

# Consulting Parties Meeting #1

## RP3 Comments and Responses

---

Pittsburgh Vertical Clearance Projects



Date: February 2020

**NSR Responses to  
Rail Pollution Protection Pittsburgh (RP3) Comments Following Consulting Parties Meeting #1**

Norfolk Southern Railway Company (NSR), in conjunction with Pennsylvania Department of Transportation (PennDOT), provides the following responses to RP3's comments following Consulting Parties Meeting #1 relating to the Pittsburgh Vertical Clearance Projects. The comments are included verbatim below in italics, with the responses appearing in indented text below the comment text. For ease of reading, NSR has broken certain of RP3's comments into multiple paragraphs with individual responses to sections of the original comment. NSR's responses to the comments are numbered for convenience and easy reference only.

Consulting Parties Meeting #1 was for the purpose of historic resource consultation and compliance with Commonwealth of Pennsylvania Act 120 of P.L. 356 (Act 120), amended Section 2002, as codified at Title 71 of the Pennsylvania Code, 71 Pa. C.S. § 512 and the Pennsylvania History Code, Act No. 1978-273 (as amended as Act No. 1988-72), as codified at Title 37 of the Pennsylvania Code, 37 Pa.C.S. § 101 et seq. (Pennsylvania History Code), as applicable. The goal of consultation is to identify historic properties potentially affected by the undertaking(s), assess its effects, and seek ways to avoid, minimize, or mitigate any adverse effects on historic properties. The scope of Consulting Parties Meeting #1 was to review and provide input on the identification of historic properties within the various areas of potential effect (APEs) of the proposed undertakings as summarized in the Identification of Historic Properties Report (Michael Baker 2019). NSR provides responses herein to RP3's comments that relate to the historic review of the projects as stated in Consulting Parties Meeting #1. A Memorandum of Agreement (MOA) between PennDOT and the Pennsylvania State Historic Preservation Office (PA SHPO) for the review of state-funded projects under the Pennsylvania History Code establishes a review process described in Stipulations III-IX and Appendix C of the Federal Programmatic Agreement (excluding involvement by the Federal Highway Administration and the Advisory Council on Historic Preservation) and in the procedures in PennDOT's Cultural Resources Handbook (Publication 689). The four-step compliance process of Section 106 as adapted for compliance with the Pennsylvania History Code is: 1). **Initiate the Review Process** by establishing the undertaking, notifying the PA SHPO, developing a plan to involve the public, and identifying consulting parties; 2). **Identify Historic Properties** by determining the scope of efforts, conducting surveys to identify historic properties, and evaluating historic significance by applying the National Register of Historic Places (NRHP) criteria for evaluation; 3). **Assess Adverse Effects** by applying the Criteria of Adverse Effect; and 4). **Resolve Adverse Effects** by continuing consultation to explore ways to avoid, minimize, or mitigate adverse effects to historic properties and to record such agreed-upon measures in a MOA (See Attachment 1). To date, only Steps 1 and 2 have been initiated and the results of each were the subject of review and comment at Consulting Parties Meeting #1.

NSR is undertaking environmental review for these projects more generally in accordance with Act 120, and only a portion of that review is at issue in this consulting parties / historic properties review phase. Many of RP3's comments pertain to other aspects of the environmental review that are currently being undertaken pursuant to Act 120 but are not within the scope of Consulting Parties Meeting #1, and some comments pertain to matters outside the scope of the Act 120 process altogether. Comments that pertain to the Act 120 review process are included in the Act 120 record and will be included in the Act 120 analysis as appropriate. As to the comments that are out of scope of the Act 120 review, NSR does not provide substantive responses in this document as they either will be addressed elsewhere or are not relevant to PennDOT's Act 120 review and in light of, among other things, timing considerations

for the Pennsylvania History Code review process. Under Act 120, before final approval of the projects, PennDOT will address effects on Section 2002 resources and make a determination regarding feasible and prudent alternatives. 71 Pa. C.S. § 512.

**NSR Responses to RP3 Comments:**

*On November 20, 2019, RP3 attended the Pennsylvania History Code compliance process Meeting #1, to review the impact of Norfolk Southern's PVCP on properties eligible for historic protection. PennDOT is required to follow the National Historic Preservation Act's four-step process for Section 106 consultation. As a "consulting party," RP3 was asked to provide its comments and concerns, which appear below.*

**Response 1:** The undertakings at issue in this proceeding are not federal actions subject to Section 106 of the National Historic Preservation Act (NHPA). Rather, PennDOT has granted funding for the projects pursuant to the Rail Transportation Assistance Program (RTAP), which subjects the projects to the Pennsylvania History Code. As the lead agency for that review, PennDOT is subject to the requirements under the Pennsylvania History Code, which generally align with NHPA Section 106.

**1. Right-to-Know Information Needed as a Prerequisite to Section 106 Public Outreach**

*On behalf of the 27 affected communities, the 175,000 residents living within the adverse effect impact zone, the children attending the 124 public/private schools, the 6 hospitals, and the 108 parks, RP3 requests that the documents listed below be provided to the Consulting Parties, pursuant to our Right-to-Know (RTK) Request, (65 P.S. Sections 67.101-3104).*

**Response 2:** It is unclear to what the RP3 comments refer as "adverse effect impact zone." The consulting parties process pertains to impacts on historic properties under the Pennsylvania History Code and as such the terms "adverse effect" and "area of potential effect" have specific regulatory definitions. Specifically, an adverse effect is found when an undertaking may alter directly or indirectly any of the characteristics of a historic property that qualify the property for inclusion in the NRHP in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association (36 CFR 800.5(a)(1)). (See PennDOT Publication 689.) The APE encompasses the area where an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist (36 CFR 80.16(d)). The APE is determined in accordance with Pennsylvania History Code provisions and guidance, and is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. (See PennDOT Publication 689.) The lead agency, here PennDOT, must consult with the PA SHPO when defining an undertaking's APE. PA SHPO reviewed the APEs for the Pittsburgh Vertical Clearance Projects and concurred with PennDOT and NSR's APEs on June 5, 2018. To the extent a consulting party has a specific area it believes is not included in the APE, the consulting party should specifically identify the area for further review by PennDOT and PA SHPO for a determination of whether to include the additional area.

*The requested information must be provided with sufficient time given for their review by subject matter experts and the Consulting Parties prior to conducting Consulting Party Meeting #2 or any other public outreach. Section 27 of the RTAP grant provides that the Pennsylvania Right-to-Know law applies to any matter related to the agreement/project. Exhibit H of that agreement provides timelines for Norfolk Southern's compliance, and penalties for non-compliance.*

**Response 3:** As a public company, NSR is not subject to Pennsylvania's right to know laws, which apply only to government agencies. Records related to or arising out of a Grant Agreement are subject to requests made pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104, ("RTKL") through procedures set forth in the statutory provisions. As such, if PennDOT received any right-to-know requests, it is charged with responding to those requests with public records. In the event PennDOT requests information from NSR, NSR will assist PennDOT in accordance with the RTAP agreement in responding relating to public records subject to the right-to-know law. The requests below relate to Act 120/Section 2002 reports and analyses that are underway and are part of the Act 120/2002 process and its public involvement process. The timeliness of RP3's right-to-know request should not delay the consulting parties process, as the focus of that process is solely related to the historic review of the undertakings being proposed.

*RP3 requests that all reports and analyses of the potential project impacts on the following Section 2002 Resources be provided: public parks; recreation areas; wildlife; residential neighborhood character and location; noise, air and water pollution; multiple use space; aesthetics; public health and safety; fire protection; public utilities; religious institutions; natural and historic landmarks; property values; engineering, right of way and construction costs of the project and related facilities; maintenance and operating cost of the project and related facilities; operation and use of existing transportation routes and programs during construction and after completion.*

**Response 4:** The Section 2002 compliance process is ongoing and will be completed as part of the Act 120 process. The focus of these consulting parties meetings is the identification of and potential effects on historic properties related to the undertakings. While historic properties are one of the noted resource types under Section 2002, the information required for Pennsylvania History Code consultation is focused on historic property concerns, not health and safety, other environmental impacts, impacts to municipal infrastructure, and other such topics that do not result in effects on historic properties. As noted above, NSR and PennDOT are going through the Act 120 review process as to the more general environmental aspects of the projects and that process is currently underway. Public review and comment will occur in relation to the larger Act 120 review in accordance with applicable PennDOT guidance.

*In addition, our request includes the following:*

- *The adverse health effects of the PVCP were formally recognized by 95 prestigious Pittsburgh-area doctors and other medical professionals who, after reviewing the scientific literature appended to the document, signed onto a request for a Health Impact Assessment (HIA): Details can be found here: [Medical Professionals Request for Health Impact Assessment of the PVCP, July 20, 2019](#) An HIA is warranted, and the answers to the questions contained therein need to be provided;*
- *analyses of noise, vibration, and atmospheric/emissions;*
- *an infrastructure analysis along the entire 20-mile PVCP route (especially water & sewer lines). Section 152 of the RTAP grant requires Norfolk Southern to be fully informed of the location and condition of private and public utilities, to protect existing utilities, and be fully responsible and liable for any injury to utilities that may occur by reason of its operations. (See also Pennsylvania Underground Utility Line Protection Law);*
- *a North Avenue Bridge sightline safety and traffic analysis (especially if one lane will be removed);*

- *a copy of all environmental, adverse effects, and alternatives analysis performed -- specifically, recent studies on track lowering and using the Mon Line to meet the Purpose and Need of the project – as discussed and requested by District 11 Environmental Planning Manager Mark Young in his June 23, 2018 e-mail and City Director of Mobility and Infrastructure Karena Rick’s February 19, 2019 letter to PUC Secretary Chiavetta. In a June 27, 2018 email exchange, District 11 Executive Moon-Sirianni stated that PennDOT Secretary Leslie Richards and Deputy Secretary Leo Bagley told Norfolk Southern “to investigate lowering the railroad and even if they cannot, be prepared to discuss why they cannot and cost cannot be the primary reason.”*
- *timeline and completion data for Positive Train Control installation throughout the PVCP route;*
- *details of RTAP grant money distributed to Norfolk Southern to date, and for what purposes;*
- *information on Right of Way acquisitions of properties adjacent to historic resources (if the bridge is raised); traffic, lane removal, and sidewalk studies;*
- *particulars of temporary construction easements;*
- *environmental documentation and coordination with the Southwestern PA Commission;*
- *asbestos surveys;*
- *the initial Johnson, Mirmiran & Thompson, Inc. (JMT) report that generated Norfolk Southern’s February 11, 2019 comments;*
- *programmatic Section 4(f) Evaluations/Act 120, Section 2002. (See Baker’s NEPA Scoping Meeting Minutes); and,*
- *a copy of the Southside Slope Stability Study (see October 11, 2018 email from Bureau Director Michael Sorbo to Nevin Myers.*

**Response 5:** The information and specific document requests listed above are not pertinent to this stage of the Pennsylvania History Code compliance consultation process as the items do not relate to the identification of and potential effects on historic properties from the undertakings. The comment has been forwarded to the Act 120 review process record and PennDOT for inclusion in the Act 120 analysis as appropriate. For the consulting parties process and Pennsylvania History Code review, review and comment with respect to issues outside the scope of the consulting party process is not necessary. See Consulting Party notifications and documents for review. The consulting parties are currently providing their comments on the identification of and potential effects on historic properties for the proposed undertakings.

The Section 2002 and full Act 120 review processes are ongoing. To the extent required by Act 120, certain of the items listed above are being evaluated by the project team and will be included in the Act 120 reports as appropriate. As information is developed and approved it is being placed on the publicly available website at <http://www.nscorp.com/content/nscorp/en/in-your-community/the-pittsburgh-vertical-clearance-projects.html> to ensure all participants and interested parties receive the same complete information. At the request of the community and to provide as complete information as possible, some preliminary information and analysis outside the Act 120/2002 process also can be found at the publicly available website. This includes the referenced report (JMT report) which was a preliminary screening summary not prepared for the Act 120 process or consulting parties process, and was prepared prior to Act 120 assessment, design, and resource considerations and analysis.

PennDOT is the lead agency for this consulting parties process and the Act 120 review process. As the lead agency, PennDOT ultimately will make the determination of the level of

environmental document based in part upon the environmental effects of the projects under the Act 120 process. All Act 120 reports and studies, including the level of environmental document under Act 120, are subject to PennDOT approval as the lead agency and opportunity for public comment will occur in accordance with the PennDOT guidance for Act 120. Pennsylvania Act 120 includes a state counterpart to Section 4(f) which is being addressed in the larger Act 120 review in accordance with applicable PennDOT guidance.

As referenced above, the assessment includes restrictions and limitations including the interruptions of interstate rail traffic due to slope instability on the south side. While NSR has experienced damage and interruption of interstate rail traffic resulting from rock slides and apparent slope instability on the Mon Line on the south side of the rivers, it has not conducted a study of slope stability in those areas as it does not own the property adjacent to the rail line about which NSR has concerns. As noted in the *Norfolk Southern Railway Company Pittsburgh Vertical Clearance Projects Project Purpose and Need Statement* (June 2019), “the Mon Line is not being considered as a viable railway improvement project due to several major physical constraints and engineering factors.”

Finally, NSR notes that railroad operations, including topics such as freight traffic density or commodities and positive train control implementation, are federal matters that are regulated by federal agencies. Federal law preempts state agencies from attempting to regulate such matters, which are subject to the exclusive jurisdiction of the Surface Transportation Board.

## **2. Allegheny Commons and Swisshale/Rankin Pedestrian Bridges Should be Included**

*The Allegheny Commons Pedestrian Bridge should be included in the Consulting Party meetings because Norfolk Southern’s RTAP application indicates in Section 5.1 as follows:*

*“While this project does not include park land, it does include a proposed pedestrian bridge replacement at Allegheny Commons. As the oldest public park in the City of Pittsburgh, it is important that there are safe crossing options for those travelling on foot through the park. This construction at Allegheny Commons will improve public safety.” The replacement of the Allegheny Commons Pedestrian Bridge was removed from the project as it is not related to vertical clearance issues and falls outside of the project’s purpose and need.*

*In addition, the “PVCP Project Purpose and Need Statement, Draft August 2018” includes a reference to the pedestrian bridge, stating as follows:*

*“In addition to the rail and vehicle traffic considerations, the bridges proposed to be modified have current pedestrian limitations with respect to ADA compliance. These projects are proposed to include enhancements to the overall safety of pedestrians, bikes and vehicles, including walking distance. For example, the Lake Elizabeth Pedestrian Bridge built in 1906, was closed in 1998 due to safety issue and removed in 2013. This limits access across the park and pedestrians travel approximately 0.25- 0.35 miles to go from the lake to the tennis courts. (See map.)”*

*Moreover, in a June 22, 2018 email, Michael Baker International’s Wendy Berrill states that, “The pedestrian bridge is planned for construction (contingent upon the project construction of course)...” In addition, the pedestrian bridge was included as part of the project in JMT’s initial report.*

**Response 6:** The pedestrian bridge in Allegheny Commons is not part of the Pittsburgh Vertical Clearance Projects. As such, there is no need to undertake a Pennsylvania History Code review relating to that bridge. There is a possibility that the bridge could be contemplated in the event mitigation is required for the projects, and in that event NSR and PennDOT will undergo appropriate reviews as needed. As NSR representatives have made clear, the pedestrian bridge

in Allegheny Commons is contingent upon the project construction and would only be considered if needed as a mitigation item.

*The Ridge Avenue Bridge provides one method of access to Allegheny Commons, and its removal is slated by the PVCP.*

**Response 7:** The Ridge Avenue bridge likewise is not part of NSR's Pittsburgh Vertical Clearance Projects. The City of Pittsburgh is the project sponsor for that project, which involves the raising of the W. Ohio Street bridge and removal of the Ridge Avenue bridge. This project was subject to federal oversight, with the Federal Highway Administration (FHWA) as the lead agency, and NSR understands that the project has already received Section 106 clearance.

*Replacing the historic pedestrian bridge would mitigate the loss of the access now provided by the Ridge Avenue Bridge. In sum, it is apparent that Norfolk Southern has contemplated replacing the Allegheny Commons pedestrian bridge at its full cost, as part of the PVCP.*

**Response 8:** See Response 6 above.

*An additional defect in the Section 106 process is the removal of the Swissvale/Rankin pedestrian bridge. This removal had an adverse effect and there was no documentation that alternatives were considered to minimize or avoid that adverse effect, or that the views of the public were solicited and considered in ways that complied with the Section 106 process. Details can be found in District 11 Environmental Planning Manager Mark Young's October 29, 2018 email.*

**Response 9:** The Frazier Street pedestrian bridge and the Overland Street bridge, both located between Braddock and North Braddock boroughs, were removed from the funded project and advanced under private funding provided solely by NSR after coordination with and approval from both boroughs. North Braddock Council approved the demolition of Frazier Street foot bridge on June 19, 2018. On June 14, 2017, the Braddock Borough Council approved the removal of the Overland Street Bridge, and on July 11, 2018, the Pennsylvania Public Utility Commission (PUC) approved the removal of the rail-highway crossing carrying Overland Street over the NSR tracks.

Section 106 review of projects is triggered where there is federal funding or federal permitting, neither of which existed with removal of those bridges. Likewise, because there was no state funding or permitting, the Act 120 process was not required. As information, the Overland Street bridge had been closed to vehicular and pedestrian traffic for years leading up to its removal due to its deterioration and unsafe condition.

### **3. The PVCP Team Has Placed the "Cart Before the Horse"**

*At the November 20, 2019 Consulting Party meeting, concerns were raised about the RTAP grant being approved without preliminary alternative studies, analyses, findings and potential mitigation options.*

**Response 10:** RTAP grants are routinely awarded at a relatively early planning stage of projects. Detailed studies and environmental review documents pursuant to Act 120 and the Pennsylvania History Code would not be prepared in advance of or submitted during the application phase of the project. Studies and documents needed for Pennsylvania Act 120 and

Pennsylvania History Code review are prepared and refined once the project is funded in accordance with applicable environmental and cultural resources laws.

*In Section 5.1 of Norfolk Southern's application to PennDOT, it answered that there was no use or taking of public park land - except perhaps for a pedestrian bridge (which was not included in the purview of the nine-bridge PVCP project.). An affirmative response would have required Norfolk Southern to submit studies that prove that there was no less intrusive alternative, or that no other alternative is available, and what steps would be taken to minimize harm before the RTAP grant was approved. As a consequence of Norfolk Southern's apparent misstatement, the \$20 million grant was approved, and the Consulting Parties are without that information. That a taking/use will occur is based on the following:*

- 1) In Application RTAP-APP-2016-NS-1, Norfolk Southern asked PennDOT to permit it to clear height restrictions along its Pittsburgh Line in order accommodate double-stacked traffic from McKees Rocks, through historic Allegheny Commons Park, the City of Pittsburgh, and on to East Pittsburgh.*
- 2) Once the height restrictions of the Pittsburgh Line are cleared, Norfolk Southern's application indicates that it intends to redirect traffic from its Mon Line along the South Side.*
- 3) Norfolk Southern has admitted that, with redirected traffic, over time it will be running its Pittsburgh and Fort Wayne lines at near or full capacity (70-80 trains per day).*
- 4) Allegheny Commons is listed in the National Register of Historic Places and enjoys Federal, State and City historic protected status.*
- 5) Because Norfolk Southern has been involved in the plan to raise the West Ohio Street Bridge since 2011, it is well aware that raising bridges and roadway approaches result in both direct and indirect use and takings of historic Allegheny Commons land, as well as the surrounding historic properties.*
- 6) Since PennDOT is following applicable programmatic Section 4(f)/Act 120, Section 2002 documentation, and Section 106, it should be noted that Section 110(C) guidelines provide that: Full consideration of historic properties includes consideration of all kinds of effects on those properties: direct effects, indirect or secondary effects, and cumulative effects. Effects may be visual, audible, or atmospheric. Beyond the effects from physical alteration of the resource itself, effects on historic properties may result from changes in such things as local or regional traffic patterns, land use, and living patterns.*
- 7) Direct taking occurs in connection with raising the West North Avenue Bridge and the roads leading to the multiple bridge intersections (as presented at the June 26, 2018 public meeting), results in the death of massive mature trees in Allegheny Commons, changes the park's topography, and changes access to the park.*
- 8) Indirect taking involves creating visual, noise, and black carbon pollution, which affect the historic properties and the health of neighboring residents, park users (humans and birds, especially protected species within the National Aviary's breeding program) and its many trees.*
- 9) Courts have held that removal of part of a historic property constitutes use of land from a historic site. Ferris v. Secretary of the United States Dep't of Transp., No. 89-C779-C (W.D. Wis. 1990) (removal of a lens from a lighthouse constituted use.)*
- 10) Courts have further recognized that noise, pollution and visual intrusion constitute constructive use. Coalition Against a Raised Expressway, Inc. v. Dole, [1987] 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,455 (S.D. Ala. Oct. 20, 1986).*

**Response 11:** As a clarification, the Vertical Clearance Projects are not federal projects but are state funded projects subject to Pennsylvania's Section 2002 and Act 120. NSR accurately described the projects in the RTAP process as they were defined at that time and is working with

stakeholders and government entities as appropriate to develop details in accordance with Act 120. Further, alternatives analyses are conducted as part of the Act 120 process, and typically will not be completed prior to the filing of an application for RTAP funding, as described in Response 10.

The question of whether any of the projects will need to have a temporary construction easement through, or minor acquisition of, parkland is premature at this point because that question depends on the alternatives analysis. The scope of the consulting parties' review here is identification of historic properties and the findings and recommendations contained in the Identification of Historic Properties Report (Michael Baker International 2019) and Historic Bridge Rehabilitation Analysis for W. North Avenue Bridge (Michael Baker International 2019).

**4. Excessively Limited Boundaries of the Area of Potential Effect:**

*At the November 20, 2019 Consulting Party meeting, concerns were raised about constricted boundaries of the Area of Potential Effect (APE) excluding other eligible National Register of Historic Places (NRHP) properties and parks similarly impacted by the PVCP. Below is RP3's view of a defect in the Section 106 process resulting from:*

- *project splitting and segmentation;*
- *the failure to integrate applicable programmatic Section 4(f)/Act 120, Section 2002 documentation, mirroring NEPA and NHPA obligations;*
- *failure to abide by the prescriptions of the Environmental Rights Amendment, Article 1 Section 27 of the Pennsylvania Constitution obligations, as well as a failure under Section 2002, as amended, to take into account the full scope of the adverse impact in order to minimize harm to the historic sites involved; and,*
- *failure to follow Commonwealth Court Judge Dan Pellegrini's Order in Case No. 1790 CD 2004. Judge Pellegrini ordered Pennsylvania agencies and the PUC to determine how a 22 foot clearance would be achieved in accordance with his February 25, 2005 Order. The case specifically involved Norfolk Southern, the West North Avenue Bridge and Allegheny Commons. His Opinion concluded,*

*"Just because the PUC under its own regulations is required to impose an overhead clearance of 22 feet unless the railroad seeks an exemption does not necessarily mean that the Bridges have to be reconstructed to achieve that height clearance because that goal could also be achieved by lowering the tracks. There is no dispute that the site is historical in nature in that it was created at the time of the Revolutionary War. If the Bridges are raised, that will have a severe impact on the park due to longer and higher street approaches to the Bridges and that could impact its historic nature. It is also undisputed that the park is an important recreational asset that could also be undermined by the increased height of the Bridges. One or both of those concerns seemed to have been taken into consideration by placing the railroad line in a cut so as not to visually impact the park when the line was constructed. Also, the PUC is constitutionally required to take those concerns into consideration under Article I, Section 27 of the Pennsylvania Constitution which declares the people's right to the preservation of the natural, scenic, historical and esthetic values of the environment and further provides that the public natural resources are the common property of all the people.*

*While the PUC took away from itself the ability to exempt reconstruction of Bridges at less than 22 foot overhead clearance requirements unless the carrier sought an exemption, it must take into consideration the historic and esthetic nature of the park and the recreational activities in fashioning a remedy. Based on the outcome of those considerations, the PUC could order that the Bridge be raised, that the tracks be lowered or a combination to preserve the park's historic and esthetic nature as well as its recreational use. Accordingly, that portion of its order is vacated and the case is remanded to the PUC for the purpose of determining how the 22 foot clearance will be achieved in accordance with this opinion.*

---

DAN PELLEGRINI, JUDGE"

*Taken together, these laws and the judicial Order require consideration of the project's potential effects on both historic and archeological resources within the purview of the PUC, PennDOT, and the Pennsylvania State Historic Preservation Office (PA SHPO).*

*Failure to follow Judge Pellegrini's order, guidelines, and analysis, results -- at a minimum -- in a defect in the Section 106 process, and is a cause of action under the Environmental Rights Amendment Article 1, Section 27 -- especially given the fact that the land comprising Allegheny Commons was originally donated to the City in the public trust for the public's benefit.*

**Response 12:** As noted above, PA SHPO concurred with PennDOT and NSR's APEs for the Pittsburgh Vertical Clearance Projects on June 5, 2018. The subject railroad corridor has been in its current location and serving interstate rail transportation for over a century, and the proposal continues that utilization and location. To the extent a consulting party has a specific area it believes is not included in the APE, the consulting party should specifically identify the area for further review by PA SHPO for its determination of whether to include the additional area. The undertakings' effects on historic properties will be assessed as part of the Pennsylvania History Code compliance process after concurrence on National Register eligibility is received. The initial Consulting Parties Meeting #1 was held to review the identification of historic properties, not project effects.

To clarify again, these projects are not federal projects, but are state-funded projects subject to the applicable requirements of Pennsylvania's Act 120 and Section 2002. As NSR has stated repeatedly, these processes are ongoing and the consulting parties discussions and historic review are a part of those processes. Environmental impacts arising from each of the projects, along with indirect and cumulative effects relating to potential corridor-wide impacts, will be considered as part of the Act 120 process.

With respect to Judge Pellegrini's Commonwealth Court Opinion as excerpted in RP3's comments, RP3 misinterprets the Opinion's conclusion and applicability. As an initial matter, the quoted portion of this decision related to the replacement of bridges within Allegheny Commons, namely the Ridge Avenue and West Ohio Street bridges. That work is now being performed by a party other than the railroad, namely the City of Pittsburgh, by removing the Ridge Avenue bridge and by raising the height of the West Ohio Street bridge to achieve the

required 22' clearance. The Opinion acknowledged the PUC's finding that the North Avenue Bridge is not within Allegheny Commons. *Norfolk Southern v. Pa. Public Utility Comm'n*, 870 A.2d 942, 946 (2005). The Opinion, read in its entirety, stands for the proposition that the railroad is the only entity that can seek waiver of the 22-foot clearance requirement, and that alternatives should be assessed. Nothing in that PUC order is inconsistent with the process NSR is and has been undertaking. Indeed, the alternatives analyses are underway and NSR has a pending proceeding before the PUC relating to North Avenue, in which it has sought a waiver of the clearance requirement and is working through the design in accordance with the PUC approval process.

*Section 2002 was amended to serve as a state counterpart to Section 4(f) of the U.S. DOT Act. Section 2002 permits approval of a project that requires the use of land from a historic site if (1) there is no feasible and prudent alternative to the use of the land, and (2) the program includes all possible planning to minimize harm to that historic site. Courts have held that the demolition of a historic structure,<sup>1</sup> or removal of part of a historic property constitutes a use of land from a historic site.<sup>2</sup> Courts have also determined that "constructive use" of a property occurs where evidence of an impact demonstrates that it would substantially impair the value of the property in terms of its use and enjoyment.<sup>3</sup> Courts have further recognized that noise, pollution and visual intrusion constitute constructive uses within the meaning of the statute.<sup>4</sup> It is undisputed that these cases apply to historic sites of national, state or local significance such as Allegheny Commons<sup>5</sup>, Allegheny West, Manchester, and Mexican War Streets properties.*

**Response 13:** The Section 2002 process is ongoing as part of the Act 120 clearance. With the exception of the Manchester Historic District, which is outside of the APE of any of the undertakings, all of the named properties, among others, are included in the projects' APEs and will be evaluated for effects on historic properties in a forthcoming Determination of Effect Report. However, Section 2002 compliance is not the focus of the consulting parties consultation, which pertains to the agreed upon Pennsylvania History Code compliance process as stated elsewhere herein.

*Since PennDOT and PA SHPO are following Section 106 processes, it should be noted that Section 110(f) guidelines provide as follows:*

*"Full consideration of historic properties includes consideration of all kinds of effects on those properties: direct effects, indirect or secondary effects, and cumulative effects. Effects may be visual, audible, or atmospheric. Beyond the effects from physical alteration of the resource itself, effects on historic properties may result from changes in such things as local or regional traffic patterns, land use, and living patterns."*

**Response 14:** To clarify again, PennDOT and PA SHPO are following the Pennsylvania History Code process for these state-funded projects. These types of effects will be evaluated in

---

<sup>1</sup> *Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis*, 701 F.2d 784 (9<sup>th</sup> Cir. 1983).

<sup>2</sup> *Ferris v. Secretary of the United States Dep't of Transp.*, No. 89-C779-C (W.D. Wis. 1990) (removal of lens in lighthouse constituted use).

<sup>3</sup> *Coalition Against a Raised Expressway, Inc. v. Dole*, [1987] 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,455 (S.D. Ala. Oct. 20, 1986).

<sup>4</sup> *Id.*

<sup>5</sup> 49 U.S.C. §303(c) (1994).

subsequent project reports and will be the subject of Consulting Parties Meeting #2. Section 110(f) of the NHPA applies specifically to the presence of a National Historic Landmark (NHL) directly or indirectly affected by a federal undertaking. Because there is no federal undertaking for the Pittsburgh Vertical Clearance Projects, Section 110 of the NHPA does not apply. In any event, no NHLs have been identified within the project areas. Further, the quoted excerpt is a portion of the Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs (Section 110 Guidelines) (63 FR 20496, April 24, 1998). The Section 110 Guidelines are not regulations, but generally set out the Secretary's formal guidance to federal agencies on meeting the requirements of NHPA Section 110, which is not applicable here.

*On August 21, 2018, PennDOT Deputy Secretary of Multimodal Transportation Jennie Granger, who is overseeing the funding of the PVCP, publicly stated that, "There is no physical way to raise the bridge at Brighton Road and North Avenue even a foot, let alone three feet. There will need to be a lot of track-lowering along that alignment."*

*In a September 18, 2018 email intended to clarify Ms. Granger's statement, PennDOT District 11 Executive Cheryl Moon-Sirianni explained:*

*"The North Avenue Bridge is actually on a diagonal through the intersection and is adjacent to buildings and the historic park. The geometry of this structure in relation to the intersection that is already slightly elevated would be very difficult. That is why we are investigating the potential to do a combination of lowering and raising of this structure. There is significant roadway reconstruction involved both on North and Brighton with a 3 foot raising of the bridge."*

*The bridges within the PVCP on the Northside are inextricably intertwined given the realization that the West North Avenue Bridge cannot be safely elevated, and the track depth must be lowered. Where, as here, a project exists that is not discreet but is complex, the Agency is under an obligation to negotiate a Programmatic Agreement (PA) covering ongoing and FUTURE activities rather than a Memorandum of Agreement<sup>6</sup>.*

**Response 15:** The referenced statement was inaccurately attributed to Deputy Secretary Granger. As an initial matter, preliminary conclusions as may have been asserted in other contexts and without full information may or may not be the final conclusions of PennDOT with respect to alternatives or any other aspect of the Vertical Clearance Projects. This is part of the purpose of Act 120 in developing information and input from stakeholders, including governmental entities, in developing appropriate detail and approach including alternatives. As noted above, the alternatives analysis is underway. A final determination of track lowering, bridge raising, or combination of both will be properly evaluated for any particular bridge using engineering and environmental factors, among other factors, in accordance with applicable Act 120 guidance. If an agreement document is needed to resolve adverse effects on historic properties, a Memorandum of Agreement has been determined to be the correct document by the PA SHPO as stated during Consulting Parties Meeting #1.

*Segmenting or splitting the project has precluded taking into account the full range of impact, and improperly restricted the area of potential effects.<sup>7</sup> The regulations define that area as "the geographic area or areas within which an undertaking may cause changes in the character or use of historic*

---

<sup>6</sup> 36 C.F.R. §800.13 (1995).

<sup>7</sup> 35 C.F.R. §800.4 (1995).

*properties, if such properties exist.<sup>8</sup> The area of potential effects is viewed broadly to go beyond the project limits or permit area.<sup>9</sup> The area of potential effects may include public or private property.<sup>10</sup> Predictive modeling and a survey canvassing 100% of the impact area (Merchant Street Bridge, North Avenue Bridge, Allegheny Commons, and surrounding neighborhoods) is warranted.<sup>11</sup>*

**Response 16:** Environmental impacts arising from each of the projects, along with indirect and cumulative effects relating to potential corridor-wide impacts, will be considered as part of the Act 120 process. The APEs for the proposed undertakings have been drawn to include areas that may result in direct and/or indirect effects to historic properties, consistent with the applicable Pennsylvania History Code provisions. As stated above, these APEs were approved by PA SHPO on June 5, 2018. Surveys canvassing 100% of the APEs have been conducted. Predictive modeling is not warranted in this instance, and PA SHPO did not suggest it may be necessary. Such modeling typically is used for archaeological investigations, which are not warranted by the proposed undertakings.

*For projects with state funding, where, as here, the PVCP projects individually and cumulatively have a significant environmental effect, more than an Environmental Documentation (ED), and an Environmental Evaluation Report (EER) are necessary. Similarly, Section 4(f) Non-applicability/No Use Form is inappropriate for the North Avenue Bridge and the PVCP.*

**Response 17:** Again, this comment is not relevant to the current historic properties review stage. While PennDOT will determine the appropriate level of environmental report, regardless of the level of environmental documentation that will be prepared for the projects, the Pennsylvania History Code consultation process remains unchanged.

*The project will result in proximity impacts that would substantially impair the features, activities, or attributes that make the property eligible for protection, in addition to perhaps requiring a right of way from a historic resource if only the bridge is raised to provide statutory clearance.*

**Response 18:** Right-of-way and proximity impacts will be determined through the alternatives analysis and Act 120 process and the conclusions RP3 makes in this comment are premature.

*Norfolk Southern stated in its February 11, 2019 comments to the initial JMT Report that:*

*“If PennDOT adopts the JMT Report with the rankings as existing in the draft [it will] likely lead to an EIS [Environmental Impact Statement] versus an EA [Environmental Assessment]. ...The report is supposed to be taken to the public officials to rebut the public’s request to lower the track*

---

<sup>8</sup> 36 C.F.R. §800.2(c) (1995).

<sup>9</sup> *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985); *New Hanover Township v. United States Army Corps. Of Eng’rs*, 796 F. Supp. 180 (E.D. Pa. 1992), vacated, 992 F.2d 470 (3d Cir. 1993) (court noted that project’s effect on adjacent historic properties would be considered).

<sup>10</sup> See *Pacific Gas Transmission Co. v. Richardson’s Recreational Ranch*, 773 F. Supp. 246 (D. Or. 1991), *aff’d*, 9 F.3d 1394 (9<sup>th</sup> Cir. 1993).

<sup>11</sup> 36 C.F.R. §800.4(a)(2) (1995); *c.f. Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983) (35 percent survey was sufficient); *Barcelo v. Brown*, 643 F.2d 835 (1<sup>st</sup> Cir. 1981), *rev’d on other grounds sub nom. Weinberger v. Barcelo*, 456 U.S. 305 (1983) (sample showed areas with no historic sites).

*through Allegheny Commons. When looking at the matrix, the items in red show high impact which generally move in the direction of an EIS...*

*Norfolk Southern's comments also pressure PennDOT and JMT to lower the scores for air, noise, and socioeconomic impacts from an Importance Weight of 4 [Very] and 5 [Extremely] down to 2 [Somewhat] which is the rating now found in the final report.*

*Norfolk Southern's comments also indicate that its own report will differ substantially from the JMT report, that the JMT report should be marked as a Draft because,*

*"Having two reports that disagree will have negative ramifications on the Act 120 process – and a resulting PennDOT ruling could be deemed arbitrary and capricious."*

*In a February 11, 2019 email, JMT Vice President Lisa Cooper stated in response to Norfolk Southern's comments that,*

*"We are completely uncomfortable with the direction this is going...Norfolk Southern is now suggesting that this study is going to contradict the Act 120 process...who's [sic] preferred alternative is it to build a new bridge [Merchant Street] with substandard vertical [road] clearance?" She continues, "NS States: 'The report is supposed to be taken to the public officials to rebut the public's request to lower the track through Allegheny Commons'...since when???" Finally, Ms. Cooper states, "NS states national facts with regard to doublestack trains; however, locally their [sic] have been incidents that we can't ignore. The Pittsburgh community has their vision and how they perceive to be impacted locally...increasing intermodal to remove trucks from roads on a national level means nothing to these folks if they have increased trains in their backyard. Our understanding was that we were supposed to develop an unbiased review based on cursory observations. We have not started an evaluation of the southside feasibility and based on the direction/expectations for the northside study by NS, I REALLY am uncomfortable with developing anything."*

*In addition, the project has a substantial adverse direct effect under Section 106. It also has indirect, secondary, and cumulative visual, audible, and atmospheric effects.*

**Response 19:** As an initial matter, NSR strongly objects to RP3's characterization of excerpts of correspondence as NSR attempting to exert undue influence over the process, the agencies, or consultants. The JMT report was a preliminary screening summary not prepared for the Act 120 process. The report did not quantify effects and preceded assessments required for the Act 120 process and environmental determination. The final determination regarding level of environmental documentation will be made by PennDOT as provided in applicable statutes, regulations, and guidance. The National Environmental Policy Act (NEPA) does not apply, but some PennDOT guidance documents employ and adapt concepts under NEPA. For NEPA projects, a higher level or Environmental Impact Statement type document is not required except where effects are significant and in the event the effects cannot be mitigated. NSR has been undertaking detailed analyses for these projects, which are still underway. Further, certain of the comments in the correspondence between JMT and PennDOT, to which NSR was not privy, relate to railroad operating matters that are outside the scope of these projects and outside the jurisdiction of any Pennsylvania state agency. RP3's mischaracterizations notwithstanding, the adverse effect conclusions made in RP3's comment are premature and unsupported at this phase. The determination of effects on historic properties will be completed as part of the Pennsylvania History Code compliance process and will be provided for review by consulting parties, in which RP3 may participate and provide comment. As noted above, NSR is undertaking the rest of the environmental review and documentation and those conclusions have yet to be finalized.

*The adverse health effects of the PVCP were formally recognized by 95 prestigious Pittsburgh-area doctors and other medical professionals who signed onto a request for a Health Impact Assessment: Details can be found here: [Medical Professionals Request for Health Impact Assessment of the PVCP, July 20, 2019](#).*

**Response 20:** See response to identical statement above.

*In connection with the PVCP, an EIS must be provided that contains a detailed discussion of the environmental impact, any adverse environmental effects that cannot be avoided, alternatives to the proposed action and other information. An impact may exceed the significance threshold depending on the degree to which it affects the “unique characteristics of the geographic area such as proximity to historic or cultural resources” or “sites, structures or objects listed in or eligible for listing in the National Register of Historic Places.”<sup>12</sup>*

**Response 21:** See response to similar comments above. The compliance process for the Pennsylvania History Code is the same regardless of the type of environmental documents being prepared (ED, EA, or EIS).

*Because of the isolated objective, the process has failed to take into account the cumulative impact on the park and community, failed to consider alternatives, and to date, an inadequate analysis of mitigation measures.<sup>13</sup>*

**Response 22:** It is unclear to what RP3 refers in its reference to “isolated objective.” The purpose and need for the projects has been clearly stated and is posted on the project website. With respect to the remainder of the comment, as noted above, the remaining analyses for Act 120 and Section 2002 are underway and suggestions that the analysis should have been completed already are misplaced.

*In Deputy Secretary Granger’s September 6, 2018 correspondence to State Senator Wayne Fontana, she stated that, “Resources within the [20-mile] corridor, such as Allegheny Commons, will be given full consideration in the avoidance, minimization and mitigation of any potential impacts.” RP3 submits that the 27 communities affected by the PVCP deserve no less.*

**Response 23:** It is unclear to what RP3 refers with respect to the 27 communities, and NSR reiterates that the APEs for the projects have been identified and approved. As with the other aspects as stated repeatedly herein, analysis of avoidance, minimization, and mitigation efforts

---

<sup>12</sup> 40 C.F.R. §1508.27(b)(3), (8) (1995).

<sup>13</sup> *City of Grapevine v. Department of Transp.*, 17 F.3d 1502 (D.C. Cir.), cert. denied, 115 S. Ct. 635 (1994) (court found that agency considered cumulative impacts of most elements of project, but those elements not considered could not be included in approved plan); *Walsh v. United States Army Corps of Eng’rs*, 757 F. Supp. 781 (W.D. Tex. 1990) (court upheld agency study where EIS included analysis of cumulative impacts of proposed actions, but not cumulative impacts of “contemplated” actions); *City of Grapevine v. Department of Transp.*, 17 F.3d 1502 (D.C. Cir.), cert. denied, 115 S. Ct. 635 (1994); *Communities, Inc. v. Busey*, 956 F.2d 619 (6<sup>th</sup> Cir.), cert. denied, 506 U.S. 953 (1992); *Communities, Inc. v. Busey*, 956 F.2d 619 (6<sup>th</sup> Cir.), cert. denied, 506 U.S. 953 (1992) (court upheld agency EIS that identified and discussed potential mitigation measures, even though EIS did not specify which mitigation measures would be adopted); *Sierra Club v. Watt*, No. CV-835878 AWT (C.D. Cal. Nov. 18, 1983); *aff’d sub nom. Sierra Club v. Clark*, 774 F.2d 1406 (9<sup>th</sup> Cir. 1985) (court found agency in compliance with NEPA where EIS had not been incorporated into EIS).

to resolve adverse effects on historic properties are assessed at later points in the historic consultation process and those issues are not relevant to the current request for comments. There will be opportunity for public comment relating to those later stages of the analysis and review under Act 120. To the extent RP3's comments or comments of other consulting parties relate to historic properties, those issues and comments are being addressed in this consulting parties process as appropriate.