

**EARLY DEVELOPMENT AGREEMENT
BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION
AND
THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION
FOR
THE RAPID BRIDGE REPLACEMENT PROJECT**

THIS EARLY DEVELOPMENT AGREEMENT ("EDA" or "Agreement"), made and entered into this 9th day of December, 2014, by and between the COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION (hereinafter "PennDOT") and the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, (hereinafter "FHWA"):

WITNESSETH

WHEREAS, on October 6, 2004, FHWA announced, in the *Federal Register* at 60 Fed. Reg. 59983, a new special experimental project to explore alternative and innovative approaches to the overall project development process known collectively as Special Experimental Project Number 15 ("SEP-15") pursuant to the authority in 23 U.S.C. § 502(b)(1)(B);

WHEREAS, SEP-15 is designed to permit tests and experimentation in the project development process for title 23 projects that are specifically aimed at attracting private investment and lead to increased project management flexibility, more innovation, improved efficiency, timely project implementation, and new revenue streams;

WHEREAS, under SEP-15, in order to facilitate tests and experimentation in the project development process, FHWA may grant modifications or deviations from the current requirements contained in title 23 of the United States Code and title 23 of the Code of Federal Regulations;

WHEREAS, on July 15, 2014, PennDOT, submitted an application under SEP-15 requesting a deviation from 23 CFR 636.109(b)(6) and 23 CFR 636.109(b)(7) for PennDOT's Rapid Bridge Replacement Project ("the Project") in order to allow a private partner to prepare draft environmental documentation for PennDOT's review, which currently is prohibited under FHWA's Design-Build Contracting regulations;

WHEREAS, the Project is a key component of PennDOT's effort to address the Commonwealth's systemic backlog of almost 4,800 structurally deficient bridges and to save costs on design, permitting, construction and ultimately maintenance, PennDOT intends to select a private partner (Development Entity or DE) to design, build, finance, and maintain 558 bridges ("Replacement Bridges") throughout the Commonwealth of Pennsylvania using newly granted Commonwealth authority under Pennsylvania's Public-Private Transportation Partnership Law, 74 Pa. C.S. §§91101-91124;

WHEREAS, if PennDOT were to replace each of these bridges individually, using its traditional procurement schedule, PennDOT estimates that the process could take 10 – 15 years; however, bringing the resources of a private sector partner to bear, PennDOT estimates it will be able to deliver the replacement of 99 percent of the bridges in the Project in just 42 months;

WHEREAS the Replacement Bridges included in the Project are categorized as either (1) Early Completion Bridges (“ECB”), which are the replacement bridges for which PennDOT will obtain all NEPA related approvals and applicable environmental permits, or (2) Remaining Eligible Bridges (“REB”) as defined in section 2.5 of this EDA, and

WHEREAS, on July 31, 2014, FHWA accepted PennDOT’s SEP-15 application for the Project; and

WHEREAS, under SEP-15, an EDA between PennDOT and FHWA is required in order to specify the conditions relating to the modifications or deviations from Federal requirements that are granted for the Project as well as to identify the reporting requirements that will be used to evaluate the extent to which the modifications or deviations contributed to the success of the process.

NOW THEREFORE, PennDOT and FHWA hereby agree as follows:

SECTION 1. SCOPE OF PROJECT AND EARLY DEVELOPMENT AGREEMENT

1.1 Scope of the Project

The DE will conduct environmental studies, prepare environmental documentation, and complete the required preliminary engineering for the 470 REB which are part of the Project and which are covered by a Level 1 or Level 2 categorical exclusion (CE). The DE will obtain the necessary permits and approvals for each REB included in the Project. PennDOT conducted initial screenings and scoping field reviews to make sure that the bridges selected for this Project are eligible for a CE under the Bridge and Roadway Programmatic Agreement (BRPA) between PennDOT and FHWA Pennsylvania Division, a Level 1 CE or a Level 2 CE. This scoping included a determination that an environmental assessment or an environmental impact statement is not required under applicable law.

1.2 Scope of the Early Development Agreement

This EDA is intended to identify and establish the parameters of the modifications or deviations from title 23 Code of Federal Regulations for the Project, which shall be hereinafter referred to as the “experimental features.” Nothing in this EDA shall be construed as a relinquishment of any Federal oversight or stewardship responsibility.

SECTION 2. DEFINITIONS

2.1 Applicant

“Applicant” means PennDOT.

2.2 DE

“DE” means the Development Entity (private sector partner) that is awarded the contract for the Project.

2.3 NEPA

“NEPA” means the National Environmental Policy Act of 1969, codified at 42 U.S.C. §§ 4321, et seq.

2.4 PPA

“PPA” means the Public Private Partnership Agreement for the Project executed by PennDOT and the DE.

2.5 Remaining Eligible Bridges (REB)

“Remaining Eligible Bridges” means the approximately 470 replacement bridges for which the DE must obtain the environmental approvals from PennDOT or FHWA along with any applicable permits through the permitting agencies.

2.6 Section 106

“Section 106” means Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. §470f.

2.7 Section 4(f)

“Section 4(f)” means Section 4(f) of the U.S. Department of Transportation Act of 1966, as amended, 49 U.S.C §1653f.

SECTION 3. GENERAL PROVISIONS

3.1 Applicability of Federal Law

A. All Federal laws, rules and regulations shall be applicable to any project using Federal funds, including, but not limited to, the requirements set forth in titles 23 and 49 of the United States Code, and titles 23 and 49 of the Code of Federal Regulations, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601 to 4655, and the

FHWA's implementing regulations found at 49 C.F.R. Part 24, and the NEPA, with respect to any related facility, except as otherwise specified herein.

B. With respect to title 23 of the United States Code and title 23 of the Code of Federal Regulations, PennDOT may apply to the REBs included in the Project the SEP-15 experimental features described in Section 4 of this EDA. PennDOT's use of such experimental features shall be deemed to be in full compliance with Federal law, rules and regulations.

3.2 Withdrawal of Approval for Experimental Features

FHWA's approval of the SEP-15 experimental features may be withdrawn at any time by the FHWA if the FHWA determines that the experimental features are not in the public interest. Prior to any such withdrawal, the FHWA will issue a written notice to PennDOT describing the FHWA's concerns and give PennDOT a reasonable period of time to address the FHWA's concerns. However, during such period of time, no further work shall be conducted based on the approval at issue until such time as the FHWA determines that PennDOT has fully addressed the FHWA's concerns. Upon withdrawal of approval of an experimental feature, the applicable requirements of 23 CFR 636.109(b)(6) and/or 636.109(b)(7) shall immediately apply. Any withdrawal of approval under this EDA shall apply only to bridge replacement projects that have not received final NEPA approval from FHWA/PennDOT as of the date of the FHWA notice. With respect to prior final FHWA/PennDOT NEPA decisions on replacement bridges subject to this EDA, the withdrawal of approval will not cause the prior final NEPA decisions to become invalid or require modification of those decisions based on non-compliance with sections 636.109(b)(6) and/or 636.109(b)(7). However, FHWA may identify corrective action(s) that must be taken on such replacement bridge projects as a condition of any required FHWA approval and/or Federal-aid participation. Nothing in this EDA permits deviation from applicable requirements of title 23 of the United States Code and title 23 of the Code of Federal Regulations except as specified in Section 4, and nothing in this paragraph shall prevent the FHWA from performing any of its obligations or regulatory functions pursuant to applicable law, or undertaking any lawful action or remedy to enforce applicable law.

3.3 Access to Documents

As provided in 23 C.F.R. § 1.5, PennDOT shall furnish, or make available, to the FHWA such information as the FHWA deems necessary to administer the Federal-aid program in connection with the Project and ensure compliance with the applicable Federal requirements. PennDOT must make available to the FHWA, upon reasonable notice, any documents and communications, in whatever format or media, that is pertinent to the Project or to performance of this EDA. This provision applies to documents and communications of both PennDOT and the DE. PennDOT is responsible for ensuring its contract with the DE contains appropriate provisions that provide PennDOT with the necessary access to the DE's documents and communications.

3.4 Order of Precedence

Except as otherwise specified herein, this EDA supersedes the July 15, 2014, PennDOT SEP-15 application and the FHWA July 31, 2014, SEP-15 acceptance letter. The July 15, 2014, PennDOT SEP-15 application and the July 31, 2014, FHWA SEP-15 acceptance letter are attached to this EDA

as Exhibits A and B, and may be used for historical and interpretive purposes, *provided that* this EDA shall be given effect to the extent there is any conflict. Any modifications to this EDA shall supersede any conflicting provisions of the July 15, 2014, SEP-15 application, the July 31, 2014, SEP-15 acceptance letter and any prior modifications to this EDA.

SECTION 4. EXPERIMENTAL FEATURE – PREPARATION OF NEPA DOCUMENTATION AND NEPA CONSULTANT SELECTION AND CONTROL

4.1 Deviations from 23 CFR 636.109(b)(6) and 23 CFR 636.109(b)(7)

A. FHWA acknowledges and agrees to PennDOT's deviation from 23 CFR 636.109(b)(6) and 23 CFR 636.109(b)(7) for the Project, as provided in the FHWA July 31, 2014, SEP-15 acceptance letter, by allowing the DE to be responsible for preparing the environmental supporting documentation and draft decision documents, and allowing the DE to select and retain exclusive control over the consultant(s) that perform(s) environmental studies and prepare(s) the environmental documents.

B. The purposes of 23 CFR 636.109(b)(6) and 23 CFR 636.109(b)(7), which prohibit a design-builder's involvement in the NEPA decision making process, are to: (1) Insulate against conflicts of interests; (2) Ensure the integrity and objectivity of the NEPA process; and (3) Protect the public's faith in the integrity of the NEPA process.

C. In order to ensure that the purposes and requirements of 23 CFR 636.109(b)(6) and 23 CFR 636.109(b)(7), as listed in 4.1.B are protected, the following conditions must be met:

(i) **DE NEPA Documentation.** For each bridge, the DE will prepare and provide to PennDOT the appropriate field data, impact analyses (if required for the proposed CE), and draft NEPA documentation. The DE will use PennDOT's standard systems such as the CE Expert System, Project Path, and the Environmental Commitments and Mitigation Tracking System for the completion of the NEPA documents and to track the completion of the mitigation. These systems have a formal quality control and approval process by PennDOT.

(ii) **Section 106.**

- a) The individual(s) proposed by the DE must meet specific qualifications and must have successfully completed training with PennDOT, the Pennsylvania Historical and Museum Commission (the SHPO), and FHWA.
- b) PennDOT will be involved in the dispute resolution process.
- c) PennDOT will coordinate with FHWA, the SHPO, and Federally Recognized Tribes to resolve adverse effects.
- d) PennDOT will draft required Memorandum of Agreement/Letter of Agreement (MOA/LOA) and circulate for signature.

- (iii) **Section 4(f).** For Section 4(f) resources, PennDOT and/or FHWA will review and must approve any proposed 4(f) determinations including applicable checklists (i.e., Programmatic, De Minimis) and Individual Section 4(f) Evaluations.
- (iv) **Public Involvement.** A PennDOT representative, independent of the DE, will attend all public meetings held for the individual bridges to ensure that the proceedings are properly administered and documented consistent with PennDOT's public involvement plan approved by FHWA.
- (v) **PennDOT NEPA Reviews.** PennDOT will require the DE, in accordance with the PPA, to submit each CE or other NEPA documentation relating to CE determinations, to PennDOT for its substantive review and independent evaluation. PennDOT will evaluate the data, analyses, and documentation necessary for the NEPA decision. PennDOT also will compare the impacts identified by the DE to the results of the scoping-phase field screening PennDOT did for the bridge. PennDOT will use the standard systems such as the CE Expert System, ProjectPath, and the Environmental Commitments and Mitigation Tracking System for purposes of reviewing and approving the NEPA documentation and assuring the completion of required mitigation.
- (vi) **PennDOT/FHWA NEPA Approval.** FHWA and/or PennDOT will make the final NEPA decisions in accordance with FHWA's NEPA delegation procedures and after independently evaluating the information and making independent judgments about the potential project impacts. The FHWA will provide oversight. The FHWA and PennDOT will take full responsibility for the scope and contents of the NEPA documents.
- (vii) **No Final Design Prior to NEPA Approval.** The DE is not permitted to commence final design activities—e.g., right-of-way acquisition—until after receiving NEPA approval (which is also needed to receive Design Field View approval from PennDOT to move into Final Design).
- (viii) **Environmental Mitigation as a Compensation Event.** PennDOT will pay for any NEPA mitigation not already pre-defined in the DE's bid proposal. This means that the DE will receive no financial benefit and bear no financial risk not already priced into its proposal related to environmental mitigation or project delays resulting from environmental findings in the NEPA process. PennDOT will compensate the DE separately for the cost of NEPA-related environmental mitigation actions. This includes final design and construction tasks such as wetland replacement, Phase III Archeological data recovery excavations, associated interpretive materials, recordation of the historic bridge and associated historic district, and context sensitive design elements.
- (ix) **Elimination of Pecuniary Harm to the DE for NEPA-related decisions by the relevant agencies.**

- a) Where a specific bridge becomes problematic for any reason related to the individual bridge, PennDOT, in its sole discretion, can remove that bridge from the Project provided that a new replacement bridge is designated via a change order. All change orders for the Project are subject to review and approval by FHWA.
- b) The change order process used to remove or replace a REB will operate so as to ensure that the DE is left in a position neither better nor worse as a result of the removal of the bridge. In other words, if the FHWA concurs, PennDOT will introduce an alternative bridge into the Project with substantially similar attributes. This will include initiation of a change order to offset any additional costs that may be associated with the new replacement bridge, so as to maintain equilibrium of the DE's financial interest in the Project.
- c) All design documents and work developed for a REB that is removed from the Project will be transferred to PennDOT for its unrestricted use. The DE will be compensated for the work completed on the removed bridge via the change order.
- d) New replacement bridges will be drawn from either a predetermined grouping of bridges or from bridges in PennDOT's regular capital improvement program.

SECTION 5. EVALUATION CRITERIA

5.1 Purpose

The purpose of this section is to describe the evaluation criteria that PennDOT shall use in evaluating the Experimental Features.

5.2 Time and Cost Savings

PennDOT will evaluate the following to measure time savings:

A. **Procurement Time:** FHWA and PennDOT agree there is no valid quantitative method to evaluate the anticipated procurement time and cost savings for the Project. Therefore, PennDOT will prepare a qualitative evaluation of the estimated cost and time savings for the REB compared to the delivery of the REB using PennDOT's traditional procurement process.

B. **Costs and Time for Environmental Work:** For each REB, PennDOT will determine the costs and time required (person hours for the work, and duration of the activities) for the DE to carry out the activities listed below in 5.2 B(i) through B(iv), and assess cost-savings and time-savings by comparing to a baseline consisting of PennDOT's active non-P3 projects and the ECBs against the cost to PennDOT for either: (a) using its staff to complete NEPA studies and NEPA documentation on a Bridge with similar environmental characteristics; or (b) selecting and contracting with a consultant to complete NEPA studies and NEPA documentation on a Replacement Bridge with similar environmental characteristics.

- (i) Manage and oversee the work of environmental consultant(s), including QA/QC activities for consultant work plans and work products.
- (ii) Conduct NEPA studies and prepare NEPA documentation for each REB.
- (iii) Complete the NEPA review process, using scoping/scoping review as the start date and last NEPA decision as the end date.
- (iv) Complete the entire environmental review and permitting process (i.e., all other required permits and approvals) using the date that the DE started NEPA work on the REB as start date and final agency decision as end date.

C. **Cost of Environmental Mitigation:** PennDOT will compare actual mitigation costs for the REBs to PennDOT non P3-projects of similar environmental characteristics receiving permits and approvals and the ECBs. In addition, PennDOT will interview the DE for the purpose of identifying which of the individual ECB bridges for which mitigation needs could have been changed if an alternate bridge through the benefits of the Alternate Technical Concepts or other contractor-specific means and methods would have been built but was not due to the cost and/or time required to amend the NEPA document, permits, right-of-way plans, and other project documents.

5.3 Impacts to the Quality and Integrity of the Environmental Process

PennDOT will evaluate the following to measure impacts to the quality and integrity of the environmental process:

A. For each REB, PennDOT shall analyze the qualitative impacts on environmental review and decision-making, both adverse and beneficial, of allowing the DE to select and control the environmental consultant or the use of DE staff, prepare the environmental documentation, and handle negotiations with permitting agencies. Impacts considered will include, at a minimum:

- (i) Effects on the interagency coordination process using Sections 5.3.B.ii, 5.3.B.iii, 5.3.B.vi, and 5.3.C.iii of this EDA;
- (ii) Effects on the integrity of the management and performance of the environmental work (i.e., whether there are indications of bias in the DE's execution of the work) using Section 5.3.B.i, 5.3.B.iv, 5.3.B.v, 5.3.B.vi and 5.3.C of this EDA; and
- (iii) Effects on the public, including the public involvement process using Section 5.3.B.ii, 5.3.B.iii, 5.3.C.iii of this EDA.

B. PennDOT will evaluate the accuracy and quality of the environmental documents prepared by the DE, and the consistency of the review process with NEPA and other environmental requirements. This will include, at a minimum:

- (i) For each Replacement Bridge, a comparison between PennDOT's scoping review and the NEPA evaluations for (a) the ECB, and (b) the REB. Where differences exist, PennDOT will quantify and analyze the reasons for the differences;
- (ii) For each REB, PennDOT will identify the number and types of comments and/or complaints received from agencies and/or the public related to the environmental

review process, and assess how those relate to the DE's performance. Compare the data to a baseline consisting of PennDOT's active non-P3 projects and the ECBs using PennDOT's normal process, including environmental consultants procured and managed by PennDOT and/or PennDOT staff;

- (iii) For each REB, identify the process used and time required to resolve objections or concerns from the agencies, the public or PennDOT. Compare this information to the same information for the ECB. As part of this evaluation, PennDOT will interview the agencies on the quality and effectiveness of the DE-managed environmental review process obtaining examples if objections and concerns are expressed by the agency(ies). FHWA will participate in the interviews as determined necessary by the Division office;
- (iv) Determine the number of REBs withdrawn as not CEs, or elevated to CE2 status, and identify and assess the reasons for the change in status from the CE classification identified in the PennDOT Scoping Document. Compare the data to a baseline consisting of PennDOT's active non-P3 projects carried out in the same time period as the PPA;
- (v) PennDOT, FHWA, and the SHPO will conduct periodic cultural resources reviews related to the 106 process and the DE's performance consistent with the terms of the implemented Section 106 MOA/LOA.

C. For each Replacement Bridge, PennDOT shall analyze the effectiveness of the financial and procedural protections designed to ensure the DE will receive no financial benefit and bear no financial risk not already priced into its proposal related to environmental mitigation or project delays resulting from environmental findings in the NEPA process. As above, PennDOT shall analyze both the ECB and the REB. This shall include, as a minimum, evaluation of:

- (i) The number of requests for change orders based on decisions or events relating to the environmental review process, the basis for the requests, and the disposition of those requests;
- (ii) The financial (time and expenses) impacts of any denied change order on the DE, including whether there is any indication the impacts had an adverse effect on the DE's performance.
- (iii) Any concerns expressed by reviewing agencies, the public, PennDOT staff, or FHWA suggesting the performance of the DE has been affected by potential impacts on the DE's financial interests.

5.4 Overall Assessment

Based on all the information gathered and analyzed pursuant to Sections 5.2 and 5.3, PennDOT will assess:

- (A) Whether the protections used under this SEP-15 adequately insulated the environmental review process against conflicts of interest, ensured the integrity and objectivity of the NEPA process, and protected the public's faith in the integrity of the NEPA process.
- (B) Whether the regulations subject to the SEP-15 experiment could be amended or revoked without adverse effect on the NEPA process, including the factors listed in 5.4(A).
- (C) What refinements or modifications would improve outcomes should a similar SEP-15 be approved for further testing of the experimental features.

SECTION 6. REPORTING

6.1 Annual Progress Report

PennDOT shall prepare or commission a third-party to prepare an Annual Progress Report to be provided no later than 60 days after the first 12 months following the Notice to Proceed for the Project, and then once every 12 months thereafter until the end of construction.

6.2 Annual Progress Report Components

The Annual Progress Report shall include the following components:

- (A) An analysis of the results of the data collected for each of the evaluation criteria described in Section 5.2 and 5.3.
- (B) An evaluation of reactions from the public, Federal/State agencies, and the industry to allowing the DE to prepare the environmental studies and documentation.
- (C) Discussion of any major problems or issues that have occurred and how they were resolved.
- (D) Listing of any bridges substituted for Replacement Bridges, with reasons for the substitutions.
- (E) Summary of the findings from the Section 106 and NEPA monitoring in the Environmental and Cultural Resources sections of the Technical Provisions.

6.3 Final Report

A final full evaluation report will be submitted to the Pennsylvania Division Office of the FHWA within six (6) months of the completion of construction of all REBs under the Project.

6.4 Final Report Components

The Final Report shall include the following components:

- (A) An analysis of the cumulative results of the data collected and analyzed for each of the evaluation criteria described in Sections 5.2, 5.3, and 5.4.
- (B) Summary of assessments by the agencies and the industry regarding the use of the Experimental Features.
- (C) Summary of the NEPA submissions prepared by the DE and approved by PennDOT, and the associated timeframes compared to similar bridge replacement project completed outside this Project.
- (D) Summary of the findings from the Section 106 and NEPA monitoring in the Cultural Resources section of the Technical Provisions.
- (E) Assessment and documentation of the project delivery impacts. This will include the cost savings for the NEPA process and cost savings associated with the overall time savings in project delivery and the streamlined preliminary engineering process approach using, among other things, the results of the Cost Estimate Review.
- (F) Cumulative listing of any bridges substituted for Replacement Bridges, with reasons for the substitutions.
- (G) Discussions of any major problems or issues that occurred during the Project as a result of the Experimental Feature and how those were resolved.
- (H) Recommendations for future P3 Projects

SECTION 7. MISCELLANEOUS PROVISIONS

7.1 Amendments

This EDA may be amended at any time by written agreement of FHWA and PennDOT. Amendments to this EDA may include, but are not limited to, the addition or deletion of SEP-15 experimental features, modification of performance measures, and modification of reporting requirements. The FHWA Pennsylvania Division Administrator shall have the authority to amend this EDA for the FHWA, subject to the concurrence of the Office of Innovative Program Delivery.

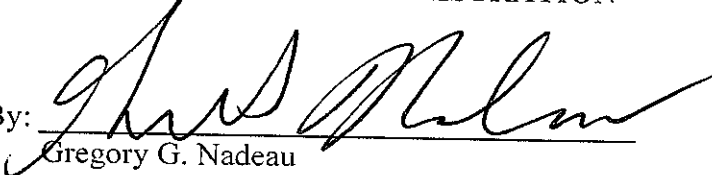
7.2 Original Copies

This EDA shall be prepared in duplicate so that each signatory has an original copy.


SIGNATURE PAGE FOLLOWS

IN WITNESS THEREOF, the Parties hereto have caused this Early Development Agreement to be duly executed in duplicate as of the day and year first written above, either on one original document or via multiple counterparts through facsimile, which, when taken together, shall constitute one and the same instrument.

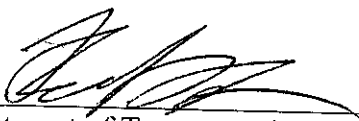
FEDERAL HIGHWAY ADMINISTRATION

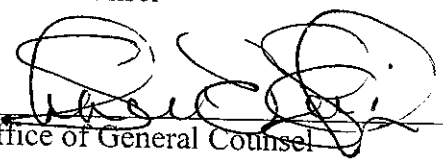
By: 
Gregory G. Nadeau
Acting Administrator

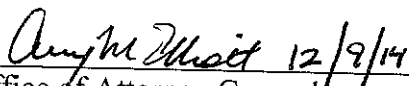
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

By: 
Barry J. Schuch, P.E.
Secretary of Transportation

APPROVED AS TO FORM AND LEGALITY

 11/7/2019
Department of Transportation (Date)
Chief Counsel

 11/12/14
Office of General Counsel (Date)
Deputy General Counsel

 12/9/14
Office of Attorney General (Date)
Deputy Attorney General





July 15, 2014

Ms. Renee Sigel
Division Administrator
Pennsylvania Division
Federal Highway Administration
228 Walnut Street, Room 508
Harrisburg, Pennsylvania 17101-1720
Email: renee.sigel@dot.gov

Re: Pennsylvania Department of Transportation "SEP-15" Request for Variances from 23 CFR 636.109(b)(6) and (7) in connection with the Pennsylvania Rapid Bridge Replacement Public-Private Partnership Project

Dear Division Administrator Sigel:

1. INTRODUCTION

This letter constitutes an application to the Federal Highway Administration (**FHWA**) by the Pennsylvania Department of Transportation (**PennDOT**) for approval pursuant to "Special Experimental Project Number 15" (**SEP-15**) to deviate from portions of clause (6) and clause (7) of 23 CFR 636.109(b) regarding the involvement of a developer and consultants in preparing documentation required by the National Environmental Policy Act of 1969, as amended (**NEPA**). This application relates to the Pennsylvania Rapid Bridge Replacement Public-Private Partnership Project (the **Project**).

The Project will be the first "multi-asset" transportation project of its kind to be procured in the United States as a public-private partnership. If granted, the requested variance will enable PennDOT and FHWA to evaluate the efficiencies, if any, of using a single contractor for all phases of the Project, including the NEPA process. If shown to be an innovation of value to the Federal Aid Highway Program (and if and when duly codified by law or regulatory action), the approach may have application nationwide as a project delivery method for addressing the systemic problem of structurally deficient bridges in the United States.

PennDOT is procuring the Project in compliance with relevant federal regulations in order to qualify the Project for Federal assistance. The U.S. Department of Transportation (**USDOT**) has made a conditional allocation of private activity bonds (**PABs**) for the Project in the principal amount of \$1.2 billion.

2. SEP-15 AND PENNDOT'S APPROACH IN SUBMITTING THE APPLICATION

Pursuant to its authority set forth in 23 U.S.C. 502(b), FHWA established SEP-15 to encourage tests and experimentation in procurements of federal aid transportation projects. Among the specific objectives of SEP-15 is the promotion of project management flexibility, innovation, improved efficiency, and timely project implementation.

In connection with prior SEP-15 applications, FHWA has recognized that experimentation, by its nature, requires the assumption of risk and that, without the assumption of risk, the federal-aid highway program cannot receive the benefit of experimentation for which SEP-15 was established.

In Section 5 of this application, PennDOT sets forth a series of terms and conditions that eliminate, or mitigate, the risk of prejudicial actions for the Project. Such terms do not replicate the protections of clauses (6) and (7) completely, however, and deliberately so. The purpose of the experiment contemplated by this application is to evaluate whether certain limitations on the activities of design-builders and consultants can be modified to achieve efficiencies without compromising the objectives for which clauses (6) and (7) were promulgated. While it is the specific purpose of this application to deviate from FHWA policy, it should be fully understood that there is no intent to alter the required tasks associated with the NEPA process. It is on this basis that PennDOT respectfully submits this application.

3. PROJECT BACKGROUND

The Project encompasses the design, construction, financing, and lifecycle maintenance of approximately 559 bridges (each, a **Replacement Bridge**) that will replace structurally deficient bridges in the Commonwealth of Pennsylvania (the **Commonwealth**) through a public-private transportation partnership agreement (the **PPA**)¹ in order to accelerate the design and construction of the Replacement Bridges. The expected time required for design and construction is approximately 3.5 years. Additional details on the Project are included in **Exhibit 1** of this application.

From an environmental perspective, all Replacement Bridges included in the Project are scoped as a Categorical Exclusion (**CE**), and the majority of the bridges are generally classified as small bridges. Of these bridges, 376 are less than 50 feet in length, 142 are between 50 feet and 100 feet, and 41 are over 100 feet. PennDOT completed an initial screening of the Replacement Bridges and completed the initial scoping field view and scoping documentation. As a result of the scoping field views, the Replacement Bridges have been scoped as follows:

- (a) 464 Replacement Bridges are eligible for a “stipulated” categorical exclusion under the Bridge and Roadway Programmatic Agreement (BRPA)²; and
- (b) 95 Replacement Bridges are eligible for Level 1 CEs.

This request for a variance applies only to the “**Remaining Eligible Bridges**” as described in **Exhibit 1**.

4. PURPOSE AND EXPECTED VALUE OF THE EXPERIMENTAL FEATURE

4.1 Purpose

PennDOT is requesting a variance of portions of clauses (6) and (7) of 23 CFR §636.109(b) in order to evaluate the efficiencies, if any, of a public-private partnership procurement involving bridge bundling—specifically streamlining the process, and accelerating the time, required to deliver a project which will result in a substantial reduction of project costs. To this end, PennDOT intends to have the Development Entity complete the required preliminary engineering, conduct NEPA studies, and prepare

¹ The PPA is authorized by Act 88 (2012) of the Commonwealth (74 Pa. C.S. 9101 *et seq.*).

² The Bridge and Roadway Programmatic Agreement (BRPA) is an agreement between FHWA PA Division and PennDOT. The BRPA applies to a subset of projects that: (a) qualify as a CE Level 1; (b) are in the same approximate footprint; (c) modifications compared to the existing bridge do not exceed certain criteria; (d) ensure that wetland impacts do not exceed 0.05 acres; (e) have no adverse effects under Section 106; (f) “no conflict” or “no effect” for T&E species; and (g) do not require an individual Section 4(f) evaluation.

NEPA documentation for each of the Remaining Eligible Bridges. The Development Entity will select and contract with the consultant who completes the NEPA studies and the NEPA documentation. Clauses (6) and (7) of 23 CFR 636.109(b) are intended to prevent the developer of a project, whether in its capacity as the design-builder or a consultant, from prejudicing the NEPA analysis with respect to the Project. The requested variances are as follows:

- (a) *Clause (6): The design-builder must not prepare the NEPA document or have any decisionmaking responsibility with respect to the NEPA process.* PennDOT is requesting a waiver from the requirement that the design-builder not prepare the NEPA document, provided that decision-making responsibility will remain with PennDOT and FHWA, as applicable.
- (b) *Clause (7): Any consultants who prepare the NEPA document must be selected by and subject to the exclusive direction of the contracting agency.* PennDOT is requesting a waiver from the requirement that PennDOT select the consultant that prepares the NEPA document and retain exclusive control over the consultant.

In order to achieve the purpose of such clauses, PennDOT and FHWA, as applicable, will retain control over the design-builder's and consultant's Project deliverables by retaining full approval authority in the NEPA process consistent with the purposes of clause (6) and clause (7).³ The difference between the arrangement contemplated by this application, on the one hand, and PennDOT's current practices, on the other, is that: (i) the design-builder will participate in the preparation of the NEPA documents, and (ii) the consultant will not be directly engaged by PennDOT nor under PennDOT's exclusive control but instead engaged by PennDOT's private partner under the PPA.

The **P3 Bridges Screening, Scoping, and NEPA Decision Annotated Flowchart** as provided in **Exhibit 2** describes the early project development actions performed by PennDOT along with the NEPA process that will be undertaken for this Project.

4.2 Expected Value

If permitted as an Experimental Feature and subject to the conditions described below in Section 5, the Development Entity's consultant participation in developing NEPA documentation will enable PennDOT to procure the Project under a public-private partnership procurement achieving efficiency in implementing the Project, project acceleration, and cost reductions while maintaining the objectives of clauses (6) and (7) of 23 CFR 636.109(b). The following are additional details on the benefits expected to be realized by transportation agencies and the public if the requested deviations are approved by FHWA:

- (a) Variance from clause (6) reduces the overall timeline of a typical design-build bridge project by approximately 8 months. Refer to **Exhibit 3** for a comparison of project timelines for a standard design-build process and a design-build process with the requested SEP 15 variances.
- (b) Variance from clause (6) & (7) eliminates the time and cost associated with procuring and managing separate consultant contracts to prepare the NEPA documents. Given PennDOT's regular program and the additional projects being advanced through its Decade of Investment program, if PennDOT has to prepare the documentation necessary for NEPA clearances, PennDOT will have to procure the services of another consultant.

³ Presently, PennDOT uses consultants to complete the NEPA process and documentation (which includes using the PennDOT CE Expert System).

- (c) Variance from clause (7) reduces costs by allowing the Development Entity to obtain the most appropriate and cost-effective professional services in preparing the NEPA documents for the individual bridges. PennDOT's standard practice for preparation of NEPA documents involves a consultant contract for services that includes the study of environmental variables that may or may not be fully definable in the early stage of the project. For this Project, the Development Entity will be able to structure the NEPA document development work tasks to bundle similar services and eliminate or minimize contingency tasks.
- (d) Variance from clause (6) allows earlier incorporation of innovative solutions because the Development Entity will be completing the preliminary design while considering the innovative concepts of an individual contractor or product supplier. Therefore the need to redesign a bridge in final design will be eliminated resulting in fewer re-evaluations, right-of-way revisions, and environmental impacts.
- (e) Variance from clauses (6) & (7) benefits environmental resource agencies by allowing the Development Entity to group similar projects and coordinate reviews to minimize the draw on staff resources.
- (f) Variance from clause (6) benefits PennDOT since the same entity will develop, design, and implement the mitigations approved by PennDOT and FHWA, as applicable, which will result in greater efficiencies and more successful mitigation with input from the construction personnel with regard to constructability and practicality issues surrounding the implementation of the mitigation.
- (g) Variance from clause (6) benefits PennDOT because prospective Development Entities will be able to price their proposals based on being able to determine when to build each specific bridge with reduced reliance on third parties having to perform work critical to advancement of the Project. This will enable the Development Entity to complete bridges at the lowest cost possible by coordinating the logistics of the design, supply, material, and construction components for each bridge within the structure of the overall Project so as to achieve maximum efficiency in delivery of the Project.
- (h) Variance from clauses (6) & (7) benefits the public because this streamlined process results in substantial time savings in delivering approximately 559 bridge replacements in a way that saves tax dollars and improves connectivity to the transportation network earlier than otherwise, which ultimately translates to time and cost savings to the traveling public by minimizing the disruption to daily travel caused by extended detours and navigating active work zones.

5. EXPERIMENTAL CONDITIONS

As a condition of FHWA's authorization of the requested deviations, PennDOT will incorporate various controls into the Project that serve to ensure the Development Entity and its consultants perform the delegated NEPA process tasks to the quality and completeness expected and provided on PennDOT's regular projects. More specifically, PennDOT will require the Development Entity, in accordance with the PPA, to submit each categorical exclusion evaluation or other NEPA documentation to PennDOT for its substantive review and independent evaluation. PennDOT will undertake, pursuant to its Project Stewardship and Oversight Agreement with FHWA, to perform such reviews, and after independently evaluating the information will approve or disapprove each submittal of NEPA documentation in accordance with the terms of the PPA. In addition, the PPA and its Technical Provisions for the Project includes numerous safeguards to ensure that the integrity of the NEPA process is maintained.

- (a) **Use of Existing Systems.** The Development Entity will use PennDOT's standard systems such as the CE Expert System, Project Path⁴, and the Environmental Commitments and Mitigation Tracking System for the completion of the NEPA/Section 106 documents and to track the completion of the mitigation. PennDOT will use its access to these systems for purposes of reviewing and approving the NEPA documentation and assuring the completion of required mitigation. These systems have a formal quality control and approval process.
- (b) **Section 106 safeguards include:**
 - (i) The individual(s) proposed by the Development Entity must meet specific qualifications and must have successfully completed training with PennDOT, the Pennsylvania Historical and Museum Commission (the **SHPO**), and FHWA.
 - (ii) The use of Project Path, of which PennDOT will monitor.
 - (iii) A quality assurance program by SHPO, PennDOT, and FHWA to independently review a sample of projects completed on a monthly basis for the first 90 days, then at 3-month, 6-month, and 12-month intervals.
 - (iv) PennDOT's involvement in the dispute resolution process.
- (c) **NEPA Approval.** For approval delegated to PennDOT, PennDOT will substantively review and comment on and require revisions to documents submitted for approval. Documentation not meeting current submission standards or requirements will be returned to the Development Entity and shall be revised by the Development Entity to meet those standards. When reviewing NEPA documents, PennDOT will compare this document to the scoping form that was prepared by PennDOT. If there is an inconsistency, clarification will be required from the Development Entity. In addition, PennDOT and FHWA, as applicable, will independently review a sample of the projects approved on a monthly basis for the first 90 days, then at 3-month, 6-month, and 12 month intervals.
- (d) **Mitigation.** Any change in NEPA-related mitigation during final design, construction, or maintenance will require PennDOT, and as applicable FHWA, review and approval.
- (e) **Reporting.** The Development Entity is responsible for providing PennDOT the status of each bridge on a quarterly basis for the purpose of managing the progress of NEPA clearance and permitting process.
- (f) **No Final Design Prior to NEPA Approval.** The Development Entity is not permitted to commence final design activities—e.g., right-of-way acquisition—until receiving NEPA approval (which is also needed to receive Design Field View approval from PennDOT to move into Final Design).
- (g) **Public Involvement.** A PennDOT representative will attend public meetings held for the individual bridges to ensure that the proceedings are properly administered consistent with PennDOT's public involvement plan that has been approved by FHWA.

⁴ Project Path is a publically accessible tracking system for the Section 106 process, with document warehouse capability and automated notification via email. Project Path supports consulting party consultation and public involvement.

- (h) **Environmental Compliance Managers.** The Development Entity is required to designate a full-time Environmental Compliance Manager who will report all issues directly to PennDOT. The Environmental Compliance Manager will coordinate with PennDOT, the Development Entity's team, and appropriate regulatory agencies.
- PennDOT will also designate its own Environmental Compliance Manager, who will be responsible for independent review of the Development Entity's compliance with the state and federal regulations during the NEPA process, design development, and construction.
- (i) **Permitting.** In addition to the monitoring conducted by the Environmental Compliance Manager, the Development Entity will submit to PennDOT a copy of the approved CEE, a report of the wetlands and stream impacts, and the mitigation proposed for the Chapter 105 and Section 404 permit requests prior to submitting the permit application to the agencies. PennDOT will compare the impacts to ensure that the impacts and mitigation reported in the NEPA document are being carried forward into the permit process.
- (j) **Replacement Bridge Process.** The PPA ensures that the Development Entity's management of the NEPA clearance process is undertaken impartially and without prejudice. This process will also ensure the avoidance of a conflict of interest for the Development Entity by eliminating certain pecuniary harm to the Development Entity for NEPA-related decisions by the relevant agencies. The following aspects of PPA are pertinent:
- (i) Where a specific bridge becomes problematic for any reason related to the individual bridge, PennDOT, in its sole discretion, can remove that bridge from the Project provided that a new replacement bridge is designated via a change order. All change orders for the Project are subject to review and approval by FHWA.
 - (ii) The change order process used to affect the removal/replacement of a bridge will operate so as to ensure that the Development Entity is left in a position neither better nor worse as a result of the removal of the bridge. In other words, if the FHWA concurs, PennDOT will introduce an alternative bridge into the Project so as to maintain equilibrium of the Development Entity's financial interest in the Project.
 - (iii) All design documents and work developed for a bridge that is removed from the Project will be transferred to PennDOT for its unrestricted use. The Development Entity will be compensated for the work completed on the removed bridge via the change order.
 - (iv) Replacement bridges will be drawn from either a predetermined grouping of bridges or from bridges in our regular capital improvement program which currently includes about 800 bridges replacement bridges valued at over \$1.4 billion in the upcoming four years.
- (k) **Time of Completion:** The time to complete the Project from Commercial Close to completion of construction is 42 months. It is expected that 99 percent of the bridges will be completed within this time frame. Inherently, this allows for about 5 bridges to extend beyond the 42-month period. This time frame allows the Development Entity to schedule the bridges with minimal right of way and environmental actions earlier, and bridges with more complex design-related actions toward the end of the completion duration.

- (l) **Environment Mitigation as Compensation Event:** The Development Entity will receive no financial benefit and bear no financial risk not already priced in its proposal related to environmental mitigation or project delays resulting from environmental findings in the NEPA process. PennDOT will compensate the Development Entity separately for the cost of NEPA-related environmental mitigation actions. This includes final design and construction tasks such as wetland replacement, Phase III Archaeological data recovery excavations, associated interpretive materials, recordation of the historic bridge and associated historic district, and context sensitive design elements.

Given the process set forth in the flowchart attached as **Exhibit 2** and the above safeguards, there is no material increase in the risk that the NEPA process will be compromised when the NEPA studies and documents are completed by the same entity that completes final design and construction of the Replacement Bridges.

6. **WORK PLAN**

Critical to the success of the Experimental Feature and timely procurement of the Project is adherence by PennDOT and FHWA to a work plan and schedule that is consistent with the schedule for the procurement and execution of the PPA. PennDOT proposes the work plan and schedule for itself and FHWA set forth in **Exhibit 4** of this application.

7. **GOALS**

Having the Development Entity perform the preliminary engineering, the NEPA analysis and documentation, the final design, and construction for this Project as described herein will serve the following goals:

- (a) Expedite the delivery of each Replacement Bridge without compromising the intent of the applicable regulations under 23 CFR 636.109.
- (b) Decrease the cost of the design, construction, and maintenance of the Replacement Bridges to the taxpayer.
- (c) Encourage flexibility, innovation, and alternative approaches to completing preliminary design.

8. **MEASURES/EVALUATION**

8.1 This experiment will be evaluated on a range of factors, including time savings to PennDOT, cost savings to the public, risk allocation optimization, and time savings for the completion of the Project. Specifically, PennDOT will:

- (a) Track the time it takes for the replacement of bridges of a similar NEPA level of clearance state-wide outside of this Project, and compare these projects to the time it takes to complete the Replacement Bridges in this Project from the initiation of NEPA to the completion of construction to evaluate the benefits identified in Sections 4.2(a), (b), and (c).
- (b) Track the number of Replacement Bridges that need re-evaluations under NEPA due to design changes or late-discovered resources to evaluate the benefit identified in Section 4.2(d).

- (c) Obtain feedback from the reviewing agencies to determine if the grouping of projects had the effect of reduced review time and manpower and to determine the success of mitigation to evaluate the benefits identified in Sections 4.2(e) and (f).
- (d) Survey the Development Entity on costs expended for NEPA activities to evaluate the benefits identified in Sections 4.2(c), (g), and (h).

8.2 To evaluate the integrity of the NEPA process, PennDOT will:

- (a) Obtain feedback from the FHWA Division Office and the SHPO regarding the monitoring completed under the Section 106 process.
- (b) Track any follow-up needed with the Development Entity due to inconsistencies with the scoping documentation for the Replacement Bridges.
- (c) Track the number of bridge change orders related to the NEPA process and the reasons for the change orders.

9. REPORTING

PennDOT will transmit to FHWA an interim report on the Experiment within six months after initiation of preliminary design work on the Replacement Bridges. Additional interim reports will be transmitted at a maximum 6-month interval. A final draft project report containing all findings will be transmitted within 6 months of the completion of the construction of all Replacement Bridges under the PPA. The following information will be included in the reports:

- (a) Descriptions of any reaction by the industry to the use of the Experimental Feature as described herein.
- (b) Documentation of the NEPA submissions prepared by the Development Entity and approved by PennDOT, and the associated timeframes compared to similar bridge replacement projects completed outside this Project.
- (c) Descriptions of time-savings that result from the deviations requested herein as well as corresponding cost benefits.
- (d) Descriptions of the findings from the Section 106 and NEPA monitoring.
- (e) Listings of any bridges substituted for Replacement Bridges, with reasons for the substitutions.
- (f) Discussions of any major problems or issues that occur as a result of the Experimental Feature and how they were resolved.

Time is of the essence in obtaining approval of the experimental elements in order for PennDOT to proceed with procurement as planned for the Project. The final RFP had been scheduled for release on July 3, 2014, and the proposals are currently due on September 29, 2014. Without approval by the end of July, PennDOT will have to undertake undesirable actions to revise the RFP so as to fully comply with the CFR.

While there are several options at hand to comply, none are favourable to the Project. PennDOT expects the Project will be delayed up to 12 months and cost impacts of up to \$25 million or more are anticipated to the Commonwealth. Additionally, all available options transfer a multitude of technical tasks and managerial responsibilities back to PennDOT.

July 15, 2014
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We truly appreciate the cooperation and efforts from all staffs in your office as well as your headquarters and look forward to ongoing dialog to obtain a meaningful outcome to this request.

Please feel free to contact me at (717) 787-8765 as you review our application. In addition, please do not hesitate to request PennDOT's relevant staff to meet with your team or your colleagues in Washington, D.C., in order to provide any clarifications or further explanations that you think advisable.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Bryan Kendro", written in a cursive style.

Bryan Kendro
Director
Office of Policy & Public-Private Partnerships

Enclosures

- Exhibit 1: Rapid Bridge Replacement Project: Description and Schedule
- Exhibit 2: P3 Bridges Screening, Scoping, and NEPA Decision Annotated Flow Chart
- Exhibit 3: Comparison of Design Build Processes
- Exhibit 4: Work Plan and Schedule for SEP-15 Variance

EXHIBIT 1

RAPID BRIDGE REPLACEMENT PROJECT: DESCRIPTION AND SCHEDULE

1. PROJECT OVERVIEW

- (a) The Project involves the design, construction, financing and maintenance of approximately 559 Replacement Bridges.
- (b) The Project is expected to create efficiencies through economies of scale, innovation and optimal risk-allocation that will allow PennDOT to deliver more bridges faster at a lower whole-life cost than is possible when using a traditional “design, bid, build” procurement. The Project will also help improve the connectivity of the Commonwealth’s transportation network, while minimizing the impacts on the travelling public. The improved connectivity, including the removal or modification of certain weight restrictions on certain Replacement Bridges, will increase the efficiency of freight and commercial movements, which benefits the economy of the Commonwealth. PennDOT will seek innovative solutions from the Development Entity that is challenged with delivering quality bridges on a large scale as quickly as possible, while providing good value and minimal inconvenience to the public.

2. SCOPE OF WORK

The Development Entity will design, build, finance and maintain the Project in return for Availability Payments and Milestone Payments.

2.1 Early Completion Bridges

Approximately 92 of the Replacement Bridges are referred to as the Early Completion Bridges. In the interest of supporting accelerated delivery of the Early Completion Bridges, PennDOT will assume certain responsibilities and risks with respect to the environmental clearance and permitting of the Early Completion Bridges. The Early Completion Bridges are situated in two clusters: the first cluster being located in the northeast part of the Commonwealth (PennDOT Districts 3, 4, and 5) and the second cluster being located in the southwest part of the Commonwealth (PennDOT Districts 10, 11, and 12).

2.2 Remaining Eligible Bridges

The remaining 467 replacement bridges are referred to as the Remaining Eligible Bridges. The Remaining Eligible Bridges are located throughout the Commonwealth.

2.3 Early Project Development

PennDOT conducted the following activities as part of the early project development process for each bridge:

- (a) Initial Screening: PennDOT started with over 1,000 bridges as potential candidates for the Project. These bridges were evaluated using PennDOT’s Linking Planning and NEPA process consisting of 31 layers of data including wetland, agricultural lands, waste sites, cultural resource GIS, wild trout and stocked streams, and 6(f) resources. The initial screening process involved the following actions:
 - (i) Bridges that were known to be individually eligible resources were eliminated using the cultural resource GIS of known resources and coordination with the SHPO.

- (ii) The PA Department of Conservation and Natural Resources (DCNR) reviewed the bridges for potential Section 6(f) and state grant issues on publicly owned lands.
 - (iii) Most bridges that could potentially result in residential or commercial displacements were eliminated.
 - (iv) PennDOT held two workshops and various other meetings with the following resource agencies to discuss the implementation of the Project: USACE; USFWS; USEPA; SHPO; the PA Fish and Boat Commission; the PA Game Commission; the PA Department of Environmental Protection; and DCNR.
- (b) Scoping. PennDOT District offices conducted the initial scoping field view and scoping the bridges using PennDOT's standard scoping process.
- (i) An interdisciplinary team, including environmental staff, conducted field views to initially evaluate the potential resources in each of the bridge areas.
 - (ii) PennDOT conducted screening of bridges areas via a Threatened and Endangered database which is controlled by agencies with jurisdiction.
 - (iii) PennDOT's Cultural Resource Professionals performed site visits and checked data bases to evaluate the potential for historic and archaeological resources.
 - (iv) The scoping document completed by the PennDOT Districts indicates whether the Project has been scoped as qualifying under the Bridge and Roadway Programmatic Agreement (BRPA), a Level 1 CE, or a Level 2 CE. FHWA will be involved with field views in accordance with our standard practice. As a result of the scoping field views the remaining bridges have been scoped as follows: BRPA—464; CE Level 1—95.

These actions serve to ensure that the bridges selected for this project are eligible for a Categorical Exclusion Evaluation or PennDOT's Bridge and Programmatic Agreement (BRPA) and do not require and Environmental Assessment or Environmental Impact Statement. Additionally, the information in these actions provides substantial background information for the Development Entity's use in understanding the environmental features that may be encountered at the individual bridge sites.

2.4 Certain Environmental and Permitting Matters

(a) Early Completion Bridges

(i) NEPA

PennDOT will be responsible for qualifying, on or before March 31, 2015, each Early Completion Bridge for a categorical exclusion under NEPA (each a CE) on the basis of the dimensions, characteristics, and impacts of the conceptual designs and "areas of potential effect" (APE) associated with each Early Completion Bridge.

(ii) Other PennDOT Obtained Governmental Approvals

PennDOT will be responsible for procuring, on or before March 31, 2015, all other PennDOT Obtained Governmental Approvals required for each Early Completion Bridge on the basis of the dimensions and characteristics of the conceptual designs and

APEs associated with each Early Completion Bridge. Such other PennDOT Obtained Governmental Approvals may include:

- (A) A Section 404 Permit and a Section 401 Permit from the Army Corps of Engineers (where applicable);
- (B) A determination of the potential presence of threatened and endangered species for review by the USFWS and certain state agencies;
- (C) A Section 106 review for purposes of the National Historic Preservation Act; and
- (D) Compliance with the Pennsylvania Dam Safety and Encroachments Act.

(b) Remaining Eligible Bridges

- (i) The Development Entity will be responsible for procuring, in conjunction with PennDOT:
 - (A) The NEPA clearance of each Remaining Eligible Bridge; and
 - (B) Any other PennDOT Obtained Governmental Approvals needed to undertake the Work with respect to each Remaining Eligible Bridge.
- (ii) The Development Entity will obtain the permits under Section 404, PA Chapter 105 (the state counterpart to the Section 404 permit program), and the NPDES permit (if required). The Development Entity qualifies, as a permittee under each of these permit programs, as an operator and the entity with primary responsibility for the bridge, especially given its responsibility to maintain the bridges for approximately 25 years after construction. PennDOT has coordinated with the U.S. Army Corps of Engineers (USACE) and the Pennsylvania Department of Environmental Protection (PaDEP) regarding the permitting of the bridge replacements and both agencies agree that the Development Entity is an acceptable and proper applicant.
- (iii) PennDOT will be involved with other Environmental issues:
 - (A) PennDOT will coordinate with FHWA when the CE requires FHWA approval.
 - (B) For any consultation required for federally listed T&E species, PennDOT will consult with FHWA and USFWS.
 - (C) Under Section 106, PennDOT will be involved in:
 - I. The training and approval of the delegated Cultural Resource Professionals;
 - II. The Elevation and Dispute Resolution process, in any coordination with FHWA, the SHPO, and tribes required to resolve adverse effects;
 - III. Tribal consultation;

- IV. The drafting of any required MOA/LOA and circulate the MOA/LOA for signature.
- (D) For Section 4(f) resources, PennDOT and/or FHWA will approve any applicable checklist (i.e., Programmatic Agreements) and Individual Section 4(f) Evaluations.
- (E) Public meetings held for the individual bridges to ensure that the proceedings are properly administered consistent with PennDOT's public involvement plan that has been approved by FHWA
- (iv) FHWA will:
 - (A) Participate in scoping field views in accordance with our standard practice and will review and approve Level 2 CEEs.
 - (B) Participate in consultation associated with formal consultations for T&E impacts, and in consultation associated with the resolution of adverse impact under Section 106, including the review and execution of any required MOA/LOA.
 - (C) Be consulted regarding the selection of the Cultural Resource Professionals and will be involved in their training and monitoring.
 - (D) Approve any applicable checklist (required under existing joint policies) and individual Section 4(f) Evaluations.

3. REPLACEMENT BRIDGE PROCESS

- (a) Where a specific Remaining Eligible Bridge becomes problematic for any reason PennDOT, in its sole discretion, can remove that bridge from the Project provided that a new replacement bridge is designated and introduced into the Project via a change order. All change orders for the Project are subject to review and approval by FHWA.
- (b) The change order process used to affect the removal/replacement of a bridge operates so as to ensure that the Development Entity is left in a position neither better nor worse as a result of the removal of the bridge. In other words, if the FHWA concurs, PennDOT will introduce an alternative bridge into the Project with substantially similar attributes. This will include initiation of a change order to offset any additional costs that may be associated with the new bridge, so as to maintain equilibrium of the Development Entity's financial interest in the Project.
- (c) All design documents and work developed for a bridge that is removed from the Project will be transmitted to PennDOT for its unrestricted use. The Development Entity will be compensated for the work completed on the removed bridge through a change order.
- (d) Replacement bridges will be established from either a predetermined grouping of bridges or from bridges under design in our regular capital improvement program.

4. INVESTIGATIONS OF PROJECT SITES

For all bridges, PennDOT is conducting investigations of the Project Sites (scoping field views, geotechnical studies, and detour analysis). PennDOT will provide the preliminary results of such

investigations to the Proposers as Disclosed Information. For the avoidance of doubt, such results constitute Disclosed Information.

5. UTILITIES

The Development Entity will be responsible for coordinating and causing all Utility Adjustments necessary in order to comply with its obligations under the Project Documents.

6. RIGHT OF WAY

PennDOT will be responsible for acquiring at its own expense the right of way that comprises the Project Site of each Replacement Bridge.

7. TIME OF COMPLETION

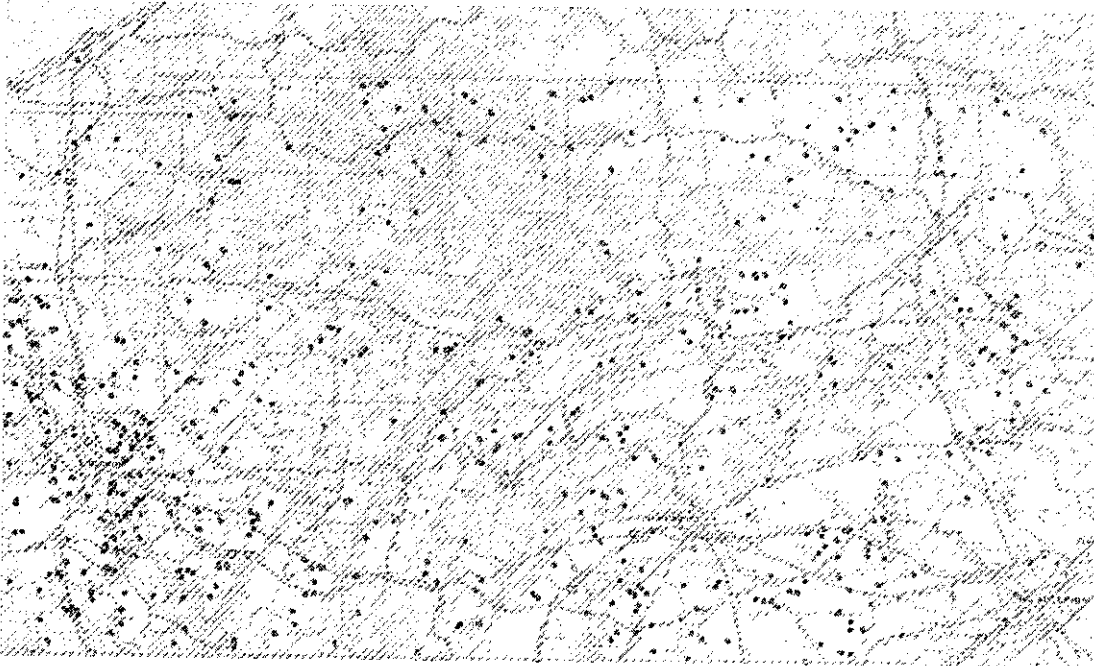
The time to complete the Project from Commercial Close to completion of construction is 42 months. It is expected that 99 percent of the bridges will be completed within this time frame. Inherently, this allows for about 5 bridges to extend beyond the 42-month period. The Development Entity is responsible for maintenance of the bridges for a period of 25 years after completion of the individual bridges.

8. CERTAIN KEY DATES

EVENT	DATE
Issuance of First Industry Review Draft of RFP Documents	April 4, 2014
Issuance of Second Industry Review Draft of RFP Documents	May 16, 2014
Issuance of Third Industry Review Draft of RFP Documents	June 3, 2014
Issuance of Fourth Industry Review Draft of RFP Documents	July 3, 2014
Issuance of Final Request for Proposals	End of July, 2014
Proposal Due Date	September 29, 2014
Anticipated Date of Announcement of Preferred Proposer	October 31, 2014
Anticipated Commercial Closing Deadline	December 16, 2014
Completion of Construction	42 months after Commercial Close
End of Maintenance	25 years after completion of construction of the individual bridge

9. REPLACEMENT BRIDGES

9.1 All Replacement Bridges Included in the Project



9.2 Early Completion Bridges

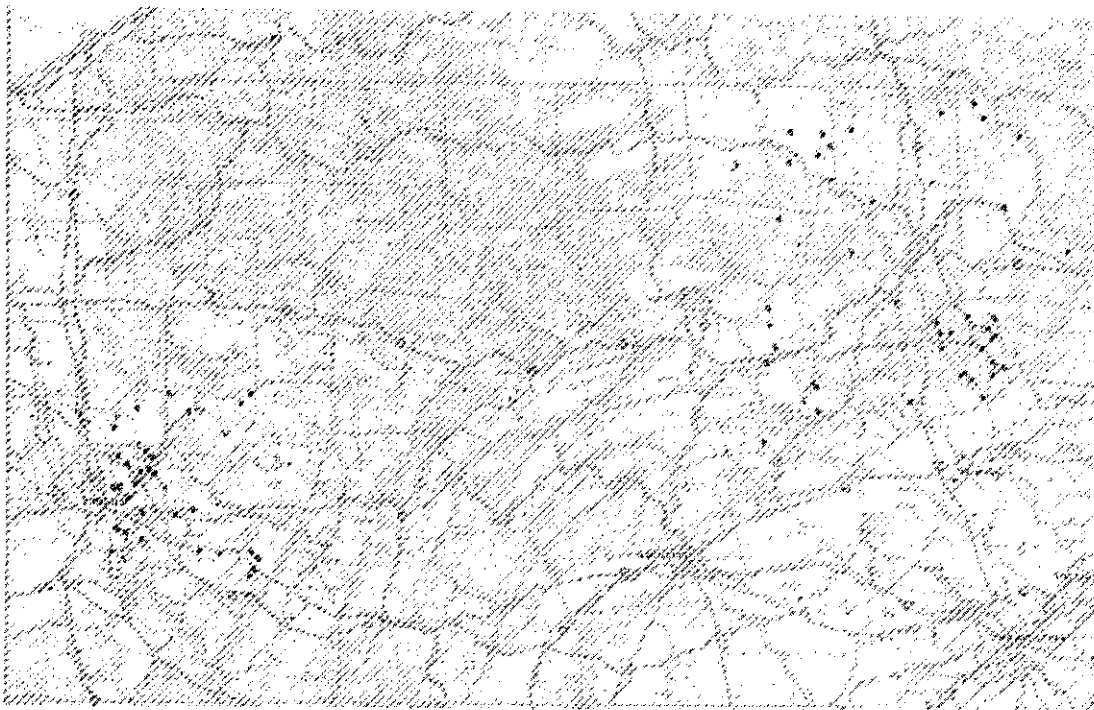


EXHIBIT 2

P3 BRIDGES SCREENING, SCOPING, AND NEPA DECISION ANNOTATED FLOW CHART

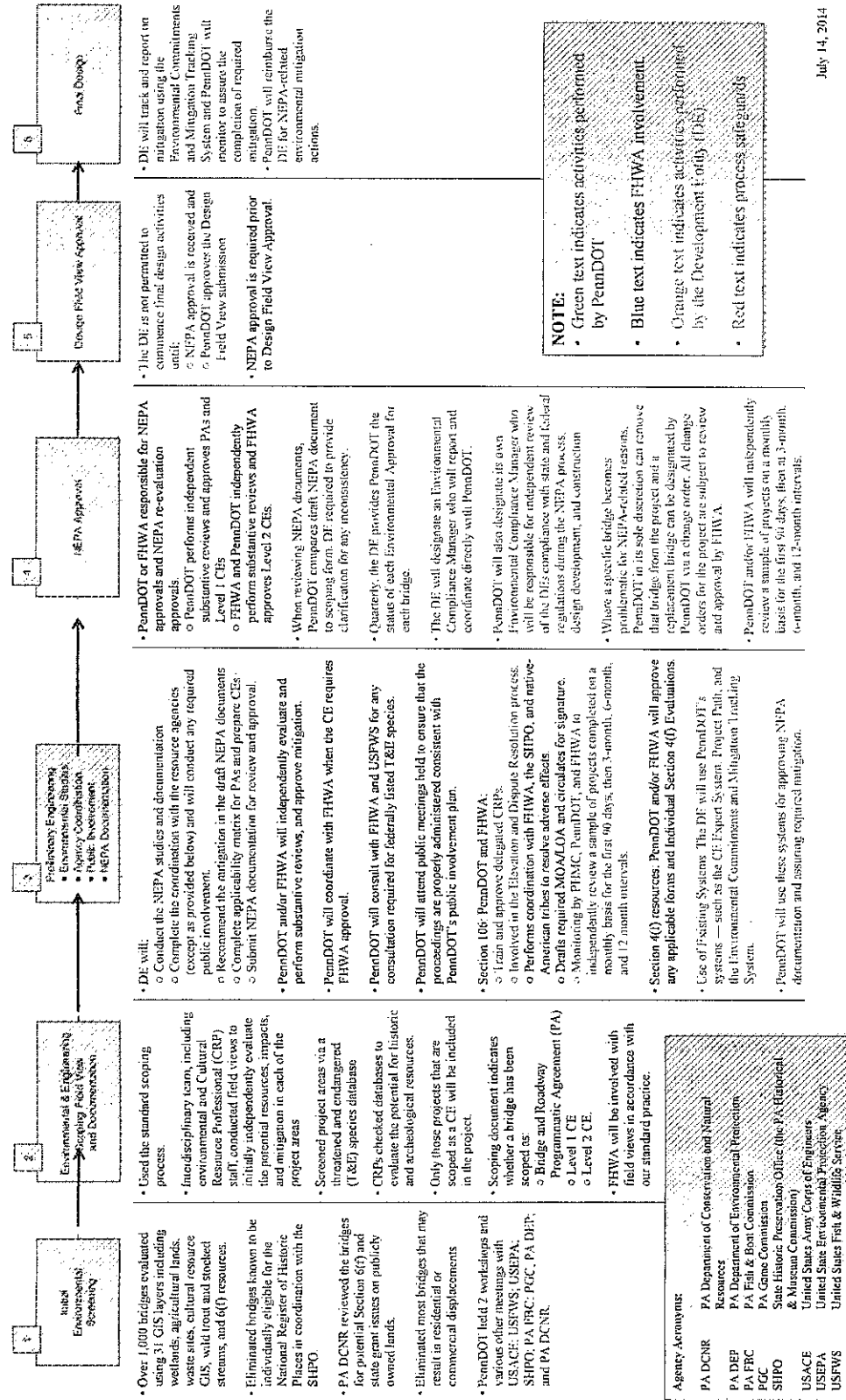
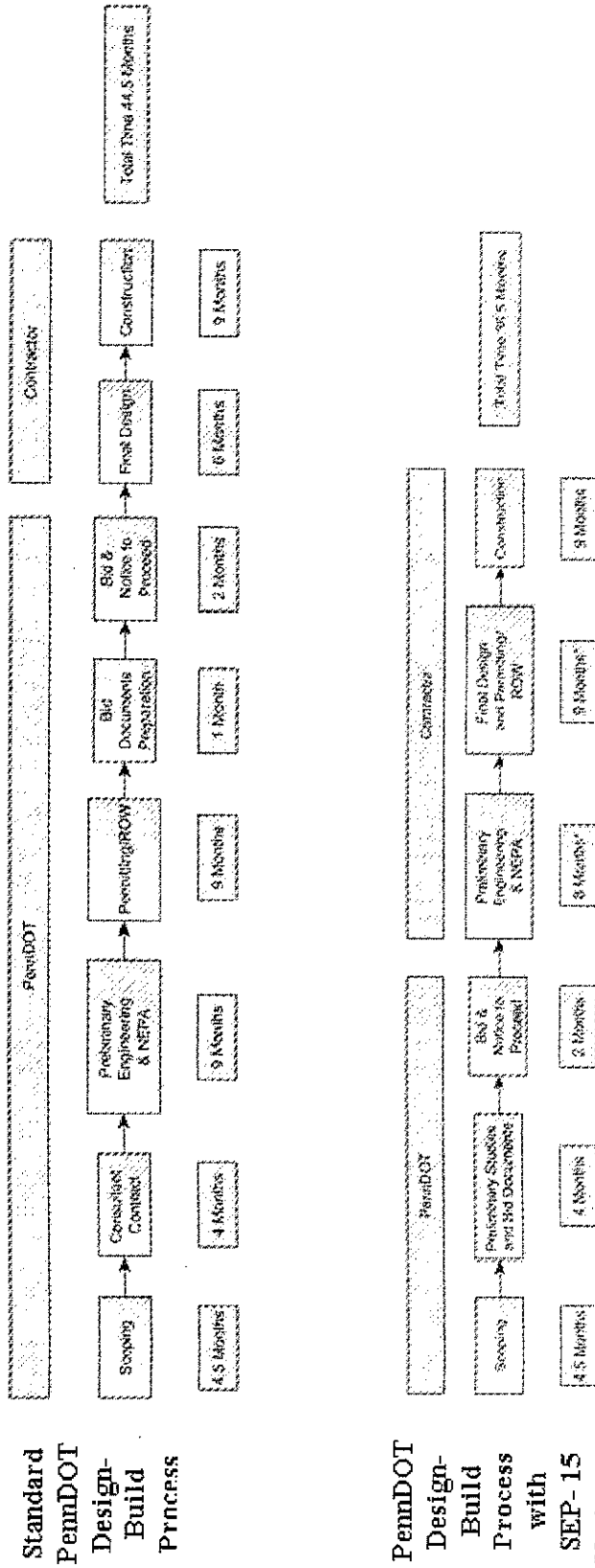


EXHIBIT 3

COMPARISON OF DESIGN-BUILD PROCESSES



* Time savings due to:

- Efficiencies from having a centralized design team
- A simplified set of build alternatives
- Bundling similar projects creates efficiencies

EXHIBIT 4

**WORK PLAN AND SCHEDULE FOR SEP 15 VARIATION
PENNDOT RAPID BRIDGE REPLACEMENT PROJECT**

Last Update: July 15, 2014

Date	Activity	Responsible Party(ies)	Comments/Status
	1. SEP 15 Process for Approval		
4/16/2014	Submit Concept Paper to FHWA	PennDOT	Received feedback that submission needed more emphasis on the intent of experiment, benefits, and risks
5/30/2014 5/31/2014	Submit White Papers on Experimental Benefits and Risks to FHWA	PennDOT	Complete
6/6/2014	Video Conference with FHWA to discuss Concept Paper	PennDOT, FHWA	Received request to provide more information on the proposed NEPA approval process along with a NEPA Process Flowchart
6/11/2014	Submit letter providing more information on the proposed NEPA approval process along with a NEPA Process Flowchart to FHWA	PennDOT	Complete
6/13/2014	Feedback to PennDOT on 6/11/2014 letter	FHWA	Received feedback to complete and transmit the SEP 15 Application
6/16/2014	Submit Draft Final SEP 15 Application to FHWA	PennDOT	Complete
6/19/2014	Receive feedback to Draft Final SEP 15 Application	FHWA	Received feedback
6/20/2014	Submit SEP 15 Application to FHWA	PennDOT	Complete
6/26/2014	Receive feedback on Final SEP 15 Application	FHWA	Received feedback
7/01/2014	Submit Revised Final SEP 15 Application	PennDOT	Complete
7/9/2014	Receive feedback on Revised Final SEP 15 Application	FHWA	Received feedback
7/15/2014	Submit Revised Final SEP 15 Application	PennDOT	
7/25/2014	Approve SEP 15 Application	FHWA	
	Prepare and submit Draft Early Development Agreement (EDA) to PennDOT	FHWA	
	Conference Call to discuss Draft EDA	PennDOT, FHWA	
	Distribute Revised Draft EDA to PennDOT	FHWA	
	Submit final comments on Draft EDA	PennDOT	
	Conference Call to discuss revised Draft EDA	PennDOT, FHWA	
	Sign EDA	PennDOT, FHWA	

Exhibit B



U.S. Department
of Transportation
Federal Highway
Administration

Office of the Administrator

July 31, 2014

1200 New Jersey Ave., SE
Washington, D.C. 20590

In Reply Refer To:
HIN

Mr. Brian Kendro
Director Office of Policy and Public-Private Partnerships
Pennsylvania Department of Transportation
Harrisburg, PA 17105

Dear Mr. Kendro:

The Federal Highway Administration (FHWA) completed its review of the Pennsylvania Department of Transportation's (PennDOT's) "Pennsylvania Rapid Bridge Replacement Public-Private Partnership (P3) Project" (the "Project") Special Experimental Project No. 15 (SEP-15) application ("Application") that was submitted to the FHWA Pennsylvania Division Office (Division Office) on July 15, 2014. The Division Office forwarded the Application to the FHWA Office of Innovative Program Delivery which coordinated the review of the proposed SEP-15 experiment with the Office of Infrastructure; Office of Planning, Environment, and Realty; Office of Chief Counsel; and the Division Office. Based on the comments provided by these offices, the SEP-15 Steering Committee recommended, and I concur, that the Project be conditionally accepted for administration under SEP-15. The FHWA's response to the proposed experimental features for the Project is discussed below.

The FHWA's acceptance of the Project for administration under SEP-15 does not commit Federal-aid funding for the Project. Until there is formal FHWA project approval, FHWA retains the right to declare the Project ineligible for Federal-aid funds at any time during the SEP-15 process. In addition, all Federal laws, rules, and regulations shall be applicable to the Project, including, but not limited to, the requirements set forth in titles 23 and 49 of the United States Code, and titles 23 and 49 of the Code of Federal Regulations, the Uniform Act, and the National Environmental Protection Act (NEPA), except as otherwise specified herein.

The FHWA may withdraw its approval of the SEP-15 experimental features if it determines that the experimental features are not in the public interest. Prior to any such withdrawal, the FHWA will issue a written notice to PennDOT describing the FHWA's concerns and give PennDOT a reasonable period of time to address the FHWA's concerns. However, during such period of time, no further work shall be conducted based on the approval at issue until such time as FHWA determines that PennDOT has fully addressed FHWA's concerns. Upon withdrawal of approval of an experimental feature, the applicable requirements of title 23 of the United States Code and title 23 of the Code of Federal Regulations shall immediately apply.

If you wish to proceed with the Project under the SEP-15 program, the next major action will be for FHWA to work with you to draft an Early Development Agreement (EDA). The EDA will identify the specific roles of all parties, define procedures and requirements, and establish timeframes and other conditions under which the experimental features will be administered.

The EDA will also identify the performance measures that will be used to evaluate the success of the Project's experimental features.

Background

The PennDOT is pursuing a P3 project to replace 559 bridges throughout the State. By bundling similar bridges into one project, PennDOT believes it can save money on design, permitting, construction, and ultimately maintenance. If PennDOT were to replace each of these bridges individually, using its traditional procurement schedule, PennDOT estimates that the process could take 10 – 15 years. However, bringing the resources of a private sector partner to bear, or Development Entity (DE), PennDOT estimates it will be able to deliver the replacement of 99 percent of the bridges in the Project in just 42 months.

The PennDOT will compensate the DE via milestone payments during construction and performance-based availability payments over the 25 – 35 year Public Private Agreement (PPA) contract term. By incorporating long-term financing and maintenance into the procurement, the DE is also motivated to make sure that the bridges are built to last.

This Project is a key component of PennDOT's effort to address the State's systemic backlog of almost 4,800 structurally deficient bridges. The Project will be the first P3 multiasset transportation project of its kind in the United States.

The PennDOT intends to have the DE conduct environmental studies, prepare environmental documentation, and complete the required preliminary engineering for bridges covered by Level 1 or Level 2 categorical exclusion (CE), and obtain necessary permits and approvals for each bridge included in the Project. The PennDOT conducted initial screenings and scoping field reviews to make sure that the bridges selected for this Project are eligible for a Level 1 CE or Level 2 CE. This screening includes a determination that an environmental assessment or an environmental impact statement is not required under applicable law.

The U.S. Department of Transportation provided PennDOT with a conditional Private Activity Bond allocation for the Project. Per the terms of this allocation, the Project must meet all applicable Federal-aid requirements.

Experimental Features

The PennDOT intends to have the DE complete the required preliminary engineering, conduct environmental review studies, prepare environmental documentation and obtain necessary permits and approvals for each bridge included in the Project. In order to allow the DE to undertake these activities, PennDOT requests two deviations from FHWA regulations:

- (1) Deviation from 23 C.F.R. 636.109(b)(6) – "The design-builder must not prepare the NEPA document or have any decisionmaking responsibility with respect to the NEPA process." The SEP-15 experiment will allow the DE to be responsible for preparing the supporting documentation and draft decision documents.

- (2) Deviation from 23 C.F.R. 636.109(b)(7) -- "Any consultants who prepare the NEPA document must be selected and subjected to the exclusion direction and control of the contracting agency." The SEP-15 experiment will allow the DE to select the consultant that prepares the NEPA document and retain exclusive control over the consultant.

Purpose: PennDOT requests the deviations from 23 CFR 636.109(b)(6) and 23 CFR 636.109(b)(7) in order to evaluate the efficiencies, if any, of the proposed Project—specifically accelerating the time and reducing the costs required to deliver a project by allowing a DE to conduct the environmental review process.

Deviation from FHWA Requirement(s): FHWA's Design-Build Contracting regulations currently prohibit the DE from preparing supporting documentation and draft decision documents as required for the environmental review process.

FHWA Response: The FHWA's prohibition against a design-builder's involvement in the NEPA decisionmaking process is intended to: (1) Insulate against conflicts of interests; (2) Ensure the integrity and objectivity of the NEPA process; and (3) Protect the public's faith in the integrity of the NEPA process.

The proposed experiment would allow FHWA to assess whether it should undertake a rulemaking to amend the Design-Build Contracting regulations to allow greater design-builder involvement in the preparation of environmental documents and in the control of environmental consultants where the projects have limited or no potential for significant adverse environmental effects and safeguards are in place to greatly reduce or eliminate the risk of design-builder bias in the outcome of the environmental review process.

The FHWA's acceptance of the PennDOT SEP-15 proposal is conditional and contingent on the inclusion of specific safeguards to protect the integrity of the environmental decisionmaking process. Conditions include a requirement that PennDOT's contracting documents and the EDA contain specified mechanisms that are clearly tied to preserving the purposes of 23 CFR 636.109(b)(6) and 636.109(b)(7). These conditions will ensure that (1) there is no material risk of bias in the environmental decisionmaking process, (2) public officials and citizens have the necessary environmental impact information for federally funded actions before actions are taken, and (3) that the DE does not assume an unnecessary amount of risk in the event the NEPA process results in a significant change in one or more of the bridges included in the Project.

The FHWA's conditional acceptance of the PennDOT SEP-15 proposal relies on the safeguards and conditions proposed by PennDOT in its Application to preserve the purposes of 23 CFR 636.109(b)(6) and 636.109(b)(7). The safeguards and conditions are as follows:

- (1) **DE NEPA Documentation.** For each bridge, the DE will prepare and provide to PennDOT the appropriate field data, impact analyses (if required for the proposed CE), and draft NEPA documentation. The DE will use PennDOT's standard systems such as the CE Expert System, Project Path, and the Environmental Commitments and Mitigation Tracking System for the completion of the NEPA/Section 106 documents and to track the completion of the mitigation. These systems have a formal quality control and approval process executed by PennDOT.

- (2) **Section 106.**
- a) The individual(s) proposed by the DE must meet specific qualifications and must have successfully completed training with PennDOT, the Pennsylvania Historical and Museum Commission (the SHPO), and FHWA.
 - b) PennDOT will be involved in the dispute resolution process.
 - c) PennDOT will coordinate with FHWA, the SHPO, and native-American tribes to resolve adverse effects.
 - d) PennDOT will draft the required Memorandum of Agreement/Letter of Agreement and circulate for signature.
- (3) **Section 4(f).** For Section 4(f) resources, PennDOT and/or FHWA will approve any applicable checklist (i.e., Programmatic Agreements) and Individual Section 4(f) Evaluations.
- (4) **Public Involvement.** A PennDOT representative will attend all public meetings held for the individual bridges to make sure that the proceedings are properly administered and documented consistent with the PennDOT public involvement plan approved by FHWA.
- (5) **PennDOT NEPA Reviews.** PennDOT will require the DE, in accordance with the PPA, to submit each CE or other NEPA documentation, relating to CE determinations, to PennDOT for its substantive review and independent evaluation. The PennDOT will evaluate the data, analyses, and documentation necessary for the NEPA decision. The PennDOT also will compare the impacts identified by the DE to the results of the scoping-phase field screening PennDOT did for the bridge. The PennDOT will use the standard systems such as the CE Expert System, Project Path, and the Environmental Commitments and Mitigation Tracking System for purposes of reviewing and approving the NEPA documentation and assuring the completion of required mitigation.
- (6) **Penn DOT/FHWA NEPA Approval.** FHWA and/or PennDOT will make the final NEPA decisions in accordance with our delegation procedures and after independently evaluating the information and make independent judgments about the potential project impacts. The FHWA will provide oversight. The FHWA and PennDOT will take full responsibility for the scope and contents of the NEPA documents.
- (7) **No Final Design Prior to NEPA Approval.** The DE is not permitted to commence final design activities—e.g., right-of-way acquisition—until receiving NEPA approval (which is also needed to receive Design Field View approval from PennDOT to move into Final Design).
- (8) **Environmental Mitigation as a Compensation Event.** PennDOT will pay for any NEPA mitigation not already pre-defined in the DE's bid proposal. This means that the

DE will receive no financial benefit and bear no financial risk not already priced in its proposal related to environmental mitigation or project delays resulting from environmental findings in the NEPA process. The PennDOT will compensate the DE separately for the cost of NEPA-related environmental mitigation actions. This includes final design and construction tasks such as wetland replacement. Phase III Archeological data recovery excavations, associated interpretive materials, recordation of the historic bridge and associated historic district, and context sensitive design elements.

- (9) **Elimination of Pecuniary Harm to the DE for NEPA-related decisions by the relevant agencies.**
- a) Where a specific bridge becomes problematic for any reason related to the individual bridge, PennDOT, in its sole discretion, can remove that bridge from the Project provided that a new replacement bridge is designated via a change order. All change orders for the Project are subject to review and approval by FHWA.
 - b) The change order process used to remove or replace a bridge will operate so as to ensure that the DE is left in a position neither better nor worse as a result of the removal of the bridge. In other words, if the FHWA concurs, PennDOT will introduce an alternative bridge into the Project with substantially similar attributes. This will include initiation of a change order to offset any additional costs that may be associated with the new bridge, so as to maintain equilibrium of the DE's financial interest in the Project.
 - c) All design documents and work developed for a bridge that is removed from the Project will be transferred to PennDOT for its unrestricted use. The DE will be compensated for the work completed on the removed bridge via the change order.
 - d) Replacement bridges will be drawn from either a predetermined grouping of bridges or from bridges in PennDOT's regular capital improvement program.

Proposed Performance Measures and Reports

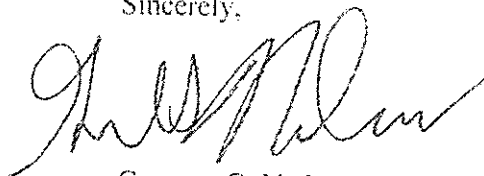
The PennDOT SEP-15 Application included proposed factors to evaluate the experimental features of the Project SEP-15. The FHWA will fully evaluate the proposed factors, listed below, for inclusion in the EDA:

- (1) Time savings for completion of the Project.
- (2) Cost savings to the public.
- (3) Integrity of the environmental review process.

The proposed initial report, periodic updates, interim reports, and a final report, described in the Application, will be reviewed during the development of the EDA and incorporated into a project timeline.

I have asked Ms. Regina McElroy, Director, Office of Innovative Program Delivery and Ms. Renee Sigel, FHWA Division Administrator for the Division Office to serve as the co-facilitators for the Project. Ms. McElroy and Ms. Sigel will establish an FHWA interdisciplinary team to work with PennDOT to develop the provisions of the EDA.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gregory G. Nadeau', with a stylized, cursive script.

Gregory G. Nadeau
Acting Administrator