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Ms. Amy Jackson-Grove
Assistant Division Administrator
Federal Highway Administration
Leo W. O'Brien Federal Building, 7th Floor
Clinton Ave. & North Pearl St.
Albany, New York 12207

**Re: Comments on the Draft Environmental Impact Statement for the
Peace Bridge Expansion Project in Buffalo, New York**

Dear Ms. Jackson-Grove:

The National Trust for Historic Preservation appreciates the opportunity to comment on the Draft Environmental Impact Statement (DEIS) for the proposed Peace Bridge Expansion Project in Buffalo, New York and Fort Erie, Canada. Our comments reflect our concerns about the proposal's profound potential adverse effects on historic properties and the DEIS's adequacy in satisfying the requirements of the National Environmental Policy Act (NEPA), Section 106 of the National Historic Preservation Act (NHPA), and Section 4(f) of the Department of Transportation Act. In spite of the sheer size of the document, the DEIS has significant flaws. We provide these comments to ensure that the Federal Highway Administration (FHWA) fully complies with all necessary federal requirements and to ensure that the Peace Bridge Expansion Project fully considers the protection of Buffalo's historic properties and landscapes.

The neighborhood that would be affected by the proposed project constitutes an intact, vital, and worthy collection of significant historic resources, including homes, religious buildings, and landscapes. A large number of these resources are either listed on the National Register of Historic Places or have been determined eligible for listing, individually or as part of a National Register Historic District. In our view, the region's transportation needs can be addressed without destroying and impacting irreplaceable historic resources on the exceptional scale defined by the single viable alternative analyzed in the DEIS.

Protecting the Irreplaceable

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Interests of the National Trust

The National Trust is a private, nonprofit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. See 16 U.S.C. § 468. With the strong support of more than 283,000 members, including over 32,000 members in New York, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust has seven regional offices around the country, including our Northeast Office in Boston, Massachusetts, which is specifically responsive to preservation concerns in New York.

Our comments below discuss the applicable federal procedural and substantive requirements, focusing on the areas that raise considerable concern. We provide recommendations to correct these identified issues/concerns. These comments are not exhaustive, particularly with respect to Section 106 of the NHPA and Section 4(f). We hope to provide more substantive and detailed comments during the Section 106 consultation process.

National Environmental Policy Act

The DEIS has some fundamental flaws with respect to NEPA, which raise questions about the adequacy of the entire document, and corrupt the Section 106 and Section 4(f) analyses. Most significantly, the DEIS fails to examine a reasonable range of alternatives, and it is based on an unreasonable statement of purpose and need. Additionally, the analysis of indirect and cumulative impacts is inadequate, providing very little documentation about how the direct transformation of 5-plus city blocks, as well as the neighborhoods surrounding these, will indirectly and cumulatively adversely impact the character and integrity of historic properties, historic districts, and historic landscapes. (See Section 106 Comments Below). We urge FHWA to correct these shortcomings through a supplemental EIS.

- **The Proposed Purpose and Need is Unreasonably Broad.**

The DEIS provides a prohibitively long list of purposes and needs for the Peace Bridge Expansion project, which has the consequence of severely limiting the number of feasible alternatives that would serve all stated purposes. The purpose and need statement is a critical component of the NEPA process because it establishes limits on whether an alternative is or is not feasible. 40 C.F.R. § 1502.13. Although an agency has discretion to define the goals of a project, it “may not define the goals of its projects so narrowly that only its preferred alternative will meet those goals.” Environmental Protection Information Center v. U.S. Forest Service, 234 Fed. Appx. 440 (9th Cir. 2007)

(citing City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997)); see also Citizens Against Burlington, Inc., 938 F.2d 190, 196 (D.C. Cir. 1991) (“an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality”) (citing City of New York v. Department of Transp., 715 F.2d 732, 743 (2d Cir. 1983)).

In this case, PBA promotes so many elements as part of the purpose and need, so as to “unreasonably narrow” the number of “feasible” options. The DEIS lists as the project’s purpose and need, border crossing operations, safety, bridge structure, capacity, environmental, economic, modal interrelationship, system mobility, and social demand and economic development. Id. at 4. In contrast, the scoping document established that the primary purpose and need of the project was only “to eliminate the bottleneck in the existing international transportation system created by the inadequate vehicular capacity of the Peace Bridge and inefficiencies in the plaza configuration, traffic flow patterns and roadway network on the U.S. side,” DEIS, Appendix C at 7. It seems the addition of non-essential elements to what appears to be traffic congestion and capacity need, like “social demand and economic development,” adds an unnecessary layer to the project, which in turn unreasonably narrows the number of feasible alternatives.

As discussed more closely below in the Section 4(f) section, this problem is highlighted by the fact that Alternative 1 (the only viable alternative, and therefore the preferred alternative) proposes to demolish St. Mary’s on the Hill and other historic properties simply to accommodate a new duty free shop and visitor’s center both with connected parking lots. Is this a necessary component of the project, such that alternatives that eliminate these facilities, or substantially reduce the size of these facilities, must be rejected as feasible alternatives? Certainly, PBA appears to reject alternatives that minimize or eliminate these facilities as infeasible for failing to satisfy the purpose and need.

Recommendation: The National Trust strongly recommends that FHWA supplement the DEIS to redefine the purpose and need in a way that distinguishes the primary, essential purpose of the proposal from the secondary, non-essential elements of the proposal. Addressing current and future traffic congestion should take priority over the need to construct and accommodate a duty free shop, visitor’s center, and parking lots, particularly where those non-essential activities would result in the destruction of significant historic resources. Revising the purpose in this way would allow for inclusion in the supplement of a more adequate evaluation including more feasible alternatives that would cause fewer anticipated adverse effects to historic properties.

- **The DEIS Fails to Consider a Reasonable Range of Alternatives.**

As a direct consequence of the flawed purpose and need, the DEIS fails to propose as feasible and analyze a reasonable range of alternatives, including alternatives that would not destroy, alter, or impair historic properties and landscapes in or eligible for the National Register of Historic Places. NEPA requires the federal agency to analyze a reasonable range of alternatives, including alternatives not within the agency's jurisdiction. 40 C.F.R. §§ 1502.14(a), (c). Pursuant to the Council on Environmental Quality (CEQ) regulations implementing NEPA, the development and analysis of alternatives is the "heart of the environmental impact statement." See id. The purpose of the NEPA alternatives requirement is to prevent the environmental analysis from becoming a "foreordained formality." Citizens Against Burlington, Inc. v. Busey, 938 F.2d at 196 (citing City of New York v. Dep't of Transportation, 715 F.2d at 743). NEPA also requires the lead federal agency to consider all practicable means of preserving "important historic, cultural, and natural aspects of our national heritage" during the decision-making process. 42 U.S.C. § 4331(b)(4).

Of substantial concern, the DEIS evaluates only one build alternative that can be chosen – Alternative 1. Although the DEIS evaluates a second build alternative (Alternative 3) that is premised on the concept of Shared Border Management (SBM), this alternative is not available due to an impasse in negotiations between the U.S. Department of Homeland Security and the Canadian government. DEIS at 7. As a consequence, PBA proposes only one alternative that is feasible. Because the development and analysis of alternatives is the "heart of the environmental impact statement," a failure to propose more than one technically viable alternative raises considerable questions about the adequacy of the DEIS. Seemingly as a result of PBA's overloaded defined purpose and need in the DEIS, PBA rejects alternatives that involve different plaza locations and/or changes in practices were eliminated from discussion. See generally, DEIS, Appendix C; see also DEIS at 104. For instance, Alternative 2, which was identified through the scoping process, proposed to build a plaza in a new location altogether. DEIS at 99. This alternative was eliminated between the scoping document and development of the DEIS as infeasible because it was determined to have "significantly more impacts with less transportation, environmental or social benefits than other reasonable alternatives." Id. at 100.

Additionally, PBA refuses to accept as feasible any alternative that does not accommodate all aspects of its broad purpose and needs. In particular, the DEIS should evaluate alternatives that accomplish significant aspects of the purpose and need, i.e., the reduction in traffic congestion, while eliminating non-essential purpose and needs, i.e., a new duty free shop, visitor's center, and dense parking. It is important to note that these non-essential elements would significantly contribute to irreparable adverse effects on NRHP listed and eligible properties. Is it not possible for a visitor's center to be built outside of the plaza boundaries to serve the intended interest of keeping visitors in

Buffalo? Pursuant to NEPA's alternative mandate, we believe the DEIS should examine alternatives to the only viable build alternative – Alternative 1 – that reduce the overall footprint of the project.

Finally, the DEIS should examine alternatives that identify programmatic changes to the Peace Bridge operations, which serve to meet the primary purpose and need – reducing traffic congestion. Such alternatives may be variations of Alternative 1 that allow for some new development and expansion of the Peace Bridge, but also provide for a reduction in the footprint. Overall, the DEIS does not appear to satisfy NEPA's critical mandate to examine a reasonable range of alternatives.

Recommendation: With primary purpose and needs identified, FHWA should supplement the DEIS to add a reasonable range of alternatives. Such alternatives should include those which substantially reduce the footprint of the proposed expansion by eliminating the non-essential elements of the proposal, e.g., a new duty free shop and visitor's center, or that address the primary purpose and needs by moving the expanded plaza functions to a less sensitive location. Additionally, the DEIS should consider alternative methods for resolving current and future traffic congestion by examining operational changes, such as minimizing or eliminating commercial traffic.

Section 106 of the National Historic Preservation Act

The Section 106 discussion suffers from the same NEPA flaws identified above. FHWA appears to be coordinating the Section 106 process with the NEPA process pursuant to 36 C.F.R. 800.8. Such coordination is permissible under the regulations, but must satisfy the Section 106 regulation's requirement to identify and assess the effects of an undertaking on historic properties, as provided for in 36 C.F.R. §§ 800.4, 800.5. *Id.* § 800.8(c)(1)(ii). Further, the agency must “[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.” *Id.* § 800.8(c)(1)(v). It does not appear from the DEIS that FHWA has met either of this specific procedural requirements.

- **Failure to Adequately Assess Potential Indirect and Cumulative Effects on Historic Properties**

The DEIS does not adequately evaluate the indirect and cumulative impacts to historic properties and landscapes pursuant to 36 C.F.R. § 800.8(c)(1)(ii). This is important to the Section 106 review because indirect and cumulative effects, not simply direct effects, are specifically considered as adverse effects within the Section 106 regulations. 36 C.F.R. § 800.5(a)(1). Section IV.B.4 in the DEIS provides only general

statements about the potential indirect and cumulative impacts of Alternatives 1 and 3, failing to provide details that can adequately inform a discussion about possible alternatives and methods to “avoid, minimize or mitigate” such impacts. For example, with respect to the historic character of the surrounding neighborhood and Frederick Law Olmsted’s coordinated system of parks and parkways (including Front Park), the DEIS simply states that “[t]he potential indirect effects of noise and traffic congestion could negatively impact the historic qualities of these features.” DEIS at 432. It further states that measures to mitigate these effects will be identified and incorporated into the project’s design and various permits issued by the U.S. and Canadian authorities. Id. These vague statements about indirect and cumulative impacts, and moreover, an approach that attempts to identify and incorporate mitigation measures at some future time, certainly after the agency has approved the undertaking, do not satisfy the spirit or letter of the law.¹

Recommendation: We recommend that FHWA more fully assess the potential indirect and cumulative effects, and provide such information in a supplement DEIS. Such information will help to inform consulting parties and the public about the broad effects associated with the proposed Alternatives.

- **Failure to Develop Alternatives and Proposed Measures to “Avoid, Minimize or Mitigate” Adverse Effects and Describe them in the DEIS**

The DEIS fails to evaluate how PBA and FHWA will meet Section 106’s requirement that the agency seek to “avoid, minimize or mitigate” adverse effects associated with the only viable alternative, or the variations of Alternative 3 for that matter. The Section 106 regulations require that this discussion be incorporated into the DEIS. 36 C.F.R. § 800.8(c)(1)(vii). Although the DEIS states that “there is insufficient information to evaluate the majority of properties under National Register Criterion A, for potential significance associated with patterns, trends, or events in history,” DEIS at 311, there are statements about which resources will or will not be “directly” adversely affected by the two alternatives, see id. at Table 4-9. In fact, the DEIS states that

¹ For reasons similar to the NHPA arguments, the vague statements about indirect and cumulative impacts appear to conflict with the requirements of NEPA. The NEPA regulations define indirect impacts as those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. . . .” 40 C.F.R. § 1508.8(b). Likewise, pursuant to NEPA, FHWA has an obligation to take a “hard look” at the potential environmental consequences of cumulative impacts. 40 C.F.R. § 1508.25(c)(3). Cumulative impacts are the compounding of an action on “other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.” 40 C.F.R. § 1508.7 (emphasis added). These impacts “can result from individually minor but collectively significant actions taking place over a period of time.” Id. FHWA does not adequately analyze or evaluate indirect and cumulative impacts in the context of NEPA.

“ongoing consultation with the NYSHPO and other consulting parties will be carried out to finalize effect determinations and resolve adverse effects on historic properties.” *Id.* at 318. The failure to evaluate alternatives and methods to “avoid, minimize or mitigate” adverse effects is not in compliance with the Section 106 regulations. A discussion about how to address this issue would appear to be appropriate in the context of the DEIS.

Recommendation: We strongly recommend that the FHWA seek to identify and evaluate alternatives or methods to “avoid, minimize or mitigate” the potential adverse effects, and incorporate this information in a supplemental DEIS. Alternatives and methods should include location and design modifications to elements of the proposed alternatives, e.g., changes to the duty free shop and visitor’s center, or that move the expanded plaza functions to a less sensitive location.

Section 4(f) of the Department of Transportation Act.

The most problematic aspect of the DEIS is its complete failure to evaluate “feasible and prudent” alternatives to the use of historic properties and landscapes in or eligible for the National Register pursuant to Section 4(f) of the Department of Transportation Act. Section 4(f) is the most stringent federal historic preservation law ever enacted, and it reflects Congress’ directive that the protection of historic properties, parks, recreation areas, and wildlife and waterfowl refuges, be given “paramount” importance in transportation planning. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412-13 (1971). Section 4(f) provides that FHWA “shall not approve any program or project . . . which requires use [of a protected resource] . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such [protected resource].” 49 U.S.C. § 303 (emphasis added). This mandate is substantive and “prohibitory.” Stop H-3 Association v. Dole, 740 F.2d 1442, 1461 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985); Druid Hills Civic Ass’n v. Federal Highway Administration, 772 F.2d 700, 713 n.15 (11th Cir. 1985).

The Section 4(f) Analysis is absolutely devoid of any analysis of whether there are no other feasible and prudent alternatives to the “use” of historic properties associated with the two build alternatives. In fact, the Section 4(f) Analysis simply states that “[i]t is difficult to design a Build Alternative that completely avoids 4(f) protected resources because of the size and scope of the project, the densely populated nature of Buffalo’s West Side, and the required retention of the bridge landing and US plaza.” DEIS at 523. The U.S. Supreme Court has narrowly defined the circumstances under which an alternative can be rejected as not “feasible and prudent.” See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The Secretary of Transportation is not permitted to “engage in a wide-ranging balancing of competing interests.” *Id.* at 411.

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Rather, to find an alternative “not prudent” under Section 4(f) the Secretary must find that it presents “unique problems” – that there are “truly unusual factors present,” or that the “cost or community disruption” resulting from the alternative would reach “extraordinary magnitudes.” *Id.* at 413. In short, FHWA is not permitted to dismiss, or worse not discuss, avoidance alternatives simply because the potential design for a build alternative is “difficult.” The failure to meet this stringent requirement violates Section 4(f).

Additionally, it is worth noting that the Section 4(f) Analysis fails to look beyond PBA’s presumption that it must accommodate non-essential elements of the project to satisfy the objectives established by its defined purpose and need, e.g., a new duty free shop, visitor’s center, and parking lots. *See* DEIS at 524 (“The thorough analysis given to this project and the careful refinement of the designs has resulted in the selection of two feasible and prudent Build Alternatives.”). The demolition of historic properties associated with Alternative 1, for the benefit of non-essential elements seems to ignore the letter and spirit of Section 4(f). Certainly, there must be other “feasible and prudent” alternatives that do not include non-essential elements, and are not determined to have “truly unusual factors.” Alternatives evaluated should also include other configurations such as additional or alternative bridge spans in other locations that would minimize impacts to an area so rich in significant resources worthy of protection. We believe it is incumbent upon FHWA to analyze other methods of satisfying the primary purpose and needs as well as non-essential elements that would avoid harm to Section 4(f) resources.

Recommendations: The National Trust strongly recommends that FHWA correct the Section 4(f) flaws by evaluating additional avoidance alternatives that thoroughly satisfy the strict “feasible and prudent” alternative standards set forth by the Supreme Court in Citizens for Overton Park.

The National Trust appreciates the opportunity to submit these comments on the DEIS for the Peace Bridge Expansion project. We hope to elaborate more fully on the broad concerns outlined in this comment letter during the Section 106 consultation meeting on December 6, 2007, and also as the process moves forward. Again, we look forward to working with you on this project.

Respectfully submitted,



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