

## PennDOT's Project Development Process from an Environmental Point of View

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## Project Development Process

- Preliminary Design
- Final Design
- Construction

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# Preliminary Design

- Environmental and historic resources are identified
- Impacts are evaluated
- Alternatives or shifts are evaluated
- A footprint is defined for the project which is refined in Final Design.



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## Environmental Concerns in Preliminary Design

- Compliance with NEPA and the other statutes that fall under the NEPA Umbrella
  - ❖ 42 USC 4332
  - ❖ CEQ Regulations 40 CFR Part 1500
  - ❖ FHWA NEPA Regulations 23 CFR Part 771
- Compliance with Act 120 - the PA Administrative Code.
  - ❖ 71 PS 512

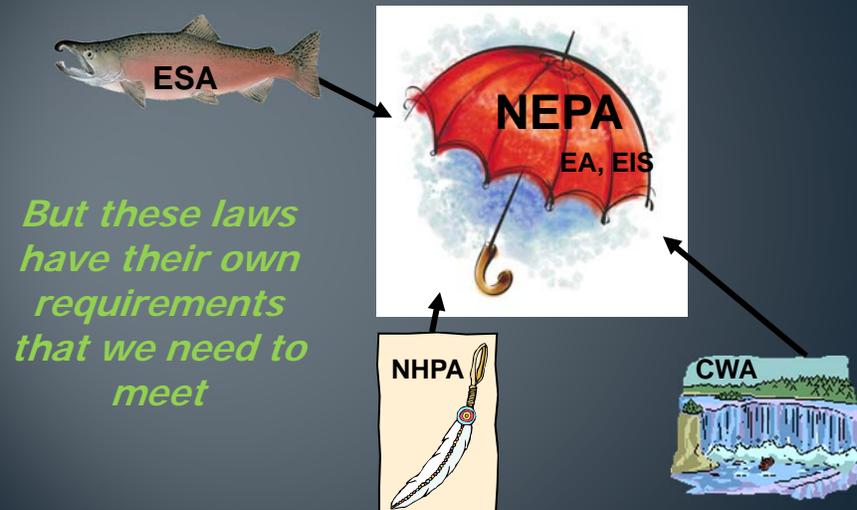
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## Environmental Review under NEPA

- **NEPA** applies when there is federal funds involved or a federal action, such as a Section 404 permit, is required for the project.
- **NEPA** is a procedural statute requiring Federal agencies to disclose and consider the environmental consequences of their proposed projects before deciding on a course of action.

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## NEPA serves as an over-arching umbrella for complying with many laws and regulations



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## Statutes considered under the NEPA Umbrella

- The National Historic Preservation Act (NHPA) and PA History Code
- The Endangered Species Act, PA Fish & Boat Code , and PA Game Code
- Federal Wild and Scenic Rivers Act
- Migratory Bird Treaty Act
- The Land and Water Conservation Act and various State grant programs
- PA Agricultural Area Security Law
- The Clean Air Act
- The Clean Water Act

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## Examples of other laws requirements

### National Historic Preservation Act Requires:

- The identification of Historic Resources
- The identification of consulting parties and consultation
- The assessment of adverse effects
- If adverse effects result, a Memorandum of Agreement

### Endangered Species Act Requires:

- Coordination with USFWS
- If potential effect on a listed species, a biological assessment from PennDOT
- A biological opinion from USFWS
- Potentially an incidental take permit from USFWS

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## Important Elements of NEPA

- ✧ Public Disclosure of Federal Actions
- ✧ Presentation of Appropriate Range of Alternatives (at least 2 – “No Action” and “Proposed Action”)
- ✧ Interagency Coordination (as appropriate)
- ✧ Public Participation (as appropriate)

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## Environmental Documentation

Time Needed  
and Generally  
Increasing  
Complexity

- Categorical Exclusion Evaluations (CEE)
- Environmental Assessment (EA)
- Finding of No Significant Impact (FONSI)
- Notice of Intent (NOI)
- Environmental Impact Statement (EIS)
- Record of Decision (ROD)

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## Coordination with Public and Resource Agencies

- Pre-application meetings with agencies to ensure that preliminary design can be permissible.
- Level of public involvement varies based on the level of NEPA documentation required.



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## NEPA Case Law in PA

*Green/Guildford Env. Ass'n v. Wykle*, 2004 U.S. App. LEXIS 6414.

- ❖ Adding an Interchange to I-81 to service Chambersburg area
- ❖ Plaintiffs claimed interchange was **predetermined**.
- ❖ Court held that "NEPA assumes that the agencies will have a subjective bias towards their proposal."
- ❖ The test for predetermination was not whether the agency is subjectively impartial, but whether the NEPA process was completed with "good faith objectivity."
- ❖ Statements made by agency official favoring an alternative prior to the completion of the NEPA process did not necessarily violate NEPA.
- ❖ Selected alternative was a modification of the preferred alternative presented in the FEIS to avoid an historic property.
- ❖ Court held an **Supplemental EIS** was not necessary because the modified alternative did not "present a seriously different picture of the environmental impacts proposed for the project."

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## NEPA Caselaw in PA cont.

*Buckingham Township v. FHWA & PennDOT*, 157 F. Supp. 457 (E.D. 2001).

- ❖ One issue was whether the US 202, Section 700 project was segmented from the Pools Corner project.
- ❖ Court found that the projects had:
  - Logical termini
  - Independent utility
  - Did not restrict consideration of alternatives
- ❖ Another issue surrounded conflict of experts regarding traffic studies – the Court held”

An agency is entitled to select any reasonable methodology and to resolve conflicts in expert opinion and studies in its best reasoned judgment based on the evidence before it.

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## NEPA Caselaw in PA cont.

*Dauphin Borough v. FHWA & PennDOT*, 1997 U.S. Dist. LEXIS 15760 (M.D. Pa. Aug. 19, 1997)

- Upheld the alternative analysis conducted under NEPA and Section 4(f)

*Concerned Citizens Alliance, Inc. v. FHWA and PennDOT*, 176 F.3d 686 (3d Cir. 1999).

- Upheld the agencies compliance with the NHPA and Section 4(f)

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## “Act 120” or “Section 2002”

- Section 512 is commonly referred to as “Act 120” or “Section 2002”.
- 71 P.S. 512 is Section 2002 of the Administrative Code of 1929.
- Act 120 of 1970 amended the Code to add these provisions .

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## Act 120 amending the Administrative Code

- \* **Section 2002(b) applies to transportation routes or programs that require the acquisition of right of way**
- \* **Consideration of environmental impacts.**
- \* **Public hearing consistent with FHWA’s hearing requirements**
- \* **Notice of results published in the Pa Bulletin**
- \* **If NEPA is triggered, that process will satisfy the documentation and hearing requirements**

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## Interpretation of “Transportation Route or Program” by Courts

Not a “route or program” if:

1. The project is primarily repair work and is not expansion of development.
2. The total land condemned is minimal and incidental to the repair work.
3. The record indicates that environmental, social, and economic impact of the project will be slight.

*In Re: Condemnation for Legislative Route 58018, Section 002, 375 A.2d 1363, 1368 (Pa. Cmwlth. 1977).*

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## PA Supreme Court’s Review of the Application of Act 120



Project involved widening of River Street in Wilkes-Barre which impacts River Common consisting of recreational areas and historic resources.

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## *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976)

- PennDOT considered alternatives including the one proposed by plaintiff.
- Mitigation for the impacts was included, e.g. replacement of trees and sidewalk, relocation of historic markers, minimization of property acquisition.
- Public hearing held was proper.
- Court found: (1) efforts were made to hold the impact to a minimum in accordance with Act 120; and (2) Act permitted striking a balance between the benefits and detriments of the project in favor of the project.

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## Environmental Rights Amendment

By complying with the requirements of NEPA and the Administrative Code, PennDOT meets its duties as trustee under Article 1, Section 27.

*Payne v. Kassab*, 361 A.2d 263, 273 (Pa. 1976) (“Having determined that Act 120 was complied with, we have no hesitation in deciding that the appellee Commonwealth of Pennsylvania has not failed in its duties as trustee under the constitutional article.”).

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## Final Design

- ❖ Phase II Archeology is usually completed
- ❖ Detailed H&H Analysis is completed
- ❖ E&S Control Plan is completed
- ❖ Stream and wetland mitigation plans are completed
- ❖ If applicable, NPDES and Section 404/Chapter 105 permit applications are submitted

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## Construction

- ❖ Permits are part of the Contracts
- ❖ Contractors become co-permittees
- ❖ Mitigation commitments are included as special provisions in the construction contract



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# Questions????

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