This case is about the environmental review of the Bayfront Parkway Project and how it fails to meet legal requirements. But more deeply, it is about how the Plaintiffs and concerned residents fell victim to a government bureaucracy’s bait-and-switch scheme. It stole from them the right our environmental law guarantees—a meaningful opportunity to review the environmental impacts of the proposed project and other alternatives that meet the project purpose and to provide comments on an apples-to-apples comparison before the final alternative was approved.

Steps from gleaming Presque Isle Bay, the Bayfront Parkway slices across Erie, isolating neighbors from the library, the bus station, and the waterfront. As drivers struggle to comply

with the 35 mph speed limit, residents are reluctant to risk crossing the veritable speedway to access waterfront amenities, even as the area has transformed from a primarily industrial area to one boasting commercial development. Hearing widespread support that something needed to be done about the Bayfront Parkway, the Pennsylvania Department of Transportation developed the Bayfront Parkway Project.

But what Erieites have been asking for—a pedestrian-focused corridor linking downtown to the waterfront—is not the project the decision-makers are funding. On the contrary, “PennDOT has selected travel time savings as the performance measure to define project success.” PennDOT, *INFRA 2020 Discretionary Grant Application: Connecting Erie’s Waterfront* (2020), AR-28 at 96. This vehicles-focused outcome reflects concerns stakeholders shared back in 2018 about “how this process seems to be engineered to favor selection of an alternative that addresses moving more vehicles faster rather than making the Bayfront and downtown better connected in a truly pedestrian friendly manner.” E-mail from Freda Tepfer to Mark Nicolson, PennDOT (Dec. 14, 2018), AR-47 at 562. Other stakeholders shared concerns about the “damage of reducing access, increasing noise and air pollution, and chewing up waterfront real estate.” Comment letter from CIVITAS to Mark Nicholson, PennDOT (Dec. 17, 2019), AR-47 at 564. Stakeholders were promised, time and again, that the project would be subject to an environmental assessment reviewing key environmental impacts on air, water, and noise, coupled with a public comment period before the project was approved. *See* PennDOT & ms consultants, *Bayfront Parkway Improvement Project Coordinating Committee Meeting No. 4 Meeting Minutes* (2018), AR-46 at 396; E-mail from Autumn Kelley, PennDOT, to Freda Tepfer et al. (Dec. 12, 2018), AR-47 at 544; PennDOT, *September 25, 2019 Agency Coordination Meeting Minutes* (2019), AR-49 at 286; PennDOT & ms consultants, *Bayfront Parkway*

*Improvement Project Coordinating Committee Meeting No.10 Meeting Minutes* (2019), AR-23 at 80; PennDOT & ms consultants, *Bayfront Parkway Central Corridor Improvements PADEP and ECCD Coordination Meeting Minutes* (2020), AR-50 at 54. What they got was an 11<sup>th</sup> hour backroom deal between the state agency and the federal government that truncated the environmental review through the illegal use of a categorical exclusion and robbed stakeholders of a legally required public hearing so that the state agency could meet a deadline to apply for \$25 million of federal funding.

The Plaintiffs do not object to a redesign of the Erie Bayfront Parkway. They object to the process which led to this particular design being chosen without meaningful consideration of stakeholder input or adequate environmental review and seek a process that protects them and their community while achieving the appropriate redesign. This project is a huge deal for Erie. PennDOT estimates this project—encompassing half a mile of highway and three intersections—will cost \$70 million. AR-28 at 66. The effects of this significant investment in Erie will be felt for decades to come. PennDOT and the Federal Highway Administration owe it to the people of Erie to get this right, and to follow the law, before greenlighting this costly project.

**I. THE BAYFRONT PARKWAY PROJECT’S APPROVAL VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT BECAUSE THE PROJECT DOES NOT MEET THE LEGAL REQUIREMENTS FOR A CATEGORICAL EXCLUSION.**

As our Nation’s bedrock environmental law, the National Environmental Policy Act (“NEPA”) had a small but powerful mandate—to ensure that federal agencies took a “hard look” at the environmental impacts of different courses of action before committing to a project. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The idea behind the law was to institute a “look before you leap” requirement forcing federal agencies to weigh several options—and their environmental consequences—before approving a major federal action.

Unlike most statutes, which have a single set of implementing regulations, NEPA has two layers of applicable regulations. First, the Council on Environmental Quality (CEQ) has promulgated the primary NEPA regulations, found at 40 C.F.R. §§1501 *et seq.* (2019).<sup>1</sup> The CEQ NEPA regulations direct individual federal agencies to promulgate regulations specifying how each agency will implement NEPA. 40 C.F.R. § 1507.3(a) (2019). The CEQ regulations clarify that, in the event that an agency NEPA regulation is inconsistent the CEQ regulations, the CEQ regulations control. 40 C.F.R. § 1507.3(a) (2019).

The Federal Highway Administration approved a categorical exclusion for the Bayfront Parkway Project. Both the CEQ and the Federal Highway Administration have regulations describing which type of projects are eligible for a categorical exclusion—the bare minimum level of NEPA review for a project. The Bayfront Parkway Project fails to meet the legal requirements for using a categorical exclusion. Therefore, the Administration’s approval of a categorical exclusion for the Bayfront Parkway Project violates NEPA.

**A. The CEQ NEPA Regulations Require That a Project Must Belong to a Category of Actions That Do Not Have a Significant Impact on the Environment and the Category Must Have Been Identified by the Agency in Its Regulations.**

The CEQ NEPA regulations explain that neither an environmental assessment nor an environmental impact statement is necessary for a categorical exclusion. The regulation defines a categorical exclusion as (1) a “category of actions which do not individually or cumulatively have a significant effect on the human environment” and (2) the category has been identified by the agency in its implementing regulations. 40 C.F.R § 1508.4 (2019). Therefore, even if a project will not have a significant impact on the environment, the agency may only use a

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<sup>1</sup> We will cite to the Council on Environmental Quality regulations that applied on June 15, 2020. For the Court’s convenience, we have attached a copy of these regulations as Exhibit 3.

categorical exclusion for a project if the project fits within a category of actions the agency had already identified through the rulemaking process. The CEQ NEPA regulations specify that proposed agency regulations must identify categorical exclusions and are subject to notice and comment procedures. 40 C.F.R. § 1507.3(a), (b)(2)(ii); *see, e.g.*, Procedures for Considering Environmental Impacts, 85 Fed. Reg. 74,640 (Nov. 23, 2020) (proposing to update the Department’s list of categorical exclusions).

In our case, the Bayfront Parkway Project does not fit within any “category of actions” identified by the Federal Highway Administration as a categorical exclusion. Because the Bayfront Parkway Project does not fit into a category of actions the Federal Highway Administration has included in its promulgated regulation governing categorical exclusions, the use of a categorical exclusion here violates NEPA.

**B. The Bayfront Parkway Project Does Not Fit Within a Category of Actions Identified in Federal Highway Administration Regulations.**

The Federal Highway Administration’s regulations define categorical exclusions as “actions that meet the definition contained in 40 C.F.R. § 1508.4, and, *based on [Federal Highway Administration’s] past experience with similar actions*, do not involve significant environmental impacts.” 23 C.F.R. § 771.117(a) (emphasis added). The regulations clarify that categorical exclusions are actions that, among other criteria, “do not induce significant impacts to planned growth” and “do not have significant impacts on travel patterns.” 23 C.F.R. § 771.117(a). When describing the actual categorical exclusions the agency uses, the regulations divide the categorical exclusions into two groups—those that do not require additional documentation and those that do. *See* 23 C.F.R. §§ 771.117(c)–(d).

Between those two groups, the Federal Highway Administration has identified 30 categories of actions that do not require additional documentation and 10 categories of actions

that require additional documentation before their use will be approved. Activities approved as categorical exclusions without additional documentation include “[l]andscaping,” “[i]nstallation of fencing, signs, pavement markings,” and “ridesharing activities.” 23 C.F.R. §§ 771.117(c)(7), (c)(8), (c)(13). Actions listed as a categorical exclusion requiring documentation include “[t]ransportation corridor fringe parking,” “[c]onstruction of new truck weigh stations or rest areas,” and “construction of bus transfer facilities . . . when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.” 23 C.F.R. §§ 771.117(d)(4), (d)(5), (d)(10).

The Bayfront Parkway Project does not fit within any of the 40 categories the Federal Highway Administration has identified as a “categorical exclusion” based on its experience with similar projects and added to the regulation through a formal notice and comment rulemaking procedure. The categorical exclusion application does not attempt to fit the Bayfront Parkway Project into any of the 40 categories of action eligible for a categorical exclusion. Use of a categorical exclusion for the Bayfront Parkway Project therefore violates NEPA.

**1. “Other” is Not a Category of Actions Entitled to a Categorical Exclusion.**

The categorical exclusion application characterized the Bayfront Parkway Project as category “other.” PennDOT, *Approved Level 2 Categorical Exclusion Evaluation*, AR-19 at 2. “Other” is not a category of actions listed in the Federal Highway Administration regulations as a categorical exclusion. *See* 23 C.F.R. §§ 771.117(c), (d).

A catch-all category like “other” cannot be a “category of actions” subject to a categorical exclusion. The CEQ NEPA regulations not only require a showing that a category of actions does not individually or cumulatively have a significant effect on the human environment, but also that the actions “have been found to have no such effect in procedures

adopted by a Federal agency.” 40 C.F.R. § 1508.4 (2019). The CEQ NEPA regulations mandate that agency implementing regulations “shall include: (2) specific criteria for and identification of those typical classes of action: (ii) [w]hich normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions § 1508.4).” 40 C.F.R. § 1507.3(b). The CEQ NEPA regulations therefore prohibit an agency from identifying a catch-all category like “other” as a categorical exclusion.

The CEQ NEPA regulations and the Federal Highway Administration regulations acknowledge that an agency’s categorical exclusion list is not static and may be added to as an agency gains experience evaluating the environmental effects of a category of actions. 40 C.F.R. § 1507.3(a) (“Agencies shall continue to review their policies and procedures... to revise them as necessary...”); 23 C.F.R. § 771.117(d) (“examples of such actions include but are not limited to:...”). The regulations specify how to amend the list. To add a category of actions to a categorical exclusion list, an agency engages in a formal rulemaking process, which involves “publishing [the revision] in the Federal Register for comment.” 40 C.F.R. § 1507.3(a). The revisions “shall be adopted only after an opportunity for public review and after review by the Council [on Environmental Quality] for conformity with [NEPA] and [CEQ] regulations.” *Id.*

If the Federal Highway Administration has experience showing that a highway project going through a city that “consists of reconfiguring three major intersections...” by adding roundabouts, an extra lane, an underpass, and a pedestrian bridge has no significant impacts, it should have initiated a rulemaking to add this category of actions to the list of categorical exclusions. AR-11 at 5. Because it has not, the Bayfront Parkway Project is not eligible for a categorical exclusion and the Federal Highway Administration’s approval of a categorical exclusion for Bayfront Parkway Project as a category “other” violates NEPA.

**2. The Bayfront Parkway Project Does Not Meet the Federal Highway Administration’s Broad Requirements for a Categorical Exclusion.**

The Federal Highway Administration’s categorical exclusion regulations describe a documented categorical exclusion as an action “that meet[s] the criteria for a [categorical exclusion] in the CEQ regulations . . . and paragraph (a) of this section . . .” 23 C.F.R. § 771.117(d). Paragraph (a) of 23 C.F.R. § 771.117(a) defines categorical exclusions as “actions that: [d]o not induce significant impacts to planned growth or land use for the area” and “do not have significant impacts on travel patterns.” Therefore, a project that induces significant impacts to planned growth or has significant impacts on travel patterns is ineligible for a categorical exclusion.

**a. Courts have rejected categorical exclusions for projects that induce significant impacts to planned growth or will have significant impacts on travel patterns.**

Courts have rejected the use of a categorical exclusion where a project is designed to accommodate more traffic and stimulate growth or where it is designed to relieve future congestion. *See West v. Sec’y of Dep’t of Transp.*, 206 F.3d 920, 929 (9th Cir. 2000) (rejecting the use of a categorical exclusion for an interchange project where the “existing interchanges were inadequate to handle the traffic from the anticipated growth”); *R.B. Jai Alai v. Sec’y of Fla. Dep’t of Transp.*, 112 F. Supp. 3d 1301, 1322 (M.D. Fla. 2015), *vacated following settlement*, 2016 WL 3369259 (M.D. Fla. 2016) (rejecting the use of a categorical exclusion for a highway overpass project designed “to accommodate more traffic and stimulate growth”). In *West*, the Ninth Circuit concluded that a roadway project “cannot simultaneously relieve traffic congestion and yet have no significant impacts on travel patterns.” 206 F.3d at 929. The court concluded that the new interchange was designed to impact travel patterns by relieving future congestion based on the department of transportation’s statement that the roadway was unable to



“handle the traffic from the anticipated growth.” *West*, 206 F.3d at 929. In *R.B. Jai Alai*, the court likewise rejected a categorical exclusion after finding the overpass at issue was designed “to accommodate more traffic and stimulate growth.” 112 F. Supp. 3d at 1322.

**b. The Bayfront Parkway Project will induce significant impacts to planned growth and significantly impact travel patterns.**

PennDOT admits the Project will “induce impacts ... [to] planned growth, land use, or development patterns for the area.” AR-19 at 341. These impacts are significant. PennDOT designed the Bayfront Parkway Project to alleviate “future congestion” it predicted based on anticipated commercial development in the Bayfront area. AR-19 at 8; *see also* ms consultants, *Traffic Analysis Report* (2020), AR-14 at 7 (“The Bayfront Place and Harbor Place developments will add a large amount of housing, hotel, and retail space at Sassafra Street and Holland Street, respectively. These developments will add a significant number of vehicles onto . . . Bayfront Parkway.”). While the Bayfront Place and Harbor Place developments are aspirational, with no set timeline and no guarantee of the development actually happening, “traffic conditions on SR 4034 (Bayfront Parkway) were analyzed assuming Design Year 2040 conditions with full development.” AR-14 at 7. In fact, the Bayfront Parkway Project’s design was selected “[i]n order to accommodate the projected traffic assuming Design Year 2040 conditions.” AR-14 at 14. Just like the projects at issue in *West* and *R.B. Jai Alai*, the Bayfront Parkway Project is designed to “accommodate more traffic and stimulate growth.” *R.B. Jai Alai*, 112 F. Supp. 3d at 1322.

The Bayfront Parkway Project will also significantly impact travel patterns because in “reconfiguring three major intersections . . .,” PennDOT, *Approved Scoping Document* (2020), AR-11 at 5, it changes the way both vehicles and pedestrians navigate along and across the Bayfront Parkway. The Project converts two signalized intersections into roundabouts. AR-11 at

5. At the third intersection—State Street and the Bayfront Parkway—the Project includes building a “grade-separated signalized intersection with a new structure to carry State Street over the Bayfront Parkway with interior ramps along the Bayfront Parkway to provide... access to and from State Street.” AR-11 at 5. Pedestrians and bicycles will navigate across the Bayfront Parkway at Holland Street via an elevated pedestrian bridge instead of using a street-level crosswalk. AR-11 at 5. These changes are significant.

**c. Plaintiffs’ traffic engineering expert confirms the Bayfront Parkway Project will significantly impact travel patterns and induce significant impacts to planned growth.**

The Administrative Record is bereft of any evidence that PennDOT or Federal Highway Administration analyzed whether the Bayfront Parkway Project will significantly impact travel patterns or induce significant impacts to planned growth. Absent any agency analysis, Plaintiffs proffer the expert testimony of traffic engineer James Jones, P.E., who has opined on these issues to assist the Court. *See* Declaration of James Jones in Support of Plaintiffs’ Motion for Summary Judgment, attached as Exhibit 1 (“Jones Decl.”).

First, Mr. Jones explains that travel patterns “can occur either at a micro-level or a macro-level,” with micro-level travel patterns involving “how vehicles, pedestrians, or bicyclists navigate an intersection or how an intersection functions.” Jones Decl. ¶ 32. Mr. Jones opines that “changes to vehicular travel patterns along the Bayfront Parkway—vehicles going around a roundabout instead of through an intersection and then traveling underneath the State Street intersection—are significant.” Jones Decl. ¶ 34. Mr. Jones also notes that the “Project’s change to pedestrian travel patterns—with pedestrians prohibited from street-level crossing at Holland Street and forcing pedestrians and cyclists to use a pedestrian bridge and ramp that increases

crossing time and distance—are significant changes to pedestrian travel patterns.” Jones Decl. ¶ 34.

Second, Mr. Jones explains that “[a] project will ‘induce significant impacts to planned growth’ if it is designed to address anticipated traffic needs based on potential or proposed development projects.” Jones Decl. ¶ 35. A project will also induce significant impacts to planned growth where the project is “designed to address ‘future congestion,’ as opposed to ‘current congestion.’” Jones Decl. ¶ 35. Mr. Jones explained the “principle of induced traffic,” which “means that when a bigger road is built, it will induce people to take additional vehicle trips until the prior level of congestion is met.” Jones Decl. ¶ 35. Mr. Jones flags an admission in the record that the Project “has been designed to ‘promote/support existing, planned, and potential development.’” Jones Decl. ¶ 36 (quoting Albert Kahn Associates, *Bayfront Parkway Framework Plan: Recommendations to the Bayfront Parkway Coordinating Committee* (2019), AR-6 at 4). Mr. Jones also details the connection between private developers’ plans and the use of pedestrian bridges for the Project. Jones Decl. ¶ 36. Ultimately, Mr. Jones concludes that “[t]he Bayfront Parkway Project will significantly impact travel patterns and will induce significant impacts to planned growth.” Jones Decl. ¶¶ 32–36.

Because the Bayfront Parkway Project will induce significant impacts to planned growth and significantly impact travel patterns, PennDOT may not use a categorical exclusion to satisfy its NEPA requirements.

## **II. APPROVAL OF THE CATEGORICAL EXCLUSION WAS ARBITRARY AND CAPRICIOUS BECAUSE PENNDOT FAILED TO EXAMINE THE PROJECT’S POTENTIALLY SIGNIFICANT IMPACTS.**

PennDOT’s failure to consider several potentially significant impacts of the Bayfront Parkway Project cannot withstand scrutiny under NEPA and the Administrative Procedure Act.

NEPA’s “hard look” mandate means an agency violates the statute when it fails to consider a project’s potentially significant impacts. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citation omitted). Similarly, an agency action is arbitrary and capricious where it “entirely fail[s] to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also* 5 U.S.C. § 706(2)(A). PennDOT’s failure to examine a number of potentially significant impacts—(1) to water resources; (2) to local air quality; (3) from climate change; (4) to the adjacent environmental justice community; and (5) to aesthetics—constitute a failure to take a hard look at the potential environmental impacts of the Bayfront Parkway Project and therefore violates NEPA and the Administrative Procedure Act.

**A. PennDOT Failed to Assess Potentially Significant Impacts Related to Water.**

PennDOT failed to assess potentially significant impacts to water resources, namely impacts related to stormwater runoff, Mill Creek, and wetlands. Impacts to water resources must be addressed in a NEPA review and PennDOT’s failure to address these impacts is arbitrary and capricious. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 440 F. Supp. 3d 1 (D.D.C. 2020).

**1. PennDOT Did Not Examine the Project’s Stormwater Runoff Impacts.**

Stormwater runoff is precipitation and other water that travels over impervious surfaces, gathers pollutants, and then is discharged into local surface waters. PennDOT’s own guidance acknowledges that preliminary engineering procedures include “[p]reliminary design of stormwater management facilities” in order to “determine right-of-way requirements and to evaluate environmental impacts.” PennDOT, *Publication 10C, Design Manual Part 1C: Transportation Engineering Procedures Nov. 2015 Ed. Change No. 4* (May 2020), AR-32 at 67.

PennDOT did not assess the impact that creating additional paved travel lanes would have on the total impervious surface in the Bayfront area and what effect that increased runoff could have on Presque Isle Bay and Lake Erie. PennDOT did not analyze how stormwater management would change with the addition of the underpass below State Street. PennDOT did not identify any options to decrease impervious surface in the project area to reduce stormwater runoff and pollution to Lake Erie.

PennDOT admitted stormwater management will be necessary to mitigate “increased pollutant concentrations and thermal impacts to receiving surface waters . . . that may be caused as a result of construction and increased impervious area.” Letter from Brian McNulty, PennDOT, to Sarah Bennett, PennFuture (June 22, 2020), AR-52 at 537. PennDOT also recognized that there will be “increase[d] maintenance/operating costs . . . due to . . . long-term maintenance of the . . . stormwater facilities.” AR-19 at 343. However, instead of analyzing stormwater issues when assessing the environmental impacts of the Project, PennDOT punted its analysis until after the Project was approved.

PennDOT claims it will compile “[a] Post Construction Stormwater Management (PCSM) Plan” that “outlines the types of stormwater [Best Management Projects] that are proposed for the project that will be used to preserve the integrity of water quality and maintain and protect the physical, biological and chemical qualities of the aquatic resources.” AR-19 at 73. Promising to create a plan assessing and mitigating stormwater impacts at a later date is not a substitute for analyzing the Project’s effects on water resources and comparing the impacts alternatives will have on water resources during the NEPA process.

**2. PennDOT Did Not Examine Potential Impacts on Mill Creek.**

Mill Creek runs “underneath the Bayfront Parkway east of Holland Street” and “drains into Presque Isle Bay.” PennDOT Answer at 18; *see also* Erie-Western Pa. Port Auth., *Erie Waterfront Master Plan Summary Report* (2009), AR-25 at 32. The creek receives stormwater runoff that it carries to Presque Isle Bay. Pennsylvania has designated Mill Creek as “impaired” for “urban runoff” because Mill Creek fails to meet water quality standards. The Bayfront Parkway Project’s additional travel lanes mean additional stormwater, or urban runoff, from the parkway. That additional runoff may enter Mill Creek and travel to Presque Isle Bay and have significant impacts to local waters.

PennDOT did not examine the impact of stormwater from the Bayfront Parkway Project—either during construction or after the expansion—on Mill Creek or Presque Isle Bay. In fact, PennDOT did not identify Mill Creek as an aquatic resource present in the Project area. *See* AR-19 at 72.

**3. PennDOT Failed to Determine Whether Wetland Impacts Could Be Avoided.**

Wetlands are a “special aquatic resource” that trigger additional environmental review before a project can destroy them. 40 C.F.R. § 230.41. Executive Order 11,990 requires each federal agency to “take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency’s responsibilities.” Exec. Order No. 11,990; 42 Fed. Reg. 26,961, 26,961 (May 24, 1977). Executive Order 11,990 directs that agencies “shall avoid undertaking or providing assistance for new construction located in wetlands” unless the agency finds that “there is no practicable alternative to such construction” and that “the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.” Exec. Order No. 11,990; U.S.

Dep't of Transp., DOT 5660.1A, *Preservation of the Nation's Wetlands* § 5 (1978). Clean Water Act regulations mandate: “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem....” 40 C.F.R. § 230.10(a).

The Bayfront Parkway Project will involve “[p]ermanent wetland fill in order to construct [the roundabout at the] Holland street intersection.” AR-19 at 74. PennDOT failed to evaluate wetland impacts for alternatives to the Holland Street roundabout to determine whether there is a practicable alternative that does not involve wetland destruction. The current four-way stop configuration of Holland Street and the Bayfront Parkway does not involve the filling of wetlands and is therefore a practicable alternative that does not involve wetland destruction. Because PennDOT did not actually evaluate wetland impacts for any alternatives, PennDOT’s conclusion that “there are no practicable alternatives to construction within the wetlands” is not supported by evidence in the record and is arbitrary and capricious. The lack of a wetlands-related practicable alternatives analysis also precludes PennDOT from receiving permission under the Clean Water Act to fill wetlands for the Bayfront Parkway Project. 40 C.F.R. § 230.10.

**4. Plaintiffs’ Engineering Expert Confirms That PennDOT’s Failure to Evaluate Water Impacts Is Not Consistent with Best Engineering Practice.**

In his expert report, James Jones explains that “[s]tormwater runoff is precipitation and other water that travels over impervious surfaces, gathers pollutants, and then is discharged into local surface waters.” Jones Decl. ¶ 3. Stormwater runoff from roads and highways can be harmful and “can negatively affect surface water quality by carrying pollutants such as heavy metals—like lead, zinc, and copper—petroleum, road salt, and sedimentation caused by particulates from pavement wear and vehicles.” Jones Decl. ¶ 3. Because of the potential for

stormwater to impact the water quality of surface water, engineering guidance recognizes that “the planning and coordination of storm drainage systems must begin in the early planning phases of transportation projects” because “water quality impacts are an important environmental element covered under NEPA.” Jones Decl. ¶ 4 (citation omitted). Mr. Jones recognized that “[a]ddressing stormwater is particularly important in Erie based on the Bayfront Parkway’s proximity to Lake Erie and given that Erie is considering collecting a stormwater fee from residents to address stormwater infrastructure issues.” Jones Decl. ¶ 8.

Mr. Jones noted that “stormwater runoff and its impacts to water quality increase with increased impervious surface,” Jones Decl. ¶ 5, and the Bayfront Parkway Project’s design will “add a minimum of approximately 30% additional impervious surface.” Jones Decl. ¶ 7. Mr. Jones concluded that “[t]he Bayfront Parkway Project, as planned, is likely to cause significant stormwater impacts to local surface waters.” Jones Decl. ¶ 10. Mr. Jones observed that “PennDOT did not quantify the additional stormwater runoff anticipated from the increased pavement and did not evaluate the pollutant impact to local surface waters from the increased stormwater runoff and the pollution which it carries.” Jones Decl. ¶ 7. Mr. Jones concluded that “PennDOT should have examined these potential [stormwater] impacts when evaluating the project’s environmental impacts in order to be consistent with best engineering practice.” Jones Decl. ¶ 10. He also concluded that “[a]ddressing stormwater issues for the first time only after the environmental analysis is complete and approved is not consistent with guidance from FHWA and AASHTO or with PennDOT’s own guidance and therefore is inconsistent with best engineering practice.” Jones Decl. ¶ 9.

PennDOT’s failure to analyze the Project’s impacts on water resources is arbitrary and capricious and violates NEPA and the Administrative Procedure Act.



**B. PennDOT Failed to Examine the Air Quality Impacts of the Bayfront Parkway Project.**

NEPA generally requires that highway projects undergo air quality review. *See PennDOT, Project-Level Air Quality Handbook (2017)*, AR-38 at 6 (“Air quality is one of several elements . . . to be considered as part of a NEPA . . . evaluation.”). An air quality impacts analysis looks at multiple air pollutants and may use different levels of review for different pollutants. *See* AR-38 at 9. Pollutants “[o]zone and PM<sub>2.5</sub> are evaluated as part of the regional conformity analyses as applied to the [Transportation Improvement Plan] and Long Range Transportation Plan (LRTP) process” while carbon monoxide and Mobile Source Air Toxics “are typically addressed at the project-level within the NEPA process.” AR-38 at 9.

Federal Highway Administration regulations list 43 projects that are exempt from project-level and regional conformity determination requirements. 40 C.F.R. § 93.126; *see also* AR-38 at 12. Projects on this list “include . . . safety improvements, roadway maintenance and resurfacing, bridge rehabilitation, and roadway landscaping activities.” AR-38 at 10. Six additional project types are exempt from regional conformity determination but not a project-level review of air quality impacts. 40 C.F.R. § 93.127; AR-38 at 13. Any highway project not listed in 40 C.F.R. § 93.126 must complete a project-level air quality analysis.

**1. PennDOT Should Have Completed a Qualitative Analysis of Carbon Monoxide Impacts.**

Carbon monoxide “is a colorless, odorless gas that is formed when carbon in fuel is not burned completely and is a component of motor vehicle exhaust.” AR-38 at 16. PennDOT recognizes that “NEPA project air quality analyses have typically focused on [carbon monoxide] as the primary indicator for vehicular induced pollution.” AR-38 at 16. PennDOT acknowledges that “NEPA documentation will require an assessment of the level of analysis, a qualitative

overview of potential emissions impacts, and a quantitative analysis, if applicable.” AR-38 at 16. PennDOT distinguishes between the two levels of analysis by explaining that “a qualitative analyses [sic] provides a brief narrative indicating the project’s limited impact on air quality,” while a “quantitative assessment involves a . . . modeling analysis utilizing emission factors from EPA’s approved emission factor model.” AR-38 at 16.

For carbon monoxide, PennDOT recognizes that for “non-exempt projects, a qualitative analysis may . . . be adequate if a project is not expected to adversely impact project-level air quality levels.” AR-38 at 17. PennDOT explains, “a qualitative analysis will consist of a project description, a general overview of the existing and future [carbon monoxide] air quality, and a summary of the screening criteria.” AR-38 at 17. PennDOT did not prepare a qualitative analysis for carbon monoxide.

## **2. PennDOT Should Have Completed a Qualitative Mobile Source Air Toxics Analysis.**

Mobile sources, like vehicles, are significant contributors of nine air toxics—1,3 butadiene, acetaldehyde, acrolein, benzene, diesel particulate matter, ethylbenzene, formaldehyde, naphthalene, and polycyclic organic matter—known collectively as priority Mobile Source Air Toxics. *See* AR-38 at 33. PennDOT recognizes that “air toxics concerns continue to be raised on highway projects during the NEPA process.” AR-38 at 33. PennDOT advises that “most highway projects” would have low potential Mobile Source Air Toxics effects and would therefore require a qualitative analysis. AR-38 at 34. A qualitative analysis for Mobile Source Air Toxics “would compare . . . the expected effect of the project on traffic volumes, vehicle mix, or routing of traffic and the associated changes in [Mobile Source Air Toxics] for the project alternatives (including No-build), based on vehicle miles traveled (VMT), vehicle mix, and speed.” AR-38 at 34. For projects with no meaningful potential Mobile Source Air

Toxics effect, “the project record should document the basis for the determination of ‘no meaningful potential impacts’ with a brief description of the factors considered.” AR-38 at 34.

PennDOT did not complete a qualitative analysis for Mobile Source Air Toxics.

**3. PennDOT’s Failure to Complete a Project-level Air Quality Analysis Fails to Comply with NEPA.**

PennDOT did not analyze local air quality impacts from the Bayfront Parkway Project, despite an admission from PennDOT’s consultant that “the team will complete a qualitative analysis” for air quality. AR-49 at 286. Instead, the Categorical Exclusion claimed that “no separate analysis [was] needed” because the “Bayfront project is included in the [Air Quality Conformity Determination Report], as part of the Transportation Improvement Program (TIP) and Long Range Transportation Plan (LRTP).” AR-19 at 233. PennDOT also claimed that the project was exempt from carbon monoxide and Mobile Air Source Toxics analysis, stating “[s]ee exempt project list in Air Quality Handbook, Pub #321.” AR-19 at 233.

This approach fails for two reasons. First, a statement of regional conformity only speaks to whether the project, when taken with other transportation projects in the region, will conform with Clean Air Act requirements related to compliance with the National Ambient Air Quality Standards. It says nothing about local air pollution impacts and is not a substitute for a project-level air quality analysis. *See* AR-38 at 9. Second, the Bayfront Parkway Project does not fit within any of the exempt project types listed. For these reasons, PennDOT’s failure to assess local air pollution impacts from the Bayfront Parkway Project constitutes failure to take a “hard look” at the project’s environmental impacts and therefore violates NEPA.

**C. PennDOT Failed to Address Potentially Significant Impacts of the Bayfront Parkway Project Related to Climate Change.**

PennDOT should have examined both the impact of the Project on climate change and the potential impact of climate change on the Project. PennDOT admits that “[greenhouse gases] and climate change are other considerations that should be considered within NEPA.” AR-38 at 9. To guide the agency in addressing these issues in a NEPA analysis, “PennDOT has established a framework to address climate change and greenhouse gas (GHG) emissions.” AR-38 at 6. Specifically, PennDOT’s climate assessment framework “includes a GHG emissions analysis as a proxy for the project’s impact to climate change and an assessment of the effects climate change may have on the proposed action and its environmental impacts considering available research and data.” AR-38 at 6.

**1. PennDOT Failed to Examine the Impact of Climate Change on the Project.**

PennDOT should have performed a qualitative analysis that would “disclose and assess the potential impact that climate change may have on the project or the selection of alternatives.” AR-38 at 51. PennDOT recognizes that “[i]ncreases in the number and intensity of extreme precipitation events is expected to be the primary climate concern addressed within the NEPA process for Pennsylvania projects.” AR-38 at 52. This means that PennDOT should have assessed the Project and alternatives “for potential impacts including: structural integrity of roads/bridges compromised due to increased soil moisture levels, damage to culverts/roads near flood zones during heavy precipitation events, . . . the potential or need for higher design standards to improve resiliency, . . . and an evaluation of historic flooding events and impacts within the study area.” AR-38 at 52.

**2. PennDOT Failed to Examine the Impact the Project May Have on Climate Change.**

PennDOT should have addressed the potential impacts of the Project on climate change. Specifically, PennDOT should have prepared a qualitative assessment of GHG emissions which “includes a discussion of the project’s impact on vehicle miles of travel and traffic operations (i.e. travel speeds) and how those impacts may affect GHG emissions.” AR-38 at 45. Pennsylvania’s Climate Action Plan underscores the need to assess the Project’s impact on climate change. Executive Order 2019-01 mandates that “all agencies under the Governor’s jurisdiction shall... [c]ollectively reduce overall energy consumption by 3 percent per year and 21 percent by 2025 from 2017 levels” and “evaluate opportunities for the reduction of vehicle miles traveled.” PennDOT’s failure to assess the impact of the Project on vehicle miles traveled violates the Governor’s mandate in Executive Order 2019-01. PennDOT’s failure to mention climate change violates NEPA’s requirement to take a “hard look” at the project’s environmental impacts.

**3. Plaintiffs’ Engineering Expert Notes That PennDOT Should Have Examined Issues Related to Climate Change.**

Engineering expert James Jones notes that “[f]looding may have significant impacts on the project depending on the location and design of storm drains and given the potential for increased precipitation and increased lake levels due to climate change.” Jones Decl. ¶ 16. Mr. Jones points to the recent roadway flooding in Philadelphia and New York City during Hurricane Ida to support his opinion that “PennDOT should have examined the flood risk of the Bayfront Parkway Project particularly because the design involves lowering the roadway elevation at State Street and constructing an underpass where Bayfront Parkway passes under State Street.” Jones Decl. ¶¶ 16, 17. Additionally, Mr. Jones noted that “[r]educing vehicle miles travelled (‘VMT’)

using smart growth policies is a keystone of the Paris Climate Accords addressing the climate crisis we face and is a component of Pennsylvania’s Climate Action Plan.” Jones Decl. ¶ 45.

PennDOT’s failure to examine the impact of climate change on the Project and the Project’s impact of climate change fails to consider “important aspect of the problem” and is arbitrary and capricious in violation of NEPA and the Administrative Procedure Act. *See Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

**D. PennDOT Failed to Meet its Obligations to Analyze Potential Impacts to the Environmental Justice Community and to Meaningfully Involve its Residents in Decision-Making.**

NEPA requires PennDOT to analyze the potential impacts of the Project on the local environmental justice community. It was also required to give impacted residents meaningful input into its decision-making process *prior* to making its decision to move forward with the project. PennDOT failed to conduct an environmental justice analysis or give the impacted environmental justice community an opportunity for meaningful input.

**1. The Presence of a Local Environmental Justice Community Triggered PennDOT’s Duty to Assess the Project’s Potential Impact on the Community and to Meaningfully Engage the Community During Project Development.**

Executive Order 12,898 directs federal agencies to “identify and address[] . . . disproportionately high and adverse human health or environmental effects of its programs” on minority and low-income populations. Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629, 7,629 (Feb. 11, 1994). The U.S. Department of Transportation and the Federal Highway Administration have adopted orders to comply with Executive Order 12,898 in the NEPA context. U.S. Dep’t of Transp., Order 5610.2(a), *Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* § (4)(a)

(2012); Fed. Highway Admin., Order 6640.23A, *FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (2012). PennDOT has also “incorporated the principles of EJ into its programs, policies, and activities.” PennDOT, *Project Level Environmental Justice Guidance (Publication No. 746)* (2016), AR-43 at 10.

PennDOT acknowledges that there is an environmental justice community living near the project, with the nearby neighborhood composed of 54% nonwhite residents and at least 49% of the residents living in poverty. *See* AR-19 at 29; AR-19 at 342 (“Is an Environmental Justice population, as identified in Executive Order 12898, present? Yes”). Presence of an environmental justice community triggers requirements to assess the Project’s potential impacts on the community and to meaningfully involve the community in the Project’s development.

Once an environmental justice community is identified, the agency must determine the “adverse and disproportionate impacts” of the proposed project. AR-43 at 20. This “analysis of adverse effects must include the totality of significant individual or cumulative natural, social, community or human health effects” and “must consider the community context that may be impacted by the project.” AR-43 at 20. PennDOT also acknowledges, “[s]ome effects may be considered as beneficial by a portion of the community, while others may consider the same effect to be adverse.” AR-43 at 20. Further, environmental justice “should be considered and addressed in NEPA decision-making and appropriately documented.” AR-43 at 24.

In order to assess the Project’s impact on the environmental justice community, “[e]ngagement of EJ populations is a crucial step in properly identifying and analyzing what is important to them as individuals and as a community, and then analyzing overall project effects to those important factors.” AR-43 at 21. Further, a “primary goal of EJ is to engage those groups traditionally underrepresented in the project development process.” AR-43 at 26.

PennDOT has created a Community Impact Assessment Handbook in order to help the agency “evaluate the effects of a proposed transportation action on a community and its quality of life.”

PennDOT, *Community Impact Assessment Handbook* (2005), AR-35 at 9.

**2. PennDOT Did Not Conduct a Separate Environmental Justice Analysis.**

The Categorical Exclusion document contains just over a page of information regarding environmental justice. *See* AR-19 at 342-343. PennDOT claims to have “conducted an *analysis* to determine if the project could cause a disproportionately high and adverse human health or environmental effects on Environmental Justice community.” AR-19 at 342 (emphasis added). The environmental justice section also referred to a “study found that numerous benefits would result in the community.” AR-19 at 343. When Plaintiffs asked Defendants for the “analysis” mentioned in the categorical exclusion, Defendants admitted that “[t]here is no separate, stand-alone environmental justice document” and “[t]he environmental justice section of the Categorical Exclusion Evaluation (“CEE”) at AR-19, pp. 342-43 is the documentation of the environmental justice analysis.” Letter from Ashley Carter, Department of Justice, to Jill Heaps, Earthjustice, at 2 (Aug. 18, 2021), attached as Exhibit 4. PennDOT did not complete a Community Impact Assessment for the Project.

The environmental justice section mentions the regional air quality conformity analysis and asserts, without evidence, that “[i]mproved efficiency of the intersections will reduce congestion, which will in turn, reduce local pollution levels.” AR-19 at 342. The section also points to the noise analysis and concludes “the project has no traffic noise impacts.” AR-19 at 343. Based on these cursory statements, PennDOT concluded that the Bayfront Parkway Project “will not disproportionately affect minority or low-income populations.” AR-19 at 342.



**3. PennDOT's Air and Noise Analyses Were Insufficient and PennDOT Never Analyzed Whether the Project Would Benefit the Environmental Justice Community.**

PennDOT did not analyze the Project's potential local level air pollution impacts. *See* Section II. B. above. Similarly, PennDOT's noise analysis was insufficient because it did not reflect current or projected traffic levels. PennDOT reports that the 2020 average daily traffic volume is 16,793 vehicles per day and anticipates 25,700 vehicles per day on the parkway in 2040. *See* AR-19 at 44. PennDOT's noise study was completed assuming a 2018 average daily traffic volume of 19,039 vehicles per day and anticipated 2040 traffic of 19,700 vehicles per day. *See* ms consultants, *Preliminary Design Traffic Noise Report* (2020), AR-12 at 70. The noise evaluation fails to reflect current and projected traffic conditions and does not support the conclusion that "the project has no traffic noise impacts." AR-19 at 343.

PennDOT suggests the Project will benefit the environmental justice community through "overall improved mobility . . . [and] safe bicycle and pedestrian facilities." AR-19 at 343. But PennDOT did not actually use any tools available to it in order to assess the current pedestrian and bicyclist mobility and how it would change with the Project. *See* PennDOT, *Design Manual Part IX* (2015), AR-33 at 351.

**4. Plaintiffs' Traffic Engineer Confirms That the Noise Analysis and the Conclusion That the Bayfront Parkway Project Increases Connectivity Are Not Consistent with Best Engineering Practice.**

Engineer James Jones explains that a noise analysis "relies on several traffic-related assumptions" and that "[t]hose assumptions must be reasonable in order for the result of the analysis to be reasonable." Jones Decl. ¶ 11. Specifically, "[a] noise analysis must reflect both existing and projected traffic levels and speed in order to reasonably predict the change in noise between existing and future conditions." Jones Decl. ¶ 11.

Mr. Jones identified problems with both projected traffic levels and speed in the Bayfront Parkway Project noise analysis. The noise analysis “measured the difference in noise between 19,039 vehicles per day and 19,700 vehicles per day—a change of only 661 vehicles....” Jones Decl. ¶ 14. The categorical exclusion “reflects that the Bayfront Parkway Project will increase vehicles from 16,793 to 25,700—an increase of 8,907 vehicles per day.” Jones Decl. ¶ 14. Because the noise analysis “underestim[es] the change in traffic volume by more than 8,000 vehicles per day, the Noise Analysis fails to predict the noise impacts caused by the Bayfront Parkway Project.” Jones Decl. ¶ 14.

Mr. Jones notes that “[f]ederal regulations state: ‘In predicting noise levels and assessing noise impacts, traffic characteristics that would yield the worst traffic noise impact for the design year shall be used.’” Jones Decl. ¶ 12 (citation omitted). PennDOT’s guidance recommends “using design speeds or posted speeds plus five miles per hour (5 mph) to ensure worst-case noise level predictions in the design year of the project.” PennDOT, *Project Level Highway Traffic Noise Handbook (Publication No. 24)* (2019), AR-34 at 26. The noise analysis assumed traffic in 2040 would be “traveling at a maximum [speed] of 35 mph on proposed Bayfront Parkway.” AR-12 at 8. The proposed design speed for the Bayfront Parkway Project is 45 mph and Mr. Jones notes that “the 11-foot travel lane supports design speeds up to 55 mph.” Jones Decl. ¶ 13 (citing AR-19 at 43). Mr. Jones concludes that the noise analysis’ “use of 35 mph does not comply with PennDOT’s own guidance or sound traffic and engineering analysis that a noise analysis should use design speed—in this case, 45 mph—or posted speed plus five miles per hour—40 mph.” Jones Decl. ¶ 13. For these reasons, Mr. Jones opines that “[t]he Noise Analysis’ conclusion that the Bayfront Parkway Project will have no impact on noise levels is not supported by accepted engineering practice.” Jones Decl. ¶ 14.

Mr. Jones rejects PennDOT's "conclusions of increased pedestrian and bicyclist mobility" because they "are not supported by studies and planning that civil engineers undertake as a matter of course when designing facilities to increase pedestrian and bicyclist accessibility and mobility." Jones Decl. ¶ 18. Mr. Jones' report lists "design guidance and planning tools that civil engineers can use to determine existing pedestrian and bicyclist safety and accessibility issues" as well as "tools that civil engineers use to identify solutions to increase pedestrian and bicyclist safety." Jones Decl. ¶¶ 19–20. Mr. Jones identifies shortcomings of PennDOT's bicycle and pedestrian analysis, including the failure to "examine current pedestrian and bicycle usage of the Bayfront Parkway or the Bayfront bicycle path," "predict growing pedestrian or bicycle volumes based on anticipated development in the Bayfront," or "count pedestrian volumes during the summer months or to count bicycle volumes at all." Jones Decl. ¶ 23. These failures are "contrary to best engineering judgment for a project which has a stated purpose to improve pedestrian and bicycle connectivity." Jones Decl. ¶ 23.

Not only did PennDOT fail to analyze pedestrian and bicycle impacts, but "the Bayfront Parkway Project is likely to decrease mobility for pedestrians and bicyclists seeking to cross the Bayfront Parkway." Jones Decl. ¶ 26. Mr. Jones also concludes that "[t]he 45 MPH design speed is deleterious to pedestrian and bicycle mobility and does not reflect best practice design guidance." Jones Decl. ¶ 22. Mr. Jones opines that the "use of pedestrian bridges will decrease pedestrian and bicyclist mobility and reduce connectivity between downtown Erie and the waterfront." Jones Decl. ¶ 29. He bases this conclusion on Federal Highway Administration's recognition that pedestrian bridges should be "use[d] sparingly and as a measure of last resort." FHWA, *Pedestrian Safety Guide and Countermeasure Selection System* (2018), AR-54 at 46. He notes the potential that pedestrians, deterred by long crossing time, will attempt to cross the

street at an unsignalized intersection, “increasing the potential for pedestrian injuries and fatalities.” Jones Decl. ¶ 29. Mr. Jones concludes “[p]edestrian, bicycle and transit access and connectivity are negatively impacted by [the project’s] excessively wide pavement, large curb radii, excessively long and circuitous pathways, excessive slopes for elderly and disabled pedestrians, lack of bicycle accommodation in the street and lack of intermodal transit stops.” Jones Decl. ¶ 26.

**5. Plaintiffs’ Environmental Justice Expert Concludes That PennDOT Did Not Conduct a Proper Environmental Justice Analysis or Meaningfully Involve the Environmental Justice Community in the Decision-Making Regarding the Project.**

Dr. Sacoby Wilson, Plaintiffs’ environmental justice expert, notes that “there is no ‘analysis’ or ‘study’ of the potential impacts of the Project to the environmental justice community in the administrative record.” Declaration of Dr. Sacoby Wilson in Support of Plaintiffs’ Motion for Summary Judgment, attached as Exhibit 2 ¶ 9. He opines that “[c]onclusory statements that are not supported by analysis do not meet the minimum requirements for an environmental justice analysis—which requires that impacts be studied and addressed—nor do they meet the requirement that analysis must be appropriately documented.” Wilson Decl. ¶ 9.

Dr. Wilson notes that the lack of “either a project-level air quality analysis or a greenhouse gas/climate change analysis for the Bayfront Parkway Project” “means that PennDOT ignored potential localized air impacts on the low-income populations of color living adjacent to the parkway.” Wilson Decl. ¶ 21. Dr. Wilson explains that “[h]ighway expansion projects can have significant negative impacts on local air quality, which can in turn cause adverse health outcomes.” Wilson Decl. ¶ 22. Dr. Wilson enumerates the potential harms air pollution causes to children and adults living near highways, including “cardiovascular disease,

reduced lung function, increased asthma rates, and greater overall morbidity and mortality.”

Wilson Decl. ¶ 22. In addition to physical impacts, “exposure to air pollution has been linked to many adverse mental health effects, including elevated risk for suicide, symptoms of depression and anxiety, and emergency department visits for mental health disorders in adults.” Wilson Decl. ¶ 22. Dr. Wilson concludes that “[g]iven the potential for traffic-related air pollution to have negative impacts on the adjacent community, PennDOT should have analyzed local air-pollution impacts as part of its environmental justice analysis.” Wilson Decl. ¶ 23.

Dr. Wilson observes that “[t]he Administrative Record includes no evidence that PennDOT actively engaged members of the environmental justice community to understand their concerns and how the project may negatively impact them.” Wilson Decl. ¶ 27. Dr. Wilson reviewed notes from meetings with Bayfront East Side Taskforce and Our West Bayfront, which reveal that neither of these groups reflect “members of the local environmental justice community who will be negatively impacted by the project and who are disproportionately low-income and/or people of color.” Wilson Decl. ¶¶ 14-17.

Dr. Wilson remarks that none of the members of the Project’s Coordinating Committee “reflect or represent the low-income populations of color in the environmental justice community” and that the Project Advisory Committee “lacked representation and engagement of members of the environmental justice community.” Wilson Decl. ¶ 18. Lack of minority and low-income representation on the Project’s advisory groups is contrary to PennDOT’s own guidance urging involvement of environmental justice populations. Wilson Decl. ¶ 10. Further, lack of transparency regarding the racial makeup of the advisory groups is contrary to U.S. Department of Transportation environmental justice guidance, which recommends “agencies should identify the ‘present and proposed membership by race, color, or national origin, in any

planning or advisory body that is part of the program, policy or activity.” Wilson Decl. ¶12. (citation omitted).

Ultimately, Dr. Wilson opines that the “environmental justice analysis for the Bayfront Parkway Project fails to meet the minimum standard for an environmental justice analysis under NEPA.” Wilson Decl. ¶ 28. He bases this opinion on PennDOT’s failure to quantify the Project’s “potential harms to the community [or] the potential benefits,” and PennDOT’s failure to “examine potential harms and benefits of alternatives to the proposed Project, including... an alternative prioritizing pedestrian and cyclist safety and mobility over reducing future congestion.” Wilson Decl. ¶ 28.

**E. PennDOT Failed to Consider the Project’s Potential Impacts on Aesthetics and Views in Erie.**

PennDOT failed to consider potentially significant aesthetic impacts of the Bayfront Parkway Project.

**1. Agencies Must Consider Potential Aesthetic Impacts of a Project.**

NEPA expressly directs federal agencies to “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.” 42 U.S.C. § 4331(b)(2); *see also Maryland-Nat’l Cap. Park & Plan. Comm’n v. U.S. Postal Serv.*, 487 F.2d 1029, 1038 (D.C. Cir. 1973). PennDOT guidance directs the agency to “[i]dentify recognized places, buildings, views, landscapes, or natural features that are considered aesthetically pleasing and/or displeasing to the community.” AR-35 at 22. PennDOT also notes that “[c]ommunity stakeholder involvement in defining aesthetic resources is important, as aesthetic character is highly subjective and those who will be affected by the project should help determine what aesthetic resources are present.” AR-35 at 22. In identifying a project’s aesthetic impacts, PennDOT

should ask “[whether] the project [would] impact a vista or alter a viewshed,” and whether the project “impact[s] . . . community focal points.” AR-35 at 42.

**2. Stakeholders Raised Concerns about Visual Impacts and Aesthetics.**

Stakeholders raised concerns regarding the Project’s impacts on views. For example, one commenter noted that the “Bayfront Parkway shares the exact same breathtaking views as Presque Isle and so it should follow the park’s lead in creating an inviting road that entices people of all ages and states in life to come and enjoy its views and recreation for its own sake.” E-mail from Abigail Clint to Mark Nicholson, PennDOT (Feb. 12, 2019), AR-48 at 24. Another stakeholder noted that some of the alternatives may require large “‘highway-like’ signs to provide information to motorists, especially those not familiar with the region, which could be unsightly.” E-mail from Jeffrey Bucher, PennDOT, to Jonathan Crum, FHWA (Oct. 9, 2018), AR-46 at 371. Likewise, architects recommended, “[v]iews to the Bayfront and the downtown should be preserved to the greatest extent possible.” AR-6 at 18. The Coordinating Committee was presented with materials acknowledging the importance of the “visual aspect of the planned improvements” and warning that “[i]nexpensive utilitarian solutions that have no ability to inspire those who use or pass by the development will have a repelling effect that could prove detrimental to the evolving Bayfront.” AR-6 at 15.

**3. PennDOT Failed to Consider Aesthetic Impacts of the Bayfront Parkway Project.**

Despite stakeholder concerns about visual and aesthetic impacts of the Project, PennDOT failed to consider two of the Bayfront Parkway Project’s potentially significant impacts on the Bayfront aesthetics and views. PennDOT did not consider that the new roundabouts at Holland and Sassafra Street intersections would demand new signage sufficiently large to alert motorists of exit lanes far in advance, and that this signage would obstruct iconic views of the Bayfront.

*See* AR-19 at 54–57. PennDOT also failed to consider the visual impact of the pedestrian bridge on Bayfront views. PennDOT’s failure to examine the Project’s visual impact is arbitrary and capricious.

**III. PENNDOT’S FAILURE TO HOLD A PUBLIC HEARING ON THE BAYFRONT PARKWAY PROJECT VIOLATED THE FEDERAL-AID HIGHWAY ACT.**

PennDOT’s failure to hold a public hearing for the Bayfront Parkway Project and send a certification and transcript to the Federal Highway Administration violated the Federal-Aid Highway Act.

**A. The Federal-Aid Highway Act Requires States to Provide a Public Hearing for a Federally Funded Highway Project Going Through a City.**

The Federal Aid Highway Act required PennDOT to: (1) hold, or provide an opportunity for, a public hearing; and (2) provide a transcript, certification, and report of the public hearing to the Federal Highway Administration. *See* 23 U.S.C. § 128(a). Specifically, “[a]ny State transportation department” submitting plans for a Federal-aid highway project “involving the bypassing of, or going through, any city” must hold public hearings or provide opportunities for such hearings. *Id.* Further, the individual state transportation departments who submit plans for federal-aid highway projects “shall submit a copy of . . . said hearings to the Secretary, together with [a] certification and report [of the hearing].” *Id.* § 128(a)–(b). The hearing report should indicate the considerations given to “various alternatives which were raised during the hearing or which were otherwise considered.” 23 U.S.C. § 128(a).

The Federal-Aid Highway Act defines a “federal-aid highway” as “a public highway” eligible for federal assistance “other than a highway functionally classified as a local road or rural minor collector.” 23 U.S.C. § 101(a)(6). A “highway” includes a “road, street, and parkway.” 23 U.S.C. § 101(a)(11)(A)



Federal Highway Administration regulations explain that public hearings are required for any project that “substantially changes the layout or functions of connecting roadways . . . .” 23 C.F.R. § 771.111(h)(2)(iii). Additionally, Federal Highway Administration regulations clarify that public hearing transcripts should be accompanied by copies of written statements from the public, both those submitted at the hearing and those submitted afterwards. *See id.* § 771.11(h)(2)(vi). PennDOT’s own guidance document confirms that “[a] Public Hearing must be held, or the opportunity for a hearing afforded, on all Federal-aid projects... when the project will: ... [s]ubstantially change the layout or function of connecting roadways....” PennDOT, *Publication #295: Project Level Public Involvement Handbook* (2011), AR-36 at 43.

**B. The Federal-Aid Highway Act’s Public Hearing Requirements Apply to the Bayfront Parkway Project Because It Is a Federal Aid Project That Substantially Changes the Layout of Three Intersections in Erie.**

The Bayfront Parkway Project is subject to the Federal-Aid Highway Act’s public hearing requirements because it is a federally funded highway project and it goes through the City of Erie. *See* 23 U.S.C. § 128(a). The Bayfront Parkway Project meets the Federal-Aid Highway Act’s definition of a “federal-aid highway” because the Project is receiving federal funding and is a project on a parkway. *See* Categorical Exclusion Application at 1 (“Federal Funding? Yes”); 23 U.S.C. §§ 101(a)(6), (a)(10)(A). The Project involves a half-mile stretch of highway that runs across the city of Erie.

Further, the Erie Bayfront Project substantially changes the layout or function of the connecting roadways in Erie. *See* AR-11 at 5. PennDOT admits the Project “consists of reconfiguring three major intersections . . . .” AR-11 at 5. The Project converts two signalized intersections into roundabouts. *See* AR-11 at 5. At the third intersection—State Street and the Bayfront Parkway—the Project includes building a “grade-separated signalized intersection with

a new structure to carry State Street over the Bayfront Parkway with interior ramps along the Bayfront Parkway to provide . . . access to and from State Street.” AR-11 at 5. The Bayfront Parkway Project triggered the Federal-Aid Highway Act’s public hearing requirements. PennDOT’s failure to comply with these requirements violates the law.

#### **IV. PLAINTIFFS HAVE STANDING TO BRING THESE CLAIMS**

Plaintiff Citizens for Pennsylvania’s Future (“PennFuture”) is a statewide environmental non-profit organization whose mission is to advocate for the protection of Pennsylvanians’ air, water, and land and to empower Pennsylvanians to build sustainable communities for future generations by using legal, policy, outreach, communications, and civic engagement tools. Declaration of Jacquelyn Bonomo on Behalf of the Citizens for Pennsylvania’s Future ¶ 3, attached as Exhibit 5. PennFuture and its members are leading Pennsylvania’s transition to a clean energy economy. Bonomo Decl. ¶ 3. In Erie, PennFuture and partner organizations support the “Common Agenda for Clean Water,” a project designed to implement clean water projects that will protect, conserve, and support Erie’s water resources. Bonomo Decl. ¶ 3. Plaintiff National Association for the Advancement of Colored People-Erie Unit 2622 (“NAACP”) is a unit of the national NAACP non-profit organization located in Erie, Pennsylvania committed to fighting racism in all of its forms, including environmental racism. Declaration of Gary Horton on Behalf of Himself and the National Association for the Advancement of Colored People, Erie Unit 2262 ¶ 7–9, attached as Exhibit 6. The NAACP’s Erie unit primarily focuses on community development and promoting racially equitable access to a healthy and safe environment. Horton Decl. ¶ 8.

The NAACP and PennFuture have members who live in neighborhoods near the Bayfront Parkway Project in Erie (“Plaintiff members”). The Bayfront Parkway Project as approved by the

Federal Highway Administration and PennDOT will have an adverse impact on the environmental quality of the Plaintiff members' neighborhoods. The Plaintiff members will suffer from having more limited access to the Bayfront and its amenities because of the current design of the Project; and Plaintiff members will be harmed by increased pollution and traffic caused by the Project, both of which have concrete impacts on the health, safety, and ambiance of a neighborhood and its residents. *See* Horton Decl. ¶ 10, 12; Bonomo Decl. ¶ 5. Plaintiff members often walk across the Bayfront Parkway to visit the Bayfront, which will be more difficult if the project proceeds without additional environmental review. Declaration of John Vanco ¶ 5, attached as Exhibit 7. Plaintiff members use the Bayfront and its surrounding amenities for recreational, aesthetic, and educational enjoyment including to observe loons and gulls, boat, and swim with friends, borrow books from the nearby Blasco Library, or to simply sit on the pier and enjoy the sights and sounds of Lake Erie's vibrant ecosystem from the Bayfront. *See* Declaration of Freda Tepfer ¶ 7, attached as Exhibit 8; Vanco Decl. ¶ 5; Declaration of Mary Watson ¶ 5, attached as Exhibit 9; Declaration of Paul Borroughs ¶¶ 5–6, attached as Exhibit 10.

Members living near the Project are concerned that higher traffic volumes on the Bayfront Parkway will increase air and noise pollution in their backyards and augment or exacerbate the disproportionate environmental burdens and public health challenges members in the East Bayfront neighborhood—a disproportionately low-income area in Erie—already face. Watson Decl. ¶ 4; Horton Decl. ¶ 11. Plaintiff members also are concerned that the Bayfront Parkway Project will increase collisions and decrease pedestrian safety, another pre-existing and disproportionate adverse burden they encounter. Watson Decl. ¶ 6; Horton Decl. ¶ 11. Plaintiff members who visit the Bayfront by using Holland Street, State Street, and Sassafras Street to cross the Bayfront Parkway on foot share similar concerns about confronting ground level air

pollution and high volumes of cars that will restrict their ability to safely walk across the Bayfront Parkway, further reducing access and opportunities to enjoy the Bayfront. Vanco Decl. ¶¶ 7–8; Tepfer Decl. ¶¶ 9–10. Plaintiff members interested in visiting the Bayfront to enjoy the Lake Erie and its attendant ecological benefits fear they will lose the aesthetic, public health, and recreational value they derive from spending time there due to increased water contamination caused by pollution associated with more vehicles on the Bayfront Parkway Project. Tepfer Decl. ¶¶ 13–14; Borroughs Decl. ¶ 8. The Plaintiff members who live in Erie also made several requests for PennDOT to hold an official public hearing and include them in the decision-making process throughout the course of planning, but PennDOT ignored members’ appeals to meaningfully participate in the environmental review and design process and only conducted informal input sessions that did not yield any meaningful opportunities for public participation or the resolution of Plaintiff members’ concerns. Vanco Decl. ¶¶10–11; Tepfer Decl. ¶ 16; Burroughs Decl. ¶ 11; Watson Decl. ¶ 8; Horton Decl. ¶ 13; Bonomo Decl. ¶ 8.

Plaintiffs’ injuries are traceable to the Federal Highway Administration and PennDOT’s approval of the Bayfront Parkway Project’s categorical exclusion and PennDOT’s failure to hold a public hearing. A court order in this case that declares that PennDOT violated the Federal-Aid Highway Act by failing to hold a public hearing would redress Plaintiffs’ hearing-related claims. Additionally, a declaration that the Federal Highway Administration violated NEPA by approving the categorical exclusion and an order enjoining the Defendants’ use of federal funds for the project until the parties are in full compliance with the Federal-Aid Highway Act and NEPA would redress the remainder of Plaintiffs’ claims.

## V. CONCLUSION

The Federal Highway Administration's approval of the categorical exclusion for the Bayfront Parkway Project violates NEPA and the Administrative Procedure Act. PennDOT also violated the Federal-Aid Highway Act by failing to hold a public hearing, taking public comment, and sending that to the Federal Highway Administration before the project was approved.

We seek remand so the agencies can address these violations. Specifically, Defendants will need to prepare an environmental impact statement or environmental assessment evaluating impacts to water, air, aesthetics, climate change, and the local environmental justice community. 40 C.F.R. §§ 1501.4, 1502.1, 1508.9 (a) (2019). Further, NEPA requires that Defendants must evaluate "alternatives to the proposed action" and must "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternatives sites." 42 U.S.C. §§ 4332(2)(C)(3), (2)(E); *See Citizens Advisory Comm. on Priv. Persons, Inc. v. U.S. Dep't of Just.*, 197 F. Supp. 2d 226, 243 (W.D. Pa. 2001) (rejecting the Bureau of Prison's environmental assessment for only evaluating the impacts of the preferred alternative). PennDOT's traffic analysis, which looked at traffic impacts of various configurations of the three intersections, does not examine meaningful alternatives to the project. *See* AR-14; Letter from Christine Spangler, PennDOT, to Alicia Nolan, FHWA (May 7, 2020), AR-18 at 2. After evaluating environmental impacts of the proposed project and reasonable alternatives, PennDOT must conduct a public comment period and hold a public hearing on the Project and comply with the Federal-Aid Highway Act's requirements before finalizing its decision. Plaintiffs also seek any other relief the Court deems just and reasonable.

Submitted this 24<sup>th</sup> day of September, 2021

/s Jill Witkowski Heaps

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### **CERTIFICATE OF SERVICE**

I hereby certify that on September 24, 2021, I electronically filed the foregoing with the Clerk of the Court for the Western District of Pennsylvania by using the CM/ECF system. I certify that all counsel of record in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s Priya Pookkulam  
Priya Pookkulam