UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA ALLIANCE FOR TRANSPORTATION REFORM, INC.	)	
and	)	
FRIENDS OF FORSYTH COUNTY,	)	
Plaintiffs,	)	
	)	**Civil Action No. 1:08-cv-570**
v.	)	
UNITED STATES DEPARTMENT OF TRANSPORTATION, et al	)	
Defendants,	)	

(Replacement) MEMORANDUM OF LAW SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, through undersigned counsel and under Local Rule 7.2, file this memorandum in support of their motion for summary judgment against the defendants on all claims of the complaint. The plaintiffs, their counsel having inadvertently filed an earlier draft of this memorandum on Friday evening, file this memorandum as a replacement for the incorrect version that was previously filed.

INTRODUCTION

Plaintiffs North Carolina Alliance for Transportation Reform, Inc. (hereafter "NCATR") and Friends of Forsyth County (hereafter "FOF") have moved this Court for summary judgment on their complaint, which requests declaratory and injunctive relief against defendants, United

States Department of Transportation (hereafter "USDOT"), the secretary of USDOT[1], the Federal Highway Administration (hereafter "FHWA"), the administrator of FHWA[2], the FHWA's North Carolina Division Administrator[3], the North Carolina Department of Transportation (hereafter, "NCDOT") and the secretary of NCDOT[4]. The complaint requests declaratory and injunctive relief against defendants for violations of the National Environmental Policy Act (hereafter "NEPA"), 42 U.S.C. Sections 4321, *et seq.*, and the North Carolina Environmental Policy Act (hereafter "NCEPA"), N.C. Gen. Stat. Sections 113A-1, *et seq*.

PLAINTIFFS

Plaintiff NCATR is a not-for-profit corporation, incorporated under of laws of North Carolina. NCATR is a membership organization with approximately 200 members in North Carolina.

Plaintiff FOF is a not-for-profit, unincorporated association with it principal place of business in Winston-Salem, North Carolina. FOF is a membership organization with approximately 10 members in North Carolina.

NCATR's and FOF's members reside in and use areas that will seriously affected by the construction of the Beltway. Some of their members will be required to relocate their homes.

STATEMENT OF FACTS

Federally-funded Transportation Improvement Program ("TIP") Projects R-2247, U-2579, and U-2579A taken together are commonly known as the Winston-Salem Northern Beltway ("Northern Beltway"). TIP Project R-2247 encompasses the western section of the Northern Beltway from US 158 north to US 52 in western Forsyth County, North Carolina

[1] Mary E. Peters served as the secretary of USDOT at the time that the plaintiffs filed the complaint on 13 August 2008. Ray LaHood has served as secretary of USDOT since 23 January of 2009.
[2] James Ray served as the acting administrator of FHWA as of the complaint's filing. FHWA has no one currently serving as administrator, although Jeffrey E. Paniati, P.E. currently serves as the acting deputy administrator.
[3] John F. Sullivan, III, P.E. currently serves as the FHWA's North Carolina Division Administrator.
[4] Eugene A. Conti, Jr. currently serves as NCDOT's secretary.

(hereinafter, "Western Section" or "R-2247" or "Bypass Project"). TIP projects U-2579 and U-2579A make up the eastern section of the Northern Beltway from US 52 to US 311 in eastern Forsyth County (hereinafter, "Eastern Section"). The defendants issued a Draft Environmental Impact Statement ("DEIS") for R-2247 in 1992, as required under the National Environmental Policy Act of 1969, § 2 *et seq.*, 42 U.S.C.A. § 4321 *et seq*. ("NEPA"). In 1995, a DEIS was issued for TIP Project U-2579. The defendants issued a Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") for R-2247 in 1996.

On 18 February 1999, the plaintiffs filed a lawsuit in this Court regarding R-2247, alleging violations of NEPA 42 U.S.C. § 4321, *et seq.* and the North Carolina Environmental Policy Act ("NCEPA"), N.C. Gen. Stat. § 113A-1, *et seq.* On June 21, 1999, the parties filed a joint motion for dismissal. On 29 June 1999 this Court entered an order of dismissal (hereinafter, "1999 Order") stating in pertinent part the following:

> 3. Federal defendants shall not grant any further approvals, enter into any contracts, or provide any funds relating to the acquisition of property or construction of the Winston-Salem Beltway (hereinafter "Bypass Project") until the new environmental analysis and documentation process has been completed, a conforming Long Range Transportation Plan and Transportation Improvement Program for the Winston-Salem metropolitan area have been approved, and federal defendants issue a new Record of Decision pursuant to applicable federal law for the Bypass Project;
>
> 4. State defendants shall not take any irrevocable actions relating to construction, right-of-way acquisitions, or negotiations for right-of-way acquisitions, in furtherance of the Bypass Project until the conditions set forth in paragraph 3 above have been met….

Subsequently, this Court found that the defendants had violated NEPA as interpreted by the Council on Environmental Quality ("CEQ") regulations and Fourth Circuit case law by analyzing the Eastern and Western Segments of the Northern Beltway in separate environmental documents. North Carolina Alliance for Transportation Reform, Inc. and Friends of Forsyth v. North Carolina Department of Transportation *et al*, 151 F.Supp.2d 661, 667-668 (2001) ("FOF

I"). This Court also ruled that the federal defendants had acted in bad faith by approving the ROD after only a one day review. Id., at 676 ("…Federal Defendants' one-day review of the ROD constitutes bad faith in performing a statutorily imposed duty."). Additionally, this Court found that the defendants acted without substantial justification in analyzing the Western and Eastern Sections in different environmental documents. Id., at 678 ("Since the court has already found that Plaintiffs carried the burden of showing bad faith conduct based on this allegation, *a fortiori* Federal Defendants were not substantially justified in issuing the ROD in the manner they did.") and 699-700 ("The court finds that no special circumstances exist which would prevent Plaintiffs from recovering attorney's fees from State Defendants [under N.C.G.S. Section 6-19.1, which required the plaintiffs to show that the state defendants acted without substantial justification and the lack of any special circumstances which would make the award of attorney fees unjust].").

After this Court's findings of bad faith and lack of substantial justification, the state and federal defendants combined Projects R-2247, U-2579, and U-2579A into one environmental document. On 1 October 2004 the defendants published a Supplemental FEIS/Supplemental DEIS ("FEIS/SDEIS") for the Northern Beltway. *See* Defendant's Mem., Exhibit B, Affidavit of John Sullivan, P.E (FOF I, Doc. 123-2). Subsequently the defendants signed the Supplemental FEIS/FEIS ("SFEIS/FEIS") for the Northern Beltway on 11 January 2007. Id. The FHWA signed the ROD for the Northern Beltway on 15 February 2008. Id.

This Court is currently considering a motion to dissolve the 1999 Order in FOF I, which turns on whether the defendants complied with NEPA in the process that led to this most recent ROD. *See* FOF I, Doc. 122, Doc 123 and Doc 127.

STATEMENT OF THE CASE

The plaintiffs filed this action ("FOF II") on 13 August 2009. The state defendants

answered on 14 October 2008. Doc. 7. The federal defendants answered on 13 November 2008. Doc. 12. The Court issued an order approving the parties joint Rule 26(f) report on 16 December 2008. Doc. 15. The plaintiffs moved for an extension of time until 29 May 2009 to file their motion for summary judgment with the consent of all parties. Doc 18. The parties agree that this matter is appropriate for resolution by summary judgment. Doc 14.

SUMMARY JUDGMENT

A court may grant summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c) and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 322, 106 S.Ct. 2548. The non-moving party must then come forward and show that a triable issue of fact exists. Anderson v. Liberty Lobby, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Conclusory allegations are not sufficient to defeat a motion for summary judgment. Id. at 249, 106 S.Ct. 2505.

QUESTIONS PRESENTED

I. Whether a genuine issue of a material fact exists as to the plaintiffs' standing to maintain this suit?

II. Whether a genuine issue of material fact exists as to the SFEIS/FEIS's failure to evaluate additional greenhouse gas emissions caused by the Northern Beltway and thus violated NEPA?

III. Whether a genuine issue of material fact exists as to the SFEIS/FEIS's failure to consider both the airport interchange and the southern loop and thus violated NEPA?

IV. Whether a genuine issue of material fact exists as to the state defendants' NEPA violations constituting a violation of NCEPA?

ARGUMENT

I. No genuine issue of a material fact exists as to the plaintiffs' standing to maintain this suit.

Plaintiffs have standing to bring this suit, and no genuine issue of material fact exists about it. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." Bennett v. Spear, 117 S. Ct. 1154, 1161 (1997). The Supreme Court has held that a person has standing under the Constitution if he or she (a) has suffered an injury-in-fact that is (b) fairly traceable to defendants' conduct and is (c) likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). In this case, the relevant prudential limitation requires that plaintiffs' members demonstrate that they fall within the zone of interests protected by NEPA and NCEPA. See Bennett v. Spear, *supra*, 117 S. Ct. at 1161.

Plaintiffs submit the declarations from NCATR and FOF members Sarah N. Jones, Bettie Potts Slater, Leslie W. Brewer, Austin C. Behan, Flora H. Forbus, Timothy R. Chambers, Jerry and Sandra Hart, Rex Peddycord, Robert Kinch, Jimmy Manuel, Elizabeth Ramey, Mac and Martha Graham and Jeffrey Hart. Declaration Nos. 1- 13[5].

Ms. Jones is a member of NCATR and FOF Declaration No. 1, paras. 2 & 3. She lives on a 92-acre farm that has been in her family since 1902 Id., para, 6. The Beltway will bisect this property and permanently alter its rural and pastoral character. Id., para. 7. The project will require the taking of 21 acres from Ms. Jones' farm. Id., para. 9.

Ms. Slater is a member of NCATR and FOF. Declaration No. 2, para. 2. She lives on a 25-acre farm that has been in her family since 1937. Id., para. 3. Entrance and exit ramps for the Beltway will be located at the front of the property and the Beltway will run parallel to one

[5] The standing declarations are attached to the motion for summary judgment as Doc. 19-2 through Doc. 19-2 through Doc. 19-14.

side of the property. Id., para. 5. The Beltway will permanently alter the rural and pastoral character of her property. Id., para. 8.

Ms. Brewer is a member of NCATR and FOF. Declaration No. 3, para. 2. She lives on one acre of a 12-acre tract of land that is owned by her father. Id., para. 3. The Beltway will bisect the 12-acre tract. Id., para. 4. Defendants will take her home for the construction of the Beltway. Ibid.

Mr. Behan is a member of NCATR and FOF. Declaration No. 4, paras 2, 3. He and his wife live on a 16-acre farm that they purchased in 1986. Id., para 4. The property contains two houses, one built around 1960 and one around 1930. Ibid. The Beltway will cut their farm in half destroying about on half of their pasture land. Id., para. 6. An exit ramp from the Beltway will be located by the front of the house. Id., para. 7.

Mr. and Mrs. Mac C. Graham are members of FOF. Declaration No. 5, para 7. The Grahams have lived in their home at 220 Sedge Garden Road, Kernersville for 45 years. Id., paras 2, 3. The Beltway would uproot residents and destroy the quietness and air quality of their community. Id., para 6.

Mr. Kinch is a member of NCATR and FOF. Declaration No. 6, paras. 2 & 3. He lives on a 7-acre tract. He lives in a home that he occupied with his wife (now deceased) since 1957. Id., para. 6. The Beltway will take approximately 150' from his property line. Id., para. 7. The immediate area will no longer be quiet, safe and peaceful. Id., para 8.

Mr. Jeffrey S. Hart is a member of FOF. Declaration No. 7, para. 3. The Eastern section of the Northern Beltway will destroy his childhood home where his parents, (Charles and Sandra Hart), still live. Id., para. 4. Mr. Hart will inherit this property. Id., para. 2.

Ms. Flora H. Forbus is a member of FOF. Declaration No. 8, para. 2. She and her husband (now deceased) were forced to leave their home in 1998 after the Department of Transportation purchased it as a right-of-way for the Northern Beltway. Id., para. 4.

Mr. and Mrs. Charles Jerry Hart are members of NCATR and FOF Declaration No. 9, paras. 6 & 8. The Eastern section of the Northern Beltway will destroy their home, historical buildings, their lake, and will take most of their land, leaving two parcels completely land locked. Id., para 9.

Mr. Jim Manuel's grandchildren are the 7th generation living on the land affected by the Northern Beltway. Declaration No. 10, para 1. The wildlife will be driven away by the road construction. Id., para 2.

Mr. Timothy R. Chambers and his family live on approximately 300-acres. Declaration No. 11, para. 3. The property contains his home, a civil war era cabin, smokehouse, and a granary. Id., para. 4. The western leg of the Northern Beltway will cross his family's property in three separate locations. Id., para 8(a). The western leg of the Northern Beltway will bisect approximately 25-acres behind his house making it inaccessible. Id., para. 8(b).

Ms. Elizabeth Ramey is a member of FOF. Declaration No. 12, para 3. Ms. Ramey would like her daughter and grandchildren to be able to live in the quiet rural area she now lives in. Id., para 5.

Mr. and Mrs. Rex Peddycord are members of FOF. Declaration No. 13, last paragraph. Their property is located near the eastern segment of the Northern Beltway and will be adversely affected by the Beltway.

These declarations demonstrate that no genuine issue of material fact exists as to plaintiffs' satisfaction of the constitutional and prudential requirements for standing. Accordingly they are entitled to summary judgment on this question.

II. No genuine issue of material fact exists as to the SFEIS/FEIS's failure to evaluate additional greenhouse gas emissions caused by the Northern Beltway and thus violated NEPA.

The SFEIS/FEIS recognizes that the Northern Beltway will cause VMT (vehicle miles traveled) to increase by 1.80[6] percent compared to the "No Action" scenario. Such an increase in VMT signifies a significant contribution from the Northern Beltway to greenhouse gas[7] emissions, which the SFEIS/FEIS fails to disclose or discuss.

Background – Climate Change

The United States Supreme Court has confirmed the link between manmade GHG emissions and global climate change: "A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species-the most important species-of a 'greenhouse gas.'" Massachusetts v. E.P.A., 549 U.S. 497, 504, 127 S.Ct. 1438, 1446, 167 L.Ed.2d 248 (2007).

Other courts have recognized the serious problems caused by global warming:

> … recent evidence shows that there have already been severe impacts in the Arctic due to warming, including sea ice decline. Global warming has already affected plants, animals, and ecosystems around the world. Some scientists predict that "on the basis of mid-range climate-warming scenarios for 2050, that 15-37% of species in our sample of regions and taxa will be 'committed to extinction.' " In addition, there will be serious consequences for human health, including the spread of infectious and respiratory diseases, if worldwide emissions continue on current trajectories. Sea level rise and increased ocean temperatures are also associated with increasing weather variability and heightened intensity of storms such as hurricanes. Past projections have underestimated sea level rise. Several studies also show that climate change may be non-linear, meaning that there are positive feedback mechanisms that may push global warming past a dangerous threshold (the "tipping point").

[6] Cumulatively with other projects in Forsyth County the Northern Beltway increases VMT by 1.80 %. In isolation from other projects, it increases VMT by 1.05%. SFEIS/FEIS, p. 4-243.
[7] This brief abbreviates greenhouse gas, or gases, as "GHG" or "GHGs".

Center for Biological Diversity v. National Highway Traffic Safety Admin., 538 F.3d 1172, 1191 (2008) (internal citations omitted).

According to E.P.A., the transportation sector accounts for 27% of the United States' GHG emissions and is the fastest growing source of total U.S. GHG emissions. U.S. E.P.A., Office of Transportation and Air Quality, "Greenhouse Gas Emissions from the U.S. Transportation Sector, 1990-2003" (2006), p. 1[8]. Within the transportation sector, light duty vehicle ("LDVs" – i.e., cars, pickup trucks, sport utility vehicles and vans) emissions accounted for over 60% of the total GHG emissions in the U.S. Id. at p. 10.

To overcome global warming and achieve climate stabilization, a commonly accepted target would require the United States to cut its carbon dioxide emissions by 60% to 80% of its 1990 levels by the year 2050. Bartholomew, K., Chen, D.T., Ewing, R., Walters, J. and Winkelman, S. "Growing Cooler: The Evidence on Urban Development and Climate Change" Washington, D.C.: The Urban Land Institute, 2007, p. 1[9]. Both fuel economy gains and a reduction in VMT will be needed to stabilize GHG emissions. Id. Indeed, without significant reform, energy demand (and therefore GHG emissions) for light duty vehicles is projected to continue increasing from 2007 to 2030, with fuel economy gains offset by annual increases in vehicle-miles traveled. Annual Energy Outlook 2009 With Projections to 2030, U.S. Energy Information Administration (2009) (emphasis added) [10]. So efforts to stabilize climate change must include efforts to reduce VMT. Yet, despite the fact that the Northern Beltway is projected to cause a significant increase in VMT, the SFEIS/FEIS omits any discussion of the beltway's unfavorable impact on global warming.

Climate Change Comments and Agency Response

[8] http://www.epa.gov/oms/climate/420r06003.pdf .
[9] http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf .
[10] http://www.eia.doe.gov/oiaf/aeo/demand.html .

After the release of the defendants' SFEIS/FEIS in January of 2007, the plaintiffs submitted timely comments on it, which stated in part (in part), "the Northern Beltway's incremental detriment to the global warming situation, stemming from additional VMTs arising out of traffic induced by the Northern Beltway, cannot be ignored or grossly underestimated, by the SFEIS/FEIS and comply with NEPA." ROD, Appendix C, Smith comment letter, p. 5. FHWA responded by stating in its ROD that it "does not believe it is informative at this point to consider greenhouse gas emissions in an [EIS]" (ROD, p. 57). This argument has no merit.

The fact that global GHG emissions and climate change are larger than this particular project does not abrogate the agencies' need to consider this issue. The U.S. Supreme Court addressed this argument in the Massachusetts case, reasoning:

> Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed.

Massachusetts, 127 S.Ct. at 1457. The argument that "a small incremental step, because it is incremental, can never be attacked in a federal judicial forum" is simply incorrect. Id. GHG emissions from this project may contribute only a small fraction of global emissions of this pollutant, but that does not allow the agencies to ignore the issue. NEPA requires consideration of environmental effects when their nature is reasonably foreseeable but their extent is not. Midstates Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 549 (8th Cir. 2003). Moreover, CEQ regulations provide specific procedures for the Agencies to follow when assessing unknown or uncertain impacts. 40 C.F.R. § 1502.22. The Agencies failed to follow these.

Indirect Impacts

NEPA requires that an EIS analyze the indirect impacts that a proposed action will have on air quality. 40 CFR 1508.8(b)[11] ("Indirect effects [include] effects on air and water and other natural systems, including ecosystems."), 40 CFR 1502.16(b) (EISs shall discuss indirect effects and their significance) and 1 NCAC 25.0603(6)(b) (EISs shall discuss indirect effects and their significance); *see also* Keith v. Volpe, 352 F.Supp. 1324, 1335 (1972) ("As long as some information on air pollution was available, NEPA and the Council's guidelines obligated the federal defendants to prepare a Section 102(2)(C) statement examining, with as much precision as was possible at the time, the impact of the proposed freeway on air quality…."); *cf.* Friends of Forsyth, 151 F.Supp.2d at 694 ("Defendants decision not to include a quantitative ozone analysis did not violate NEPA…." (emphasis added))[12].

Cumulative Impacts

Furthermore, GHG emissions qualify as cumulative impacts:

> "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. 1508.7. NEPA requires an agency to evaluate the "[c]umulative impact" of its action, Department of Transp. v. Public Citizen, 541 U.S. 752, 769, 124 S.Ct. 2204, 2216, 159 L.Ed.2d 60, 72 (U.S.,2004) *citing* 40 C.F.R. 1508.7; *see also* 1 NCAC 25.0603(6)(a) - (c) (NCEPA requires EIS to evaluate direct, indirect and cumulative effects). "The

[11] The Council on Environmental Quality ("CEQ") formulated NEPA's implementing regulations, which appear at 40 C.F.R. §§ 1500-1508. "CEQ regulations are binding on all federal agencies and are entitled to substantial deference." Friends of Forsyth v. U.S. Dept. of Transp. 151 F.Supp.2d 661, 684 (M.D.N.C., 2001)

[12] In FOF I Judge Bullock distinguished Sierra Club, Illinois Chapter v. U.S. Dept. of Transp., 962 F.Supp. 1037, 1045 (N.D.Ill.,1997) ("an impact statement is incomplete without an analysis of the effect the [road] will have on the production of ozone in the region."). The situation that Judge Bullock encountered in FOF I differs from the case at bar, because of the SFEIS/FEIS's complete lack of any mention of the Northern Beltway's contribution to GHGs. In FOF I, "the FEIS devoted… two paragraphs of discussion to the expected changes in the ozone level resulting from completion of the Western Section" (FOF, 151 F.Supp.2d at 694); in the present case the SFEIS/FEIS makes no mention of GHGs. SFEIS/FEIS, pp. 4-85 through 4-101.

impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." Center for Biological Diversity, 538 F.3d at 1217.

Reasonably Foreseeable

Cumulative impacts must be "reasonably foreseeable" to qualify for evaluation in an EIS. Public Citizen, *supra*. Similarly, indirect impacts must qualify as reasonably foreseeable for NEPA to require their evaluation in an EIS. 40 C.F.R. 1508.8. "[R]easonably foreseeable" means "that a person of ordinary prudence would take it into account in reaching a decision." Sierra Club v. Marsh, 976 F.2d 763, 767 (1992).

As the SFEIS/FEIS indicates, the Northern Beltway will contribute a significant amount of GHG emissions. On an annual basis, the additional greenhouse gas emissions from the Northern Beltway would meet the threshold set by EPA in its proposed rule requiring annual emissions reports from "facilities that emit 25,000 metric tons or more per year of GHG emissions."[13] Federal Register Docket ID No. EPA-HQ-OAR-2008-0508 (10 April 2009). According to the SFEIS/FEIS, the Northern Beltway, in conjunction with "other reasonably foreseeable projects in the study," will generate an additional 218,000 vehicle miles traveled each day (SFEIS/FEIS, p. 4-243). The E.P.A. calculates that every 12,000 miles of travel for the average passenger vehicle produces 5.2 metric tons of carbon dioxide. Appendix 1[14]. This level of additional vehicle miles traveled equates to an additional 94 metric tons of carbon dioxide

[13] The E.P.A. recently published the proposed regulations in the Federal Register on 10 April 2009 under Docket ID No. EPA-HQ-OAR-2008-0508.

[14] http://www.epa.gov/OMS/climate/420f05004.htm . The Appendices are attached to the motion for summary judgment as Doc. 19-15 through Doc. 19-29.

generated each day[15], or 34,479 metric tons of additional carbon dioxide generated every year by the Northern Beltway[16].

If the Northern Beltway would cumulatively induce[17] 218,000 additional vehicle miles traveled each day, as the SFEIS/FEIS indicates it will, a person of ordinary prudence would take into account the inevitable sequellae of such huge numbers of additional vehicle miles of travel generated by the Northern Beltway – according to E.P.A., this increase in VMT will generate 34,479 metric tons of additional carbon dioxide annually, far exceeding the 25,000 ton annual threshold set by EPA for stationary sources. The significance of the GHG pollution from this project is even greater considering the indirect and cumulative impacts wrought by the sprawl growth patterns facilitated by this project. Clearly, in reaching a decision on whether to build the Northern Beltway, a person of ordinary prudence would take into account the substantial GHG emission cumulatively generated by it.

NEPA Requires a Hard Look at GHGs

NEPA's procedural requirements required the defendant agencies to take a "hard look" at the environmental consequences of their actions. A hard look includes "considering all foreseeable direct, indirect impacts and cumulative." Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir.2002). A hard look should also involve a discussion of adverse impacts that does not improperly minimize negative side effects. Earth Island Institute v. U.S. Forest Service, 442 F.3d 1147, 1159 (C.A.9 (Cal.),2006) citing Native Ecosytems Council v. U.S. Forest Serv., 428 F.3d 1233, 1241 (9th Cir.2005). In this SFEIS/FEIS the defendant agencies

[15] 218,000 vehicle miles induced by the northern beltway/day X 5.2 metric tons/12,000 vehicle miles = 94.4 metric tons of carbon dioxide per day.
[16] 94.4 metric tons of carbon dioxide per day X 365 days/year = 34,479 metric tons of carbon dioxide per year.
[17] According to the SFEIS/FEIS "induced travel for all reasonably foreseeable projects in the study area is 1.80 percent of total travel [for Forsyth County]." SFEIS/FEIS, p. 4-243. "Since the largest figure for vehicle miles of travel is 12.1 million VMT/day countywide, this equals about 218,000 additional vehicle miles of travel each day countywide." Id. "Induced travel with only the entire northern beltway and no other anticipated projects is approximately 1.05 percent." Id. 1.05% is slightly over 127,000 VMT/day countywide.

utterly failed to discuss adverse impacts, or even mention the existence of the climate change phenomenon.

Defendant Agencies Failed to Take a Hard Look

A fundamental purpose of NEPA is "to ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). The decision to build the Northern Beltway translates directly into additional emissions of GHGs from induced traffic, an important impact which the SFEIS/FEIS completely ignores. The defendant agencies' failure to take any look at GHGs, whatsoever, let alone the "hard look" required by NEPA, gives the SFEIS/FEIS a fatal flaw.

At an absolute minimum, the defendant agencies must model the GHG emissions under each of the different alternatives. 42 U.S.C. § 4332; 40 C.F.R. § 1502.14. They must also consider whether other alternatives could accomplish the purpose and goals of the Northern Beltway while limiting the GHG emissions. Ibid. They must consider what mitigation measures are available to limit the GHG emissions that will result from the Northern Beltway. 42 U.S.C. § 4332; 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1508.20. Failure to consider GHG emissions from the Northern Beltway is unreasonable, arbitrary and capricious. Center for Biological Diversity, *supra*. Therefore, the Court should require the defendant agencies to prepare a supplemental EIS that evaluates the GHG emissions related to the Northern Beltway.

No genuine issue of material fact exists, and the plaintiffs are therefore entitled to summary judgment on this question.

III. No genuine issue of material fact exists as to the SFEIS/FEIS's failure to consider both the airport interchange and the southern loop and thus violated NEPA.

The plaintiffs' members made, and the defendants received, a number of comments on the SFEIS/FEIS regarding the failure of the SFEIS/FEIS to analyze the Airport Connector (a.k.a. the I-73/I-74 connector) and the Southern Loop in the SFEIS/FEIS. *See* SFEIS/FEIS, p. 6-85; ROD, p. 51. The defendants responded to these comments as follows:

> The portion of the I-73/I-74 connector from the Winston-Salem Northern Beltway to the Forsyth County/Guilford County line is estimated at $76 million in the Winston-Salem Urban Area 2030 Long Range Transportation Plan (LRTP), and is designated as a Turnpike Authority project. The $76 million would have to be provided by toll revenues since no state, Federal or local funds have been identified for the project. The Turnpike Authority is not currently studying the I-73/I-74 Connector. It is not funded in the 2007-2013 TIP. It is not a reasonably foreseeable project.

ROD, p. 51.

> The Southern Loop is not a funded project, is not in the TIP, and is not included in the *2030 Long Range Transportation Plan*. Therefore, it is not a reasonably foreseeable project and is not included in this study.

SFEIS, p. 6-85; ROD, p. 51.

Although the SFEIS/FEIS was signed in early January of 2007, previous to the defendants' response to the plaintiffs' comments the following had occurred:

- As reported by the Winston-Salem Journal, in September 1997 transportation officials in Forsyth County began discussing a 17 mile long Southern Loop that would connect with the proposed Northern Beltway at either end. Appendix 2[18] (AR _____).
- In October of 2001, the Winston-Salem Journal reported that local transportation officials had planned a series of public meetings to study the Southern Loop, which by this time – some four years after discussions of the Southern Loop had begun – had evolved into a 10 mile facility extending from US 158 (South Stratford Road), where it would meet up with the western segment of the Northern Beltway, to Hwy 311, where it would connect with the

[18] As noted earlier, the Appendices are attached to the motion for summary judgment as Doc. 19-15 through Doc. 19-29.

eastern segment of the Northern Beltway. To join the Northern and Southern (Loop) Beltways, the Northern Beltway would be extended from business I-40 to Hwy 311. Appendix 3 (AR _____).

- On 28 February 2002, the NCDOT and the Winston-Salem Department of Transportation prepared a thoroughfare plan, which showed the Airport Connector and the Southern Loop as part of the thoroughfare plan for the Winston-Salem area. Appendix 4 (AR _____ ; map only at AR 000488).
- On 2 September 2004, the NC Board of Transportation adopted the Airport Connector as a "strategic corridor" as part of its Strategic Highway Corridors initiative. Appendix 5 (AR _____).
- On 3 December 2004 officials from the Town of Kernersville and the Kernersville Chamber of Commerce met with NCDOT personnel, including NCDOT 9th Division Engineer Pat Ivey, to discuss the "Winston-Salem Beltway" and "TIP Project U2579A", which is part of the Northern Beltway. Appendix 6 (AR 23553). The minutes indicate that, when discussing the Airport Connector, the NCDOT representatives communicated that

  > [a]fter the Record of Decision (ROD) on the Northern Beltway, there may be ways to address the new interchange as a supplemental document. NCDOT could do a supplement if the Airport Connector was funded, or even if a portion of it was funded. If a portion from West Mountain Street to the Beltway, or from NC 66 to the Beltway was funded, NCDOT may be able to study an interchange with the Beltway.

  Id. (emphasis added). The agenda for this meeting described the more direct route the Airport Connector would provide, how it would provide local access from north of Kernersville onto the Northern Beltway, stated that "[a] future interchange location should be considered now as part of this Beltway EIS document" and concluded that "[o]nce a likely location is determined for the interchange, local governments can begin to plan around a corridor." Appendix 7 (AR _____[should be near AR 23553]).

- On 27 January 2005, during the Winston-Salem TAC's "consideration of a resolution in support of the N2S1 alternative of the Northern Beltway", Pat Ivey, the NCDOT's 9th Division engineer, "stated that any additions or deletions at this point would cause significant delays and stated that concerns regarding connectivity could be addressed in the future with a supplemental resolution." Appendix 8 (AR _____).
- On 15 June 2005, at a meeting of the Turnpike Authority over which NCDOT Secretary Lyndo Tippett presided, the Turnpike Authority voted to ask NCDOT to fund feasibility, environmental and preliminary engineering studies for I-4924 – i.e., the Airport Connector. Appendix 9 (AR _____). At the same Turnpike Authority meeting Secretary Tippett was quoted as saying "the earliest the road [i.e., the Airport Connector] could open is 2013 or 2014" by the Greensboro News-Record. Appendix 10 (AR _____).
- The next day, 16 June 2005, Winston-Salem Journal reported NCDOT officials as stating that "If chosen for construction – the DOT could make a decision within a year – the road could be built as early as 2012." Appendix 11 (AR _____).
- On 28 June 2005 the Executive Director of the Turnpike Authority, David W. Joyner, sent a memo to NCDOT's Program Development Branch manager, Calvin W. Leggett, requesting NCDOT to fund feasibility, environmental and preliminary engineering studies for I-4924. Appendix 12 (AR 24967).
- On 21 July 2005 the Winston-Salem TAC considered a resolution presented by Pat Ivey, the NCDOT's 9th Division engineer, to include an environmental/feasibility study for the I-73/I-74 connector (a.k.a. Airport Connector) in the 2006-2012 Winston-Salem Metropolitan TIP, and the Winston-Salem TAC approved the resolution. Appendix 13 (AR _____)
- On 27 July 2005 the Chair of the Transportation Advisory Committee ("TAC") of the Greensboro Urban Area Metropolitan Planning Organization, Sandy Carmany, sent a letter to

Mike Stanley of NCDOT's Transportation Improvement Program (TIP) Development Unit communicating "the MPO's support for a project to study the potential for constructing I-73/I-74 connector as a toll-road in Forsyth and Guilford Counties, as shown on the respective thoroughfare plans. The resolution also indicates MPO's support for any associated future amendments to the [TIP] needed to advance this project toward construction." Appendix 14 (AR 25008). The letter conveyed a resolution of the MPO, which showed that the NCDOT requested the MPO to make a resolution supporting the Airport Connector. Id. ("WHEREAS, NCDOT has requested that the Metropolitan Planning Organization adopt a resolution of support for associated future amendment to the Transportation Improvement Program needed to create and advance said project toward implementation in a timely manner.").

- On 5 August 2005, the Planning Development Coordinator for the Winston-Salem Department of Transportation transmitted to Lyndo Tippett (at the time NCDOT's Secretary) a resolution of the Winston-Salem Urban Area TAC, made on 21 July 2005, which asked Secretary Tippett to amend the 2006-2012 TIP to add $400,000.00 for an "environmental/feasibility study" of I-4924, the Airport Connector (a.k.a. I-73/I-74 Connector). Appendix 15 (AR 25118). The minutes of this meeting show that Pat Ivey, the NCDOT's 9th Division engineer, presented the resolution to the Winston-Salem TAC.
- On 3 November 2005, the NCDOT added I-4924 to its 2006-2012 TIP. Appendix 16 (AR _____).

At the time that the defendants signed the SFEIS/FEIS in January of 2007, the transportation officials had been discussing the Southern Loop for almost ten years, and it had appeared in the Winston-Salem Thoroughfare plan (prepared in conjunction with NCDOT) for nearly five years. The Airport Connector had appeared in the same Winston-Salem Thoroughfare plan for nearly five years, had been selected for inclusion in the NCDOT Strategic Highway

Corridors initiative for approximately two and a half years, had been selected by the North Carolina Turnpike Authority for one of six projects under N.C. Gen. Stat. § 136-89.183 at a meeting presided over by NCDOT's Secretary (then, Lyndo Tippett), had received the support of both the Greensboro and Winston-Salem Metropolitan Planning Organizations, and had been on the TIP for over year. As one can see from the map attached to the 2002 Thoroughfare Plan (Appendix 4), the Airport Connector and Southern Loop have similar magnitudes as the Northern Beltway, and one can reasonably deduce that they will have impacts of magnitudes similar to the Northern Beltway.

The term "reasonably foreseeable" is "properly interpreted as meaning that the impact is sufficiently likely to occur that a person or ordinary prudence would take it into account in reaching a decision." Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir.1992). Of the hundreds of projects that have appeared on the TIP over the last two decades, the defendants cannot name more than a handful that have ever been removed, if that many. Now that I-4924, the Airport Connector (a.k.a. I-73/I-74 Connector), appears on the TIP. Clearly, the Airport Connector is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.

Unfortunately, the defendants repeatedly fail to take the Southern Loop's and the Airport Connector's impacts into account in the SFEIS/FEIS. However, the SFEIS/FEIS makes clear that the defendants did plan the Northern Beltway's configuration in a way that facilitates the construction of the Airport Connector by leaving sufficient spaces between interchanges for the Airport Connector's interchange. SFEIS/FEIS, pp. 6-39 ("The distance between the proposed interchanges at Reidsville Road and US 421/I-40 Bypass is approximately 3.5 miles. This provides adequate interchange spacing for a future connector to the airport, as shown in the Thoroughfare Plan"); 6-108 ("Current proposed spacing of proposed interchanges does not

preclude a future interchange with the airport connector"); 6-110 ("The proposed interchange spacing does allow room for this interchange in the future, should that project become funded and built.").

Although the defendants claim in the SFEIS/FEIS that the Airport Connector "is programmed for planning and environmental study only by the Turnpike Authority" (SFEIS/FEIS, pp. 6-110): (1) the Secretary of NCDOT presided over the Turnpike Authority meeting where the Authority voted to adopt it (Appendix 9); (2) the Board of Transportation voted to include the Airport Connector in its Strategic Highway Corridors Initiative (Appendix 5); (3) NCDOT officials (including its Secretary) projected that the Airport Connector could be completed early in the next decade (2012-2014); (4) NCDOT in conjunction with the Winston-Salem TAC included the Airport Connector in the 2002 thoroughfare plan (Appendix 4); and (5) NCDOT personnel suggested to Kernersville officials that they wait until after the publication of the Northern Beltway ROD before seeking to have NCDOT "address the new interchange [with the Northern Beltway] as a supplemental document." (Appendix 6).

Although not as egregious as the federal defendants' efforts to evade environmentally-based, regulatory restraints on their behavior in FOF I[19], the state defendants' efforts to move forward with the Airport Connector, while avoiding NEPA scrutiny for the Airport Connector, tend to support the plaintiff's contention that the Airport Connector is reasonably foreseeable.

In finding that the previous EIS for the western segment improperly segmented, this Court in the FOF I case relied on the CEQ regulation concerning scope:

[19] "FHWA's Regional Administrator issued the record of decision only one day after its submission. The Raleigh Division of FHWA submitted the ROD to the FHWA Regional Administrator on May 6, 1996. The Regional Administrator issued the ROD on May 7, 1996…. The issuance of the ROD came one day prior to FHWA's announcement on May 8, 1996, that Forsyth County's TIP no longer conformed with Clean Air Act requirements. Under regulatory provisions applicable at the time, a project located in an area in conformity with the Clean Air Act when the project was approved could continue to receive federal funds even if the area subsequently fell out of conformity with the Clean Air Act…. When considered in combination with the non-conformity announcement on the next day, Federal Defendants' one-day review of the ROD constitutes bad faith in performing a statutorily imposed duty." Friends of Forsyth, 151 F.Supp.2d at 675-676.

> *Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement.... To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:
>
> (a) Actions (other than unconnected single actions) which may be:
>
> ....
>
> (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

Friends of Forsyth, 151 F.Supp.2d at 684 *citing* 40 C.F.R. § 1508.25.

The Northern Beltway and the Airport Connector have cumulatively significant impacts – similar lengths, similar road design (interstate design), similar geographic location and they connect to each other. Although federal agencies are given the primary task of defining the scope of NEPA review and their determination is given considerable discretion, cumulative actions must be considered together to prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact. Id. *citing* Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1118 (9th Cir.2000). Similarly, "NEPA provides that cumulative actions that have been proposed must be considered in a single EIS, *see* 40 C.F.R. § 1508.25(a)(2), and NEPA separately requires that the environmental evaluation of the current action consider the cumulative impacts of reasonably foreseeable future actions. *See* 40 C.F.R. § 1508.7." Western North Carolina Alliance v. NCDOT, 312 F.Supp.2d 765, 773 (2003). The Northern Beltway and the Airport Connector are cumulative actions within the ambit of 40 C.F.R. § 1508.25.

NEPA aims to "ensure that an 'agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.' " Hodges v. Abraham, 300 F.3d 432, 438 (4th Cir.2002) *citing* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). NEPA's language and focus on considering environmental impacts before acting also undermine the defendants'

position that they could avoid considering the cumulative impacts from other connected projects, because they were not fully funded or planned. Western North Carolina Alliance, *supra*.

Accordingly, the SFEIS/FEIS's failure to consider the cumulative impacts from the Northern Beltway in conjunction with the Airport Connector and the Southern Loop is unreasonable, arbitrary and capricious. Since no genuine issue of material fact exists as to this question, the Court should grant the plaintiffs' motion for summary judgment and require the defendant agencies to issue another supplemental EIS that evaluates the cumulative impacts from the Northern Beltway in conjunction with the Airport Connector and the Southern Loop.

IV. No genuine issue of material fact exists as to the state defendants' NEPA violations constituting a violation of NCEPA.

Both this Court and the North Carolina Court of Appeals have stated that to the extent that the federal environmental law is relied upon to meet the requirements of the North Carolina Environmental Policy Act ("NCEPA") – N.C. Gen. Stat. §§ 113A-1, *et seq.* – the federal requirements are by reference enforceable against North Carolina agencies as state law. FOF I, 151 F.Supp.2d at 678 *citing* Orange County v. North Carolina Dep't of Transp., 46 N.C.App. 350, 368, 265 S.E.2d 890, 903 (1980). For this reason, in determining whether the state defendants were substantially justified in preparing the FEIS this Court has held that it will consider NEPA's implementing regulations, and, for simplicity, refer primarily to NEPA rather than to both NEPA and NCEPA when discussing the adequacy of the FEIS. Id.

Under both FOF I and Orange County, *supra*, the plaintiffs are entitled to summary judgment against the state defendants under NCEPA, because no genuine issue of material fact exists as to the SFEIS/FEIS violating the requirements of NEPA, which the state defendants relied upon to meet the requirements of NCEPA.

CONCLUSION

While the defendants have prepared lengthy environmental documents in an effort to satisfy the requirements of NEPA and NCEPA, their length cannot mask their serious deficiencies. Since no genuine issues of material fact exist with regard to any of the issues, the plaintiffs pray that the Court grant summary judgment against all defendants.

Respectfully submitted, this the 1st day of June, 2009.

/s/Marsh Smith

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing Memorandum with the Clerk of Court using the CM/ECF system, which will send notification of such filing to other counsel of record.

This the 1st day of June, 2009.

/s/Marsh Smith
Marsh Smith