

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

No. 2:19-cv-00014-FL

NORTH CAROLINA WILDLIFE
FEDERATION and NO MID-CURRITUCK
BRIDGE-CONCERNED CITIZENS AND
VISITORS OPPOSED TO THE
MID-CURRITUCK BRIDGE

Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION;
ERIC BOYETTE, in his official capacity as
SECRETARY, NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION;
FEDERAL HIGHWAY ADMINISTRATION;
and EDWARD PARKER in his official capacity
as ASSISTANT DIVISION ADMINISTRATOR,
FEDERAL HIGHWAY ADMINISTRATION.

Defendants.

**PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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Plaintiffs, North Carolina Wildlife Federation and No Mid-Currituck Bridge-Concerned Citizens and Visitors Opposed to The Mid-Currituck Bridge (“Conservation Groups”) submit this memorandum of law in support of their motion for summary judgment.

I. NATURE OF THE CASE

The Conservation Groups challenge the unlawful approval of the proposed Mid-Currituck Bridge (“the Toll Bridge”) by Defendants the North Carolina Department of Transportation (“NCDOT”) and the Federal Highway Administration (“FHWA”) (collectively the “Agencies”) in violation of the National Environmental Policy Act (“NEPA”).

After decades of false starts, the Agencies issued a Draft Environmental Impact Statement (“EIS”) in 2010 and a Final EIS in 2012. The project then lay dormant for several years. Because there were a number of significant new circumstances in the intervening time period, the Conservation Groups requested a Supplemental EIS in 2017. The Agencies did not prepare one. Instead, in 2019, the Agencies issued the Record of Decision (“ROD”) challenged here without any intervening opportunity for public review and scrutiny of the significant changes and developments that had occurred in the intervening seven years.

The Agencies violated NEPA and the Administrative Procedure Act (“APA”) because they (1) failed to prepare a Supplemental EIS in light of significant new information; (2) relied on an arbitrary and capricious analysis of alternatives that failed to evaluate a full range of reasonable alternatives, consider a combination of alternatives, and present alternatives in comparative form; and (3) failed to account for the growth and travel inducing impacts of the Toll Bridge, rendering the analysis of alternatives analysis environmental impacts invalid.

The Conservation Groups request the Court declare the Agencies violated the APA and NEPA, vacate the Record of Decision, and enjoin the Agencies from proceeding with the Toll Bridge until they have complied with NEPA.

II. STATEMENT OF FACTS

A. History of the Mid-Currituck Bridge

Attempts to construct the Mid-Currituck Bridge began in 1975.¹ AR-74489. For almost a half century, the Toll Bridge has faced massive opposition from the local community, *see, e.g.*, AR-36509; from federal and state resource agencies, *see, e.g.*, AR-69795; 69930; 69905; 69922; and from all those who cherish the Northern Outer Banks and the rich natural heritage of the Currituck Sound. All the while, developers and connected politicians have attempted to push the Toll Bridge forward. *See, e.g.*, AR-69693; 69966. Yet, even today, there is no financial plan to build the expensive \$600 million project.

The Mid-Currituck Bridge began as a political pet project. Before any study had been completed, in 1989, Senator Marc Basnight wrote the bridge into law, with a mandate that it must be constructed. AR-69693. NCDOT, however, did not begin the legally required formal scoping for the purpose and need of the proposed project until 5 years later in 1994. AR-69720.

From the very start, environmental resource agencies expressed concerns about the proposal. The Division of Coastal Management (“DCM”) noted that the Toll Bridge seemed intended to promote resort development, and would make issues like hurricane evacuation worse, not better. AR-69728. The agency noted that more moderate upgrades to existing highways would be preferable. AR-69729. Ultimately, DCM stated “*the bridge option should be the last alternative considered.*” AR-69728 (emphasis added). Other resource agencies like the U.S. Fish and Wildlife Service (“USFWS”) noted the considerable damage the Toll Bridge would cause to Maple Swamp, vegetation in the Currituck Sound, and over-wintering waterfowl. *Id.*; AR-69733. The agencies also expressed concern that the Toll Bridge would increase off-road vehicle use in the wildlife refuge areas north of Corolla. AR-69728. As the Toll Bridge moved forward, agencies including the North

¹ According to the Court’s Case Management Order, Plaintiffs are not required to file a separate statement of facts under Local Rule 56.1(a). ECF No. 18 §II ¶ E.

Carolina Wildlife Resources Commission voiced objections and advocated instead for an alternative focused on upgrading existing highways. *See, e.g.*, AR-69756. The U.S. Army Corps of Engineers (“the Corps”), in a position that would remain consistent for years to come, expressed doubt that the Toll Bridge would assist hurricane evacuation. *See, e.g.*, AR-74890, 69759.

NCDOT published a Draft EIS for the project in 1996. Documents supporting this DEIS included hurricane evacuation clearance as a key element of the “purpose and need” for the project. AR-74490. The Corps objected, noting that the document gave preferential treatment to the Toll Bridge without adequate justification. AR-69763. In 1997, the Corps insisted that it would not sign off on the project unless NCDOT revised the document to remove any suggestion that the Toll Bridge would provide congestion relief and improve hurricane evacuation. AR-69761. The Agencies ultimately agreed to do so, but the Corps continued to express doubts. AR-69768.

The Toll Bridge faced further agency pushback in 1997 when the majority of state and federal agencies refused to sign off on the stated purpose and need for the project. *See, e.g.*, AR-69930; 69905; 69922. NC Division of Water Resources noted that no “public need” had been demonstrated for the Toll Bridge, rather it was simply a project meant to fuel development on the Outer Banks that would cause extensive environmental harm. The agency concluded “a new bridge across Currituck Sound would easily cause more problems than it could solve.” AR-69795. *See, e.g.*, AR-69930; 69905; 69922. At subsequent public hearings an overwhelming majority of citizens—sixty-one of the sixty-six speakers—opposed the project. At a post-hearing meeting in August 1998, NCDOT, FHWA, and the Corps decided to put the project on hold. AR-69961.²

B. Project Reactivation

In early 2001, in response to political pressure from developers, N.C. Senator Marc Basnight and U.S. Congressman Walter Jones began to push for the project to move forward again, by

² At the time of the 1998 DEIS, the estimated cost of the project ranged from \$70.5 to \$85.9 million. *See* AR-69960

compelling state and federal agencies to advance the project. AR-69971; 69977; 69978.³

Subsequently, NCDOT announced it would reactivate the Toll Bridge. AR-70026.

Despite the previously stated agency concerns, NCDOT continued to set forth a statement of purpose and need based on hurricane evacuation. *See* AR-70030. Ultimately, after additional pressure from Congressman Jones, a compromise was reached. Hurricane evacuation was included, with the caveat that it must be supported by empirical data. AR-70071.

In 2006, the North Carolina Turnpike Authority took over the project and began to pursue it as a public private partnership Toll Bridge. AR-70085. In addition, Senator Basnight championed and passed legislation earmarking \$35 million per year to support the “gap” in funding needed for Toll Bridge construction that would not be covered by toll revenue. N.C. Gen. Stat. § 136-178–79, *repealed by* 2013 N.C. Sess. Laws 183, § 4.9. The Turnpike Authority embarked on a new NEPA process and published a new Draft EIS in March 2010, followed by a Final EIS in January 2012.

1. Purpose and Need

The Turnpike Authority refreshed the statement of purpose and need for the project and once again included hurricane evacuation as a primary purpose. AR-70027; 34909. The stated purpose and need of the project is:

- to substantially improve traffic flow on the project area’s thoroughfares. Thoroughfares in the project area are NC 12 and US 158;
- to substantially reduce travel time for persons traveling between the Currituck County mainland and the Currituck County Outer Banks; and
- to reduce substantially hurricane clearance time for residents and visitors who use US 158 and NC 168 during a coastal evacuation.

AR-34909. This purpose and need was supported by projections suggesting that by 2035 summer traffic would exceed capacity of the existing road system. Specifically, summer weekend traffic was

³*See also* AR-69972 (Congressman Jones stated in a letter: “I will anticipate hearing which specific federal agencies are improperly holding up which specific reviews, permits or processes.”). The Corps responded by noting that USDOT needed to reinstate the NEPA process in order to move the project forward. AR-69973.

anticipated to reach between eleven and eighteen hours of congestion per day. AR-34908. Summer weekday traffic was estimated to range between two and seven hours of congestion per day. *Id.*

2. *Alternatives*

Under this purpose and need, five “alternatives” were considered in detail, four of which were versions of a Toll Bridge. AR-34911. Other more creative solutions were summarily dismissed by the Turnpike Authority. AR-34962. For example, the main cause of Outer Banks summer traffic congestion stems from the fact that a substantial amount of vacation rental properties are rented by the week. At the time the EIS was drafted, most property rentals (nearly 70%) turned over occupancy on Saturday, resulting in high congestion as tens of thousands of tourists attempt to check into their property as others attempt to leave. AR-72152. During the week and during off peak hours there is less congestion. *Id.* One suggested way to address this problem was thought to be to incentivize property owners to spread out change-over days more evenly through the week. The concept was briefly and incompletely analyzed in a 2009 Alternatives Screening Report by the Turnpike Authority. AR-9411-12. The analysis of the alternative was significantly limited because it only considered how checkout days could be spread between Friday, Saturday and Sunday, and not the rest of the week. AR-9412. More importantly, the report diluted the significant impact the change would have on congestion reduction (28% at peak times), by averaging out the impact throughout the entire calendar year. *Id.* In other words, rather than look at the ability of the alternative to address peak congestion in the summer months (the stated need for the Toll Bridge), the Agencies looked at the average impact the alternative would have on days where 1) it was not, by design, being employed; and 2) was not needed because there was no congestion to reduce. With this deceptive math, the Agencies concluded that the effect of the solution would be “minimal” and removed it from detailed study. AR-9413, 34962.

Other creative alternatives, such as ferries, traffic demand management, and transit options were also summarily dismissed because the Agencies found that each standing alone would not meet

the established purpose and need. AR-34962; 69562-63. The Agencies did not study how such changes could work together along with shifting rental checkout times to collectively address the purpose and need. *Id.*

The only non-Bridge alternative studied in detail involved upgrades to the existing highway, and was titled “Existing Roads 2” or “ER 2” [hereinafter “Existing Road alternative”]. The alternative involved widening the existing Wright Memorial Bridge and highways NC-12 and US-158, along with constructing a new interchange where the two highways meet. AR-34914. The Agencies stated that the alternative would meet the purpose and need and be the least expensive option. AR-34955-56.

Despite its relatively low cost and full efficacy, the Agencies rejected the Existing Roads alternative because, as a set of upgrades to the existing road system, it could not be tolled and thus was ineligible for the gap-funding earmark. AR-34958; 34965. By contrast, the Agencies anticipated that the Toll Bridge would generate approximately \$21 million in toll revenue annually for the first ten years and up to \$34 million annually by 2065. AR-34957. The Agencies also justified their rejection of the Existing Roads alternative because they claimed the State’s funding formula at the time—the Equity Formula—only had minimal funding available for the Outer Banks, and the limited funding available was necessary for the impending Bonner Bridge replacement. AR-34958.

In addition to funding and financing issues, the Agencies relied on hurricane evacuation to favor the Toll Bridge over other alternatives. Hurricane clearance was one of the primary purposes of the proposed project, AR-34874, and each alternative was assessed on whether it reduced hurricane evacuation time, AR-9398. In the Final EIS, the Agencies determined that the preferred alternative would achieve a hurricane clearance time of twenty-seven hours, as it would not include a third outbound lane on U.S. 158. AR-34954. In contrast, the Existing Roads alternative includes a third outbound lane, and was expected to achieve a faster hurricane clearance time of 22 hours. *Id.* Despite this analysis the Agencies obscured the fact that the Toll Bridge would underperform on this

metric. *Id.* Yet at the same time the Agencies eliminated other alternatives such as shifting rental times, transportation systems management, bus transit, and ferries from detailed review because they “would not provide any reduction in hurricane clearance times.” AR-9413-22.

3. Induced Traffic and Development

The Agencies used future forecasts of both anticipated development and traffic to compare alternatives and assess their merit. For both, the Agencies presented a “No Build” scenario, as NEPA requires them to, to compare the effect if no improvements were made with the effects of different “Build” alternatives. The assumptions underlying these projections were inconsistent.

The baseline scenario used to create traffic forecasts was premised on a level of future growth into the baseline scenario that *assumed the Toll Bridge would be constructed.* AR-35074, AR-5428. Thus, all the traffic forecasts assumed growth and traffic attributable to the Toll Bridge. AR-5442.

Elsewhere, however, in their analysis of development, the Agencies obliquely admit that the not building the Bridge would constrain growth, and under a “No Build” scenario there would be significantly less development than if the Toll Bridge was constructed (1,800 new homes or hotel rooms under a No Build scenario and 4,200 new homes or rooms if the Toll Bridge is built). AR-35074-75. The Agencies’ updated projections indicate that an additional 830 acres would be developed on the Outer Banks if the Toll Bridge was selected over the No-Build Alternative. AR-68942. Rather than be upfront about the significant growth attributed to the Toll Bridge, the Agencies instead presented the No-Build scenario as a “reduction” in growth. Extrapolating from this analysis, the Final EIS suggested that if the Toll Bridge was built, significant development would occur in the roadless area north of Corolla. AR-35075.

Despite implicitly conceding that the Toll Bridge would increase development, the Agencies did not acknowledge this growth as an effect of the Toll Bridge or include any analysis of how the growth would impact the natural environment of the Outer Banks. AR-35083-87. In fact, the Agencies stated that

For the NC 12-accessible Outer Banks, there would be no reasonably foreseeable change in the overall type and density of development with implementation of the detailed study alternatives, including the Preferred Alternative, compared to the No-Build Alternative. Negligible or no increase in the demand for houses and businesses throughout the Outer Banks resort area would be foreseeable over the No-Build Alternative. AR-35074.

AR-35074. This statement is at odds with the Agencies' own projections in the Final EIS, as well as a concurrently prepared Traffic and Revenue Study, which stated that construction of the Toll Bridge "could greatly facilitate the continued growth within the area." AR-70210, *see also* AR-70325 ("The Mid-Currituck Bridge, could also facilitate further growth in the northern Outer Banks.")⁴ In response to comments about the flawed analysis, the Agencies claimed that the improper baseline made no difference, stating "either approach results in planned and expected development being assessed as a cumulative impact, so from the perspective of documenting cumulative impacts, it makes no difference which starting point one uses." AR-69103.

4. Sea Level Rise

The only discussion of sea level rise in the Final EIS relied on a 2007 ICF International Report—a document that itself was premised on climate data from the mid-1990s and early 2000s. AR-35047-49. The Agencies forecast different scenarios of sea level rise. The "high" scenario predicted a rise of 23.2 inches by 2100. AR 35047-48. The Agencies concluded that the Toll Bridge would never experience these high levels of sea level rise because they would not occur before 2100 when the Toll Bridge would be replaced. AR-35048. The Agencies also concluded that "US 158 on the Currituck County mainland south of a Mid-Currituck Bridge would not be inundated under any sea level rise scenario." AR-20235. Based on these conclusions, the Agencies stated that the proposed Toll Bridge "would be a useful asset in reducing the impact of sea level rise on the project area's road system." AR-34892.

⁴ Further, the Traffic and Revenue Report states "the project presents a unique marketing opportunity to leverage the existing Outer Banks travel/tourism industry with tailored marketing strategies to highlight substantial travel time savings, cost savings, and increased accessibility to this beautiful and unique destination." AR 70219.

The Conservation Groups and others submitted substantial comments outlining deficiencies in the Draft and Final EIS. *See, e.g.*, AR-16891; 36509; 69051; 69096; 69505. Concerns were raised about the statement of purpose and need, the analysis of alternatives, the projections of induced growth and traffic, the analysis of sea level rise, and more.

C. Project Delay and Interim Developments

A Final EIS would usually be promptly followed by a Record of Decision. But not here. In 2013 significant changes were made to North Carolina's transportation funding system. The earmark for the Mid-Currituck Bridge was repealed. Strategic Transportation Investments Act, N.C. Gen. Stat. § 136-189 (2016). A new scoring process replaced the Equity formula that had previously been invoked to justify elimination of the Existing Roads alternative. AR-70168. The Mid-Currituck Bridge scored very poorly under the new system and was placed on hold. *Id.* In addition, the public private partnership for the project with a Spanish conglomerate fell through. AR-69062.

In 2018, a consultant prepared a new draft plan of finance, which relied on a May 2018 draft Traffic and Revenue forecast. AR-75481. The Plan of Finance anticipates that the Toll Bridge would be financed by toll revenue through 2073, AR-75487, and NCDOT would provide \$199 million in funding, in addition to \$319 million generated through toll revenue. AR-75483. Under this assessment, even if sufficient toll revenue could be generated, there would continue to be a shortfall in funding of at least \$17.8 million. AR-75484. Importantly, up-to-date projections of sea level rise indicate that by 2073, much of the development in the Toll Bridge's vicinity will be underwater or subject to frequent flooding and the Toll Bridge itself may be inaccessible. *See* AR-75590-97.

During this same time period, despite general political opposition to the Toll Bridge, there remained some push for the project under the theory that it would bring growth and development to the Northern Outer Banks. For example, in 2019, State Representative Bobby Hanig, who represents Currituck County, stated that the Toll Bridge would "change what the landscape of Currituck looks like in the not-too-distant future." AR-78880. Other elected officials echoed these comments. *See,*

e.g., AR-78874. Despite NCDOT's statements that the Toll Bridge would not change growth and visitation patterns, the North Carolina State Travel and Tourism Board called the Toll Bridge "one of the highest priority Tourism-development infrastructure projects within the State of North Carolina." AR-72971; *see also* AR-72972. Members of these groups and other entities urged the General Assembly to provide funding for the Toll Bridge to spur economic development in the area. AR-72911; 72913; 72915; 72916; 72920; 72923; 72924; 72926; 72929. Thus despite the Agencies' assumption in the Final EIS that the Toll Bridge would not impact or increase development and visitation to the Northern Outer Banks, the majority of Toll Bridge supporters stated that such impact was precisely why the Toll Bridge would be desirable.⁵

Alongside these developments, scientific thinking also continued to evolve. In 2017, the U.S. Global Change Research Program issued Volume 1 of the Fourth National Climate Assessment, ("Fourth Assessment"), AR-46713, which predicted that global average sea levels are expected to rise by at least several inches in the next fifteen years and by one to four feet by 2100, AR-46728. According to the report, an eight-foot rise by 2100 "cannot be ruled out" and sea level rise will be higher than the global average on the East and Gulf Coasts of the United States. AR-46744. The report noted daily flooding and extreme weather events are increasing in impact, threatening human safety and coastal infrastructure along the Atlantic coast. AR-46728; 46770.

⁵ *See, e.g.*, AR-72947 (E-mail from Denise Walsh, Town of Duck, to Dorothy Killingsworth, Dare County expressing that the Bridge is needed to increase tourism); AR-72949 (Email from Peter Bishop, Currituck County, to Warren Judge, Dare County Board of Commissioners expressing that a growing tourism economy necessitates a Bridge); AR-72954 (E-mail from Owen Etheridge, Chairman, Currituck Board of Commissioners, to Shelton Harrell, managing partner, Lynberg & Watkins expressing that development is inevitable and the Bridge will allow the area to handle it); AR-72957 (E-mail from Denise Walsh, Town of Duck, to Jeff Smith, UNC-TV expressing that that a "key point" of the Mid-Currituck Bridge is that it would "lead to significant economic development in Currituck County" and would be used to drive tourism); AR-72959 (Sample letter to Pat McCrory emphasizing the economic benefits associated with the development and tourism the Bridge would bring); AR-72960 (Mid-Currituck Bridge Talking Points, Dare County emphasizing the financial merits of bringing in visitor spending and increased economic development across the county); AR-72963 (Email from Michelle LaMotte, Delta Associates, to Warren Judge, Dare County Board of Commissioners expressing Delta's (a real estate analysis firm) interest in speaking with government officials and landowners to development assumptions and land use projections).

Meanwhile because more than three years had passed since the Final EIS, the Agencies began a mandatory internal review of the analysis. This review began in 2015 and took more than four years. AR-69513; 68747. The reevaluation document was not made public, but in 2016 the Conservation Groups were able to obtain an interim draft through a public records request. AR-69513. The draft document made clear that the circumstances surrounding the Toll Bridge and alternatives had changed significantly since publication of the Final EIS—including projections of traffic and growth, cost estimates, funding realities, and scientific realities. *See, e.g.*, AR-69539; 69526; 69592; 69542. In light of these changes, the Conservation Groups contracted with a transportation engineer, Walter Kulash, to prepare an updated alternative to the Toll Bridge that would solve updated needs at a lower fiscal cost and with less environmental damage. AR-45547. The Conservation Groups presented this alternative (“Improved ER-2”) to the Agencies for their consideration. *Id.*; *see also* AR-45418. In addition, the Conservation Groups detailed at length the many changed circumstances that had occurred since publication of the Final EIS, and requested the Agencies prepare a Supplemental EIS so that the public could review and scrutinize the alternative options based on up-to-date information. *See* AR-45382-442. The Agencies did not respond to the Conservation Groups, publish a Supplemental EIS or provide the public with any updated analysis.

D. Official Reevaluation

In March 2019, more than seven years after the Final EIS and any opportunity for public input or scrutiny, the Agencies released their final ROD selecting the Toll Bridge. The ROD was accompanied by a Final Reevaluation Report and Study (the “Reevaluation”) and nineteen separate technical study reports, none of which were made public prior to the Agencies’ final decision. All told, it took the Agencies almost five years of internal study to make their determination that nothing significant had changed to warrant public review. *See* AR-68784; AR-69443; AR-69480.

Despite this conclusion, the Agencies’ various published reports demonstrated that significant changes had indeed occurred. For example, the projected cost of the Toll Bridge had

risen (from an estimated \$502.4- 594.1 million to as much as \$632.8 million), *compare* AR-34882 *with* AR-75499; 68806, while the cost of the Existing Road Alternative had decreased from an estimate of \$416-523.4 million to just \$277.9-288.1 million. *Compare* AR-34881 *with* AR-68806.

Traffic forecasts were also dramatically different. For example, where the Final EIS predicted that by 2035 there would be 45,400 average annual vehicles trips between the US 158 Barco intersection to Mid-Currituck Bridge if the Toll Bridge was not built, the new forecasts show only 26,100 vehicle trips. AR-68826. And where previous summer weekday traffic volume at the U.S. 158 Wright Memorial Bridge was forecast as 58,900 vehicles without the Toll Bridge, the more recent forecasts anticipate only 34,400 vehicles. *Id.* Tables 1 & 2 demonstrate the stark differences.

Representative Links	Average Annual Daily Traffic (number of vehicles)					
	2006	2015	No-Build/ER2		Preferred Alternative	
			2035 Previous Forecast	2040 Updated Forecast	2035 Previous Forecast	2040 Updated Forecast
US 158 Barco to Mid-Currituck Bridge	21,300	17,400	45,400	26,100	45,400	26,100
US 158 Wright Memorial Bridge	24,600	21,000	48,700	30,600	37,400	23,100
NC 12 Duck	19,500	16,000	29,000	27,000	21,700	19,500
NC 12 Albacore Street to Mid-Currituck Bridge	14,100	12,100 ¹	20,100	17,700 ¹	21,700	17,400 ¹
Mid-Currituck Bridge	NA	NA	NA	NA	12,600	7,700

Table 1 AR-68826.

Representative Links	Summer Weekday Traffic (number of vehicles per day)					
	2006	2015	No-Build/ER2		Preferred Alternative	
			2035 Previous Forecast	2040 Updated Forecast	2035 Previous Forecast	2040 Updated Forecast
US 158 Barco to Mid-Currituck Bridge	27,000	19,600	54,300	29,300	54,300	29,300
US 158 Wright Memorial Bridge	29,500	23,600	58,900	34,400	46,000	26,000
NC 12 Duck	24,000	18,000	36,500	30,300	27,900	21,900
NC 12 Albacore Street to Mid-Currituck Bridge	17,000	13,600 ¹	25,300	19,900 ¹	26,800	19,500 ¹
Mid-Currituck Bridge	NA	NA	NA	NA	14,500	8,600

Table 2 AR- 68826.

All the updated predictions show significantly less traffic in the future than previously expected, significantly less congestion, significantly less need for the Toll Bridge, and significantly less anticipated toll revenue.

The Reevaluation also acknowledged that multiple indicators of growth and development have slowed since the Agencies' last traffic and growth counts which were taken in 2006 to inform the 2012 Final EIS. AR-68823. For example, the permanent population in Dare and Currituck County slowed from compound growth rates of approximately 3% per year between 1990 and 2006, to less than 1% per year since 2006. AR-68825. Furthermore, Gross Occupancy tax receipts, a key indicator for tourism trends in the Outer Banks, historically increased by 9% annually from 1994 to 2000, but have slowed to increases of 7.2% annually from 2001 to 2006, and 3.7% annually since 2006. *Id.* Despite these and other significant changes, the Agencies concluded that a Supplemental EIS was not necessary and finalized the selection of the Toll Bridge option without further public review.

The Reevaluation did not analyze up-to-date sea rise data. The Reevaluation only tersely mentions the 2016 North Carolina Sea Level Rise Assessment Report, a document that itself relies on sea level rise data from 2014. AR-68930. The new data is not modeled or analyzed in relation to the project area. Instead, without explanation, the Agencies merely cited the report as justification to

continue reliance on the outdated (and significantly different) data in the Final EIS. AR-68930-31. Worse, the 2019 Reevaluation entirely failed to acknowledge the widely-available 2017 Fourth Assessment produced by NOAA, AR-46713, which provided the most recent data regarding sea level rise along the Outer Banks. AR-68930-31.

Updated projections in the NOAA Technical Report now indicate that the 2100 “high” sea level rise scenario analyzed in the Final EIS (23.2 inches), *see* AR-35047-48, is now the “low end scenario.” AR-78409-10. As such, the Final EIS underestimated sea level rise by 400%. NOAA concluded that the scenario labeled “intermediate high,” anticipating 28.3 inches of sea level rise by 2050 and 81.1 inches of sea level rise by 2100 in the Outer Banks, is the most likely scenario. AR-78267; 78454. Updated data show that under this most likely sea level rise scenario, the Toll Bridge will experience a higher amount of sea level rise within the next fifty years than the Final EIS predicted it would experience in its entire seventy-five-year lifetime under the worst-case scenario.

Id. New projections indicate that in mere decades the Toll Bridge will no longer be a viable route on and off the Northern Outer Banks because the base of the Toll Bridge will be inundated or extremely vulnerable to flooding, and US 158 and NC 12 will be inundated cutting off access to the Toll Bridge from the mainland. AR-75591-97. These significant changes render many of the Agencies’ study documents, which the Final EIS and Reevaluation relied upon, entirely outdated and substantially inaccurate. *See, e.g.*, AR-20235.

Shortly after the ROD was published, the Conservation Groups sent the Agencies another letter asking them to prepare a Supplemental EIS to allow for public scrutiny and input prior to moving forward with the Toll Bridge. AR-78893. The Agencies did not respond. The Conservation Groups initiated this action on April 23, 2019.

III. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, Fed. R. Civ. P. 56(c), and is often appropriate in

cases involving a review of an administrative record. *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 598 (4th Cir. 2012). NEPA cases are reviewed pursuant the APA, 5 U.S.C. §§ 701-06. See *Ohio Valley Env't. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 189 (4th Cir. 2009). The Court must set aside agency action that it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* §§ 706(2)(A),(D). An agency decision is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

IV. STANDING

Plaintiff Conservation Groups are North Carolina Wildlife Federation (“NCWF”), the state’s oldest and largest statewide non-profit conservation organization, and No Mid-Currituck Bridge-Concerned Citizens and Visitors Opposed to the Mid-Currituck Bridge (“No MCB”), an organization founded in 2009 and based in Currituck County. The Conservation Groups have standing to bring suit on behalf of their members because the interests at stake in this case are germane to the purposes of each of the Conservation Groups, the members themselves have standing, and neither the claims nor relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth v. Laidlaw Env't. Servs.*, 528 U.S. 167, 181 (2000).

The interests at stake in this case relate closely to the purposes of each of the Conservation Groups. See *id.* The mission of NCWF is to protect and promote natural areas throughout the state—not only as habitat for native wildlife, but also as recreational, hunting, fishing, and wildlife observation areas for its dedicated and passionate members. Exh. A at ¶6 (Gestwicki Decl.). NCWF works to preserve wild places and species through policy and protection work, research, education, and direct hands-on conservation projects. *Id.* at ¶¶ 6,7. NCWF has numerous members in Currituck County who visit, recreate, fish and hunt, observe wildlife, photograph, and otherwise use and enjoy

the Currituck Sound. *Id.* at ¶¶ 8-9; Exh. B at ¶¶ 5-11 (Aydlett Decl.). The mission of No MCB is to protect the unique natural environment of the Currituck mainland and the northern Outer Banks, and the organization was founded in opposition to the Toll Bridge. Exh. C at ¶ 4 (Symonds Decl.). No MCB has members who live and work on both sides of the Currituck Sound in areas that would be directly affected by the proposed Toll Bridge. No MCB has members who visit, recreate in, and otherwise use and enjoy the Currituck Sound and Outer Banks. *Id.* at 3; Exh. D at ¶¶ 2, 9-13 (Pierce Decl.); Exh. E at ¶¶ 2-3, 8-10 (Davis Decl.). For more than ten years, No MCB members have actively opposed the Toll Bridge. Exh. C at ¶ 6 (Symonds Decl.); Exh. D at ¶ 8 (Pierce Decl.); Exh. E at ¶ 6 (Davis Decl.).

The Conservation Groups monitor and participate in transportation planning in Currituck County and have participated in the administrative process surrounding the planning of the proposed Toll Bridge, including the NEPA process leading up to the issuance of the 2019 ROD. Exh. A at ¶¶ 10-13 (Gestwicki Decl.); Exh. C at ¶ 8 (Symonds Decl.). The organizational interests outlined above are directly and irreparably injured by the Defendants' violations of law challenged in this case and as detailed in this memorandum in support of the Conservation Groups' motion for summary judgment.

Each Conservation Group has members who have each suffered or imminently will suffer injuries to his or her recreational, aesthetic, health, and procedural interests that are traceable to the Defendants' construction of the Toll Bridge. *See Friends of the Earth*, 528 U.S. at 181. Plaintiff NCWF has over 10,000 members, supporters and affiliate constituents including members who live near and who regularly hunt and recreate in the vicinity of the proposed Toll Bridge. Exh. A at ¶¶ 7-8 (Gestwicki Decl.); Exh. B. at ¶¶ 6-11 (Aydlett Decl.). NCWF has members who have dedicated their life to environmental advocacy in the region. Exh. B at ¶¶ 11-14 (Aydlett Decl.). No MCB has approximately 50 members who live in or visit the vicinity of the proposed Toll Bridge. Exh. C at ¶ 4 (Symonds Decl.). Some members of No MCB will lose their property and business interests if the

Toll Bridge is constructed. Exh. D at ¶¶ 9-20 (Pierce Decl.); Exh. E at ¶¶ 11-12 (Davis Decl.). Members will suffer injuries to their way of life as their fishing, hunting, kayaking, and sailing opportunities will be depleted. Exh. C at ¶¶ 11-18 (Symonds Decl.); Exh. D at ¶¶ 13-17 (Pierce Decl.); Exh. E at ¶¶ 11- 15 (Davis Decl.). Members of both organizations are concerned about losing the environmental aesthetics and outdoor activities that brought them to live in, visit, or recreate within the area. Exh. B at ¶¶ 15-26 (Aydlett Decl.); Exh. E at ¶¶ 11,14 (Davis Decl.); Exh. D at ¶¶ 13-20 (Pierce Decl.).

The interests of the members outlined above will be injured if the Toll Bridge is permitted to be built based on the illegal NEPA review. The injuries suffered by these members are concrete, imminent, and fairly traceable to Defendants' decision to build the Toll Bridge without reviewing and disclosing updated traffic forecasts, sea level rise projections, and other information. *See Friends of the Earth*, 528 U.S. at 180-81; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). These injuries will be redressed by a decision in the Conservation Groups' favor. *Friends of the Earth*, 528 U.S. at 180-81.

V. LEGAL BACKGROUND

NEPA is the nation's keystone environmental law, designed to serve as "the democratic decisionmaking tool" by ensuring careful decisionmaking and requiring a rational consideration and disclosure of a full range of alternatives and the environmental impact of each. *N.C. Wildlife Fed'n*, 677 F.3d at 603 (citing *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 n.24 (9th Cir. 2010)); *see also* 42 U.S.C. § 4332(C).

NEPA promotes its purpose in two ways. First, NEPA ensures that a federal agency will carefully consider the effects of its actions on the environment by specifying formal procedures the agency must follow before taking action. Second, NEPA requires an agency to disseminate widely its findings on the environmental impacts of its actions.

Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 184 (4th Cir. 2005) (internal citation omitted).

For major federal actions significantly affecting the quality of the human environment, NEPA

requires that federal agencies prepare an EIS. 42 U.S.C. § 4332(C). An EIS must identify the direct, indirect, and cumulative impacts of the proposed action and consider alternative actions and their impacts. *Id.*; 40 C.F.R. §§ 1502.14, 1508.7, 1508.8 (1978). The requirement to consider “alternatives to the proposed action,” 42 U.S.C. §§ 4332(C)(iii), (E), is intended to “provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14 (1978).⁶

These effects and alternatives must be evaluated against a baseline “No Action” alternative. *Id.* § 1502.14(d). “[C]ourts not infrequently find NEPA violations when an agency miscalculates the ‘no build’ baseline or when the baseline assumes the existence of a proposed project.” *N.C. Wildlife Fed’n.*, 677 F.3d at 603 (citing *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1037–38 (9th Cir. 2008); *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep’t of Transp.*, 151 F.Supp.2d 661, 690 (M.D.N.C. 2001)).

Agencies typically prepare a draft EIS that is subject to public review and comment, followed by a final EIS that responds to comments on the draft EIS. 40 C.F.R. § 1502.9. A ROD represents the culmination of the agency’s NEPA decisionmaking process. *Id.* § 1505.2

Because circumstances can change over time, NEPA requires that an agency prepare a Supplemental EIS when “there are new significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *id.* § 1502.9(c)(1). If project changes or new information presents a “*seriously* different picture of the environmental impact of the proposed project,” then a supplemental EIS is required. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996) (emphasis in original).

Relatedly, under FHWA regulations, a written “Reevaluation” is required where major steps to advance an action have not occurred within three years after finalizing an EIS. 23 C.F.R. § 771.129(b). A reevaluation is a non-public internal agency process and does not substitute for a

⁶ The NEPA documents for the Mid-Currituck Bridge were prepared using the 1978 NEPA regulations that were in place when the ROD was published in 2019. The Conservation Groups’ claims are all based on those regulations and not new 2020 regulations which were promulgated in 2020 and did not have retroactive effect.

supplemental EIS. To the contrary, an agency may use the reevaluation to make “the initial determination about whether a change or new information meets the threshold of ‘significance’ or ‘uncertainty’ needed to require further environmental documentation. . . .” *Piedmont Env’t. Council v. U.S. Dep’t of Transp.*, 159 F. Supp. 2d 270-71 (W.D. Va. 2001), *aff’d in part, remanded in part on other grounds*, 58 F. App’x 20 (4th Cir. 2003).

VI. ARGUMENT

A thorough and transparent NEPA review is particularly important for costly, environmentally damaging, and controversial projects like the Mid-Currituck Bridge. For almost 50 years, federal and state agencies and the public have expressed concerns about the validity of the need for the Toll Bridge, the magnitude of construction and associated environmental damage, and the impact the Toll Bridge will have on development patterns in the Northern Outer Banks. At the same time, State funding revisions have left the expensive project without a financial plan to move forward. Despite all this, the Agencies have continued to push the Toll Bridge forward, cutting corners and relying on outdated and inaccurate data to support its decision.

In the time between the Agencies’ 2012 Final EIS and the 2019 ROD, the identified benefits of the Toll Bridge have decreased measurably. At the same time, the cost for the Toll Bridge has risen, while the costs of alternatives have plummeted. Seven full years passed between publication of the Final EIS, which was the last opportunity for public scrutiny and input, and the Agencies’ formal final decision. In this intervening period traffic forecasts (and associated projections of toll revenue), growth patterns, and sea level rise projections changed significantly. New realities indicate that the Toll Bridge no longer meets the purpose and need articulated under the NEPA document. In fact, other alternatives now appear better situated to accomplish the articulated aims. Given the substantial price tag, political controversy, and blatant disregard for accurate, current information, it is all the more important that this Court conduct a “thorough, probing, and in-depth review” of the

agencies' decision and vacate the ROD. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415(1971).

The ROD should be vacated because (1) the Agencies failed to prepare a Supplemental EIS, which was legally required in light of new traffic forecasts, updated growth and development projections, new sea level rise data showing the Toll Bridge is likely no longer structurally or financially feasible, and a new details about feasible alternatives; (2) the Agencies relied on an arbitrary and capricious analysis of alternatives that failed to evaluate a full range of reasonable alternatives and failed to present alternatives in comparative form; and (3) the Agencies relied on a faulty baseline that failed to account for the true growth-inducing and travel-inducing impacts of the Toll Bridge, thus rendering the analysis of impacts and alternatives arbitrary and capricious.

A. The Agencies Violated NEPA Because they Failed to Prepare a Supplemental EIS in the Face of Significant New Information.

The Agencies improperly ignored new, significant, and relevant information that emerged in the seven years between the publication of the Final EIS and the ROD. This information calls into question the need for, utility, and financial feasibility of the Toll Bridge, while at the same time indicating that other alternatives are more fit to meet the project's purpose. Failure to take a hard look at and publicly disclose this information in a Supplemental EIS was arbitrary and capricious.

NEPA requires that an EIS "contain high-quality information and accurate scientific analysis." *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (citing 40 C.F.R. § 1500.1(b)). Thus, NEPA "imposes a continuing obligation on agencies to consider the environmental impacts of a proposed action, even *after* a [Final EIS] has been issued." *Defs. of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 394 (4th Cir. 2014) (emphasis added). An agency cannot simply put on "blinders to adverse environmental effects" after a Final EIS has been produced. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). Instead, an agency must "prepare supplements" to its analyses when "there are significant new circumstances or information relevant to environmental

concerns and bearing on the proposed action or its impacts.” *Id.* at 372-73; 40 C.F.R. § 1502.9(c)(1) (noting duty to prepare Supplemental EIS wherever “there are new significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”) Agencies must “provide for broad dissemination of relevant environmental information,” including new information and any supplemental analysis that agencies undertook. *N.C. Wildlife Fed’n*, 677 F.3d at 601. The broad dissemination of information mandated by NEPA is intended to allow the public to react to the effects of a proposed action at a meaningful time. *Marsh*, 490 U.S. at 371.

In determining whether to prepare a Supplemental EIS, an agency must apply the “rule of reason,” which “turns on the value of the new information to the still pending decisionmaking process.” *Marsh*, 490 U.S. at 373-74. If the new information “present[s] a seriously different picture of the environmental impact of the proposed project from what was previously envisioned,” a Supplemental EIS must be prepared. *Hughes*, 81 F.3d at 443; *see also La. Wildlife Fed’n, Inc. v. York*, 761 F.2d 1044, 1051 (5th Cir. 1985) (holding that a significant change to the assumption of baseline conditions was “sufficient to require an agency to supplement an original EIS”). If the new information weighs upon the selection of one alternative over another, it is “nothing short of ‘significant,’” and requires a Supplemental EIS. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 561 (9th Cir. 2006).

In keeping with this requirement, FHWA regulations require the agency to complete an internal reevaluation if three years have passed since the preparation of the Final EIS to determine if a Supplemental EIS is needed. 23 C.F.R. § 771.129(b). This reevaluation is not a substitute for a Supplemental EIS, because it is an internal process not subject to any public scrutiny or comment. *See Piedmont Env’t. Council*, 159 F. Supp. 2d at 270. Instead, the Agencies use a reevaluation to decide whether to continue relying on a Final EIS (rather than preparing a supplement) to justify their final decision, as they did here.

A court “undertake[s] a two-step inquiry” when reviewing whether a decision not to prepare a supplemental EIS was proper. *Hughes*, 81 F.3d at 443. “First, the court must determine whether the agency took a hard look at the proffered new information. Second, if the agency did take a hard look, the court must determine whether the agency’s decision not to prepare a supplemental EIS was arbitrary or capricious.” *Id.* “Close calls should be resolved in favor of preparing a SEIS.” *Senville v. Peters*, 327 F. Supp. 2d 335, 356 (D. Vt. 2004) (citing *Nat’l Audubon Soc. v. Hoffman*, 132 F.3d 7, 13 (2d Cir.1997)).

In the seven years between publication of the Final EIS and ROD, significant new information regarding traffic forecasts, development expectations, sea level rise projections, feasible alternatives, and other circumstances have emerged that call into question the need for the project, the validity of the analysis of impacts and alternatives, and the relative utility and financial feasibility of the Toll Bridge. All this presented “a seriously different picture of the environmental impact of the proposed project from what was previously envisioned,” and required a supplemental EIS. *Hughes*, 81 F.3d at 443; *Louisiana Wildlife Fed’n, Inc.*, 761 F.2d at 1051. The Agencies violated NEPA because they failed to take a hard look at significant new information and because their decision not to prepare a Supplemental EIS was arbitrary and capricious. *Hughes*. 81 F.3d at 443.

1. New Traffic Forecasts Show Significantly Diminished Need for the Toll Bridge and Increased Viability of Alternatives.

The Agencies failed to take a hard look at new traffic forecasts that undermine the stated need for the Toll Bridge, place its financial viability in question, and demonstrate that other alternative solutions are more viable than previously thought. The Agencies further violated NEPA because their decision not to prepare a supplemental EIS based on the significant new traffic forecasts was arbitrary and capricious.

In the Final EIS, the Agencies relied on projected travel demand to establish a need for the Toll Bridge. The Agencies projected that summer traffic was expected to exceed capacity of the

current road system by 2035. Specifically, the Final EIS projected summer weekend traffic would amount to seven to eighteen hours of congestion per day. AR-34908. The Agencies used these projections to compare alternatives and selected the Toll Bridge due to its ability to meet the projected demands. AR-34963.

More recent traffic forecasts, however, show that every single prediction underlying the Agencies' asserted "need" is no longer true. The new forecasts, which project out to 2040, are significantly lower than the previous 2035 forecasts. For example, updated forecasts indicate that projected future annual average daily traffic on the proposed Toll Bridge decreased by 39%, from 12,600 to 7,700 vehicles. AR-68826. At the same time, projected summer weekday traffic between US 158 and the proposed Toll Bridge site decreased by 47%, rendering the Existing Roads alternative much more attractive. *Id.* See Tables 1 & 2 *supra* p. 12-13.

The significant changes to traffic forecasts are important because the Agencies used the projections to justify the need for the Toll Bridge and to compare alternatives. The forecasts are also significant because they underlie the financial viability of the Bridge—as toll bridges rely on high traffic numbers to generate necessary revenue.

First, the new traffic forecasts show that the established need for congestion relief can now be met through less expensive and damaging solutions. The Toll Bridge was initially selected as the only alternative that would sufficiently improve traffic flow in the project area. AR-9398; 9400-10. The Agencies concluded that they could not select the Existing Roads alternative, in part because the high future traffic forecasts meant that it would be unable to "improve system efficiency" or offer significant congestion relief. AR-9406. The new significantly reduced forecasts undermine this objection.

Second, the new traffic forecasts severely undercut the financial feasibility of the proposed Toll Bridge. The Agencies have long depended on projected toll revenue as an essential part of the financial path forward for the Toll Bridge. And expected toll revenue the Toll Bridge is expected to

generate was a key justification for selecting it. *See* discussion *infra* p. 37-39. The Final EIS estimated the Toll Bridge would generate approximately \$21 million in toll revenue annually for the first ten years and up to \$34 million annually by 2065. AR-34957. The new traffic projections, however show seriously diminished traffic, by some 40%. The Agencies refused to analyze and disclose the exact impact this would have on toll revenue before issuing the ROD. AR-68827. But it is undeniable that less usage will make financing for the Toll Bridge even more implausible: a corresponding 40% diminution of the toll-based financing (toll revenue bonds and TIFIA loans) in the draft finance plan would equate to a loss of approximately \$127.6 million in toll-based financing. AR-75483, leaving a dramatic funding gap on top of an already expected \$17.8 million deficiency.

The new traffic forecasts make the Toll Bridge option less financially viable, and make alternative options that have a lower upfront price tag more attractive. The change “is an event requiring serious and detailed evaluation” by the agencies in a supplemental EIS. *Alaska Wilderness Recreation and Tourism Ass’n. v. Morrison*, 67 F.3d 723, 730 (9th Cir. 1995).

Despite the significant changes to traffic forecasts that undermine all the assumptions and conclusions from the Agencies’ initial analysis, the Agencies arbitrarily and capriciously decided not to prepare a public Supplemental EIS with the new data. This violates NEPA. When changes in baseline conditions remove barriers that were once in place and used to eliminate alternatives, an agency must undertake a “serious and detailed evaluation” and prepare an Supplemental EIS to assess whether those changes merit selecting a different path. *See Alaska Wilderness Recreation and Tourism Ass’n*, 67 F.3d at 7303 (holding that the Forest Service had to prepare an Supplemental EIS when a longstanding timber sales contract fell through that “opened for consideration alternatives which could not be freely reviewed” originally).

The Agencies did not take the requisite hard look at new traffic forecasts or assess how the forecasts would change the viability of different alternatives, and thus failed to meet the first step in

Hughes. The Agencies' failure to disclose the changed forecasts in a Supplemental EIS is arbitrary and capricious, and fails *Hughes*'s second step. 81 F.3d at 443.

2. *Updated Growth and Development Projections Indicate that Development Trends Have Slowed in the Area, Undermining the Need for the Toll Bridge.*

Much as they violated NEPA by brushing off the significant changes to traffic forecasts, the Agencies also committed legal error when they failed to meaningfully evaluate and disclose changes to growth and development projections that call into question whether the Toll Bridge is necessary and the best alternative.

In the Final EIS, the Agencies assumed that the project area would reach "full build-out." AR-35074; 5428. This baseline assumption was used to both justify the need for the project and serve as the basis for the Agencies' analysis of alternatives and impacts. AR-5428. The traffic data underlying the baseline assumptions in the Final EIS relied on conditions existing in 2001 as well as field counts and land use forecasts used to estimate 2006 existing conditions. AR-5427. Since then, much has changed. The Revaluation Study Report acknowledges that permanent population growth in both Dare and Currituck County have slowed from compound growth rates of approximately 3% per year between 1990 and 2006, to less than 1% per year since 2006. AR-68784. Gross occupancy tax receipts that indicate tourism trends now show an annual increase of 3.7% , down from 9.0% annually from 1994 to 2000 and 7.2% annually from 2001 to 2006. AR-68784. Updated traffic data indicate that current trip rates to the project area, traffic volumes on US 158 and NC 12, and tourist population growth rates are all lower than the Final EIS had expected. AR-68786. Further, the overall annual increase in housing units fell to 0.82% per year from 2007 to 2014 compared to a rate of 1.41% per year from 2001 to 2007. AR-75283. This data corresponds to almost a 100% reduction in development in seven years. *Id.*

The Agencies did not take a hard look this new information and its impact on the NEPA analysis. *See* AR-68822. In fact, the Agencies were explicit in their Reevaluation that they were

expressly *not* analyzing the change and would address it only in subsequent financial documents needed for bond financing, in direct violation of NEPA. AR-68827.⁷ Because development assumptions were a baseline condition relied upon by the agencies through multiple facets of the previous NEPA analysis, the changes are “sufficient to require [the Agencies] to supplement an original EIS.” *La. Wildlife Fed’n*, 761 F.2d at 1051. The Agencies did not take a hard look at the new development data, and the decision to not prepare a Supplemental EIS was arbitrary and capricious. *Hughes*, 81 F.3d at 443.

3. Updated Sea Level Rise Projections Undermine the Overall Utility and Financial Feasibility of the Toll Bridge.

The Agencies further violated NEPA because they failed to take a hard look at readily available new sea level rise data that has a significant impact on the proposed Toll Bridge’s utility and financial feasibility.

The Agencies’ brief consideration of sea level rise in their 2012 Final EIS relied on an ICF report issued in 2007, which in turn used inundation levels from EPA studies published in the 1990s and the Intergovernmental Panel on Climate Change’s third assessment report published in 2001.⁸ Based on this old data, the Agencies concluded that the “worst-case sea level rise scenario” would result in 6.7 inches of sea level rise by 2035, or up to 23.2 inches by 2100. AR-35047-49. The Agencies also claimed the Toll Bridge “would never experience the highest sea level rise” predictions because the Toll Bridge would be replaced by 2100, AR-35048, and that the Toll Bridge “would be a useful asset in reducing the impact of sea level rise on the project area’s road system.” AR-34892; *see* AR-34965; 35048. A related 2011 Technical Report for the Toll Bridge relied on this same obsolete data in its sea level rise discussions, also noting that “US 158 on the Currituck County

⁷ The Agencies stated: “[t]he effects of changes in development and traffic growth trends on bridge volumes as they relate to toll revenue and toll bridge financing will be addressed in a new investment grade traffic and revenue forecasts being prepared independent of this reevaluation.” AR-68827.

⁸ The ICF Report explicitly says that “given the uncertainty of the sea level rise data, it should not be used to predict sea levels at a particular location or point in time.” AR-78009.

mainland south of a Mid-Currituck Bridge would not be inundated under any sea level rise scenario.” AR-34248; 34244.

In the time between publication of the Final EIS in 2012, and issuance of the ROD in 2019, there were significant advances in sea level rise data and modeling that show the Final EIS’s sea level rise assumptions and projections are flat wrong. The Agencies had a responsibility to address and disclose this significant new information prior to making a final decision to construct the Toll Bridge.

In 2017, the U.S. Global Change Research Program, which comprises thirteen federal agencies including NOAA, issued the Fourth Assessment, which provides the most recent data regarding sea level rise on North Carolina’s Outer Banks, and explained that global average sea levels are expected to continue to rise by at least several inches in the next fifteen years and by one to four feet by 2100. AR-46728. The report concluded that sea level rise will be higher than the global average on the East Coast of the United States. AR-46744. NOAA’s Technical Report supporting the Fourth Assessment provides the most comprehensive study of sea level rise to date and provides localized projections that are fine-tuned and tailored to certain geographic areas. AR-78267.

The updated projections in the NOAA Technical Report indicate that the 2100 “high” sea level rise scenario relied on by the Agencies in the Final EIS (23.2 inches), *see* AR-35048, is now the “low end” sea level rise project or least likely to occur scenario. AR-78267-68. The Technical Report shows that its sea level rise scenario labeled “intermediate high,” anticipating 28.3 inches of sea level rise by 2050 and 81.1 inches of sea level rise by 2100 in the Outer Banks, is the most likely scenario. *Id.*; AR-78454. This means the Toll Bridge will experience a higher amount of sea level rise within the next fifty years than the Agencies expected the Toll Bridge would experience in its entire seventy-five -year lifetime under the worst-case scenario. AR-78267-68. In other words, the new projections show that the Final EIS likely underestimated sea level rise by the year 2100 by almost 400%.

These projections have serious consequences for the viability of the Toll Bridge and will seriously impact other assumptions the Agencies made about traffic and growth in the project area. Simply put, the baseline sea level rise data presented in the Final EIS is no longer accurate, tainting the Final EIS's other analyses. *See La. Wildlife Fed'n*, 761 F.2d at 1051 (holding that a significant change to the assumption of baseline conditions was "sufficient to require an agency to supplement an original EIS").

For example, under the most likely sea level rise scenario, the base of the Toll Bridge on the mainland will be inundated or extremely vulnerable to flooding and US-158 will be inundated, rendering the Toll Bridge inaccessible from the mainland. AR-75592. Meanwhile, the Plan of Finance depends on toll revenue through 2073, well after these new sea level rise models predict that much of Currituck County's coastline will be flooded. *See id.*; AR-75487. Chronic flooding on this scale is sure to impact development in Currituck County, and will likely significantly alter traffic patterns and toll revenue projections.⁹ Yet the Agencies failed to consider how this updated sea level rise information disrupts their plan to finance the Toll Bridge, or how sea level rise affects the Agencies' assumptions about growth and development in the project area.

The Agencies failed to take a hard look at these widely-available, dramatically-changed sea level rise projections, in violation of NEPA's hard look requirements. Instead, the 2019 Reevaluation simply reaffirms the outdated projections in the Final EIS and fails to even acknowledge the widely-available 2017 Fourth Assessment and accompanying NOAA Technical Report.¹⁰

⁹ In addition, state law mandates that NCDOT "maintain an existing, alternate, comparable nontoll route corresponding to each Turnpike Project[.]" N.C. Gen. Stat § 136-89.197, yet the ROD states that "under all sea level rise scenarios considered, the entire barrier island would be inundated at the Dare/Currituck County line, creating a breach in the island and making a Mid-Currituck Bridge the only way off the Currituck County Outer Banks." AR-68769. The Agencies did not consider that if the Toll Bridge were to become the only way off the Currituck County Outer Banks, it could no longer operate as a toll bridge.

¹⁰ Rather than consult the 2017 National Climate Assessment data, the Re-Evaluation turns to the 2016 North Carolina Sea Level Rise Assessment Report, which in turn relies on data from 2014. AR-68930; *see also* AR-78023; AR-78067.

Thus, the Agencies' decision to not prepare a Supplemental EIS in light of the new sea level rise projections was arbitrary and capricious. Widely-available, updated sea level rise projections show a "seriously different picture of the environmental impact . . . from what was previously envisioned," and the Agencies must update their impact analyses and funding plans to reflect the more recent sea level rise data and disclose them in a Supplemental EIS. *Hughes*, 81 F.3d at 443.

4. Updated Alternative and Emerging Vacation Trends Offer a More Financially and Environmentally Responsible Approach to the Agency's Goals.

The Agencies further violated NEPA when they ignored significant new information about viable alternatives including an improved variant on the Existing Roads alternative that was submitted by the Conservation Groups, and changing vacation patterns which made the alternative focused on shifting rental times even more viable.

Because of the rapidly evolving circumstances surrounding the project since the Final EIS, in 2017 the Conservation Groups hired a traffic expert, Walter Kulash, to design an improved alternative solution based on upgrades to the existing highway system. This alternative, "Improved ER2," is a comprehensive set of multiple solutions designed to work together to meet the purpose and need. The alternative combines physical road expansion techniques similar to the Existing Roads alternative,¹¹ with other solutions such as manned traffic control at key intersections during holidays, incentivizing electronic keys for rentals to eliminate trips to rental agency office, as well as incentives for staggered check-in and check-out times. *See* Figure 1.

¹¹ The physical changes associated with Improved ER2 include reconstructing US 158 between Wright Memorial Bridge and the Home Depot into a four-lane superstreet, modifying the US 158/NC 12 interchange to a simple flyover or continuous flow intersection, converting signalized intersections on NC 12 into roundabouts to improve through-flow, constructing an overhead pedestrian walkway in Duck, and consolidating driveways along NC 12. AR-45562-63.

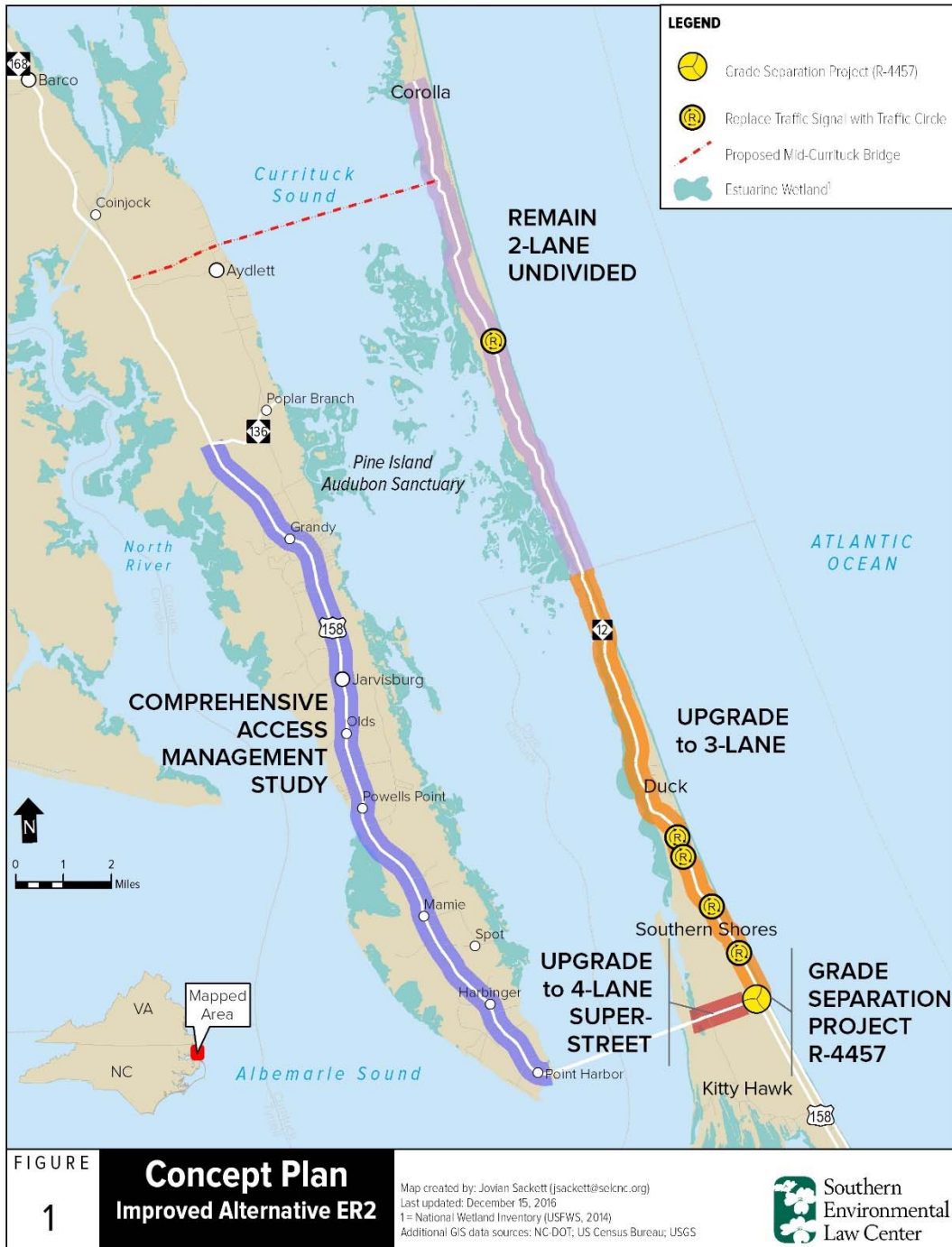


Figure 1 AR-45525.

The Agencies did not take a hard look at the Improved ER2 alternative. Brief comments submitted in a response document included with the Reevaluation show that the Agencies did not take any serious effort to consider how the small scale alternatives could meet the (reduced) need to

cure traffic congestion at a low cost. AR-69281-82. The failure to take a hard look at this information violated NEPA, and the unreasoned decision not to include it in a Supplemental EIS was arbitrary and capricious. *Hughes*, 81 F.3d at 443.

The Agencies also violated NEPA when they ignored significant new information about evolving vacation habits that make other alternatives more viable. As discussed below on p. 30 one alternative the Agencies failed to analyze adequately was a solution based on incentives for staggered check in days at rental homes. This solution has become increasingly more viable with the shift in more flexible vacation schedules as well as companies like VRBO and Airbnb, which provide an opportunity for visitors to check-in on days not previously assessed. AR-72220; 72221; 72222; 72223; 72224; 72225; 72229. These emerging vacation trends are more than a “remote and speculative possibilit[y]” and the Agencies’ failure to seriously consider the new information was arbitrary and capricious. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978).

B. The Agencies Violated NEPA Because they Failed to Objectively Analyze a Full Range of Reasonable Alternatives and Fairly Compare Them

The Agencies violated NEPA because they failed evaluate a full range of reasonable alternatives, consider a combination of alternatives, and objectively present alternatives in comparative form. The Agencies failed to rigorously explore alternatives in at least four ways. First, the Agencies relied on an outdated and fundamentally flawed Screening Report to eliminate consideration of an alternative that staggered rental check-in times, despite the fact that the alternative met the primary purpose of the project. Second, the Agencies failed to consider a combination of these alternatives. Third, the Agencies inconsistently used hurricane evacuation clearance times to promote and reject alternatives. Fourth, the Agencies inconsistently used costs and financing to promote and reject alternatives.

NEPA requires every EIS to be prepared with objective good faith and to fully and fairly discuss a full range of alternatives to the proposed action. 42 U.S.C. § 4332(C). The alternatives analysis is the “heart of the environmental impact statement,” 40 C.F.R. § 1502.14, as the “assessment of alternatives to the proposed action ‘sharply defin[es] the issues and provid[es] a clear basis for choice among options by the decisionmaker and the public.’” *N.C. Wildlife Fed’n.*, 677 F.3d at 602. An EIS is inadequate if the agency “failed to consider an alternative that was more consistent with its basic policy objectives than the alternatives that were the subject of final consideration,” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999). Only alternatives that are deemed unreasonable can be eliminated from study. *See* 40 C.F.R. § 1502.14; *Audubon Soc’y of Greater Denver v. U.S. Army Corps of Eng’rs*, 908 F.3d 593, 603 (10th Cir. 2018). The goal of the alternatives analysis is to inform an agency of environmental impacts associated with the proposed action, not to “justify[] decisions already made.” 40 C.F.R. §§ 1502.1, 1502.2(g). The Agencies failed to comply with these requirements.

1. The Agencies Violated NEPA Because they Arbitrarily Eliminated the Alternative of Staggering Rental Check-In Times.

One of the purported purposes of the proposed Toll Bridge is to address summer weekend traffic congestion. AR-34907-08. The Currituck Outer Banks play home to a substantial amount of vacation rental properties that are rented by the week, with their peak use in summer months. Most property rentals (nearly 70%) turn over occupancy on Saturday, resulting in extremely high congestion as tens of thousands of tourists attempt to check into their property as others attempt to leave. AR-9411-12. Unsurprisingly, the rate of traffic congestion correlates directly with the days of rental check-outs. The Agencies’ own traffic forecasts show that even by 2040, during the week, traffic on U.S. 158 is projected to remain at a reasonable and unproblematic level. AR-68863. It is only on summer weekends that extremely congested conditions are projected to occur. AR-68854-56. Thus, an alternative that spreads out the flow of traffic beyond the weekend would alleviate the

problem and be a reasonable alternative worthy of consideration in the EIS and presentation to the public for review. *See* 40 C.F.R. §§ 1502.13; 1502.14(a).

The Agencies failed to “rigorously explore” and “objectively evaluate” an alternative looking at shifting rental times, which was premised on relieved transportation demand during congested summer weekends. The Agencies arbitrarily and capriciously dismissed the alternative from detailed study first by arbitrarily limiting the scope of the alternatives, and second by analyzing it in a way that obscured its merit.

Without justification, the Agencies limited the concept of spreading out rental checkout days to just Fridays, Saturdays, and Sundays. AR-9412. The analysis did not consider how to extend the analysis into the weekdays, where significant congestion alleviation could be found. AR-68863. Even under this arbitrary cap, the Agencies found that the alternative would bring a massive 28% reduction in congestion during summer weekend days—the problem the Agencies seek to alleviate. AR-9412.

Despite the demonstrated ability of the alternative to serve the project purpose, the Agencies illegally eliminated it from detailed study. The Agencies justified their elimination of the alternative with deceptive math. Rather than look at the efficacy of the alternative at the time it was needed, they averaged the impact throughout the entire calendar year. AR-9411-12. Having done so, the Agencies incorrectly stated the project’s impacts would “not be substantial.” AR-9411-13.

This conclusion, however, hides and dramatically misrepresents the actual effectiveness of the alternative. Averaging the impact out across all days (even those not subject to high traffic demand) dissipates the apparent effectiveness of shifting rental times. It is no surprise at all that the alternative would have no impact in the middle of January when there is no traffic problem. Indeed, the Toll Bridge itself is not needed or effective for much of the year but the Agencies did not similarly critique its ineffectiveness outside of peak summer travel. Looking at the alternative in this way violates the responsibility to consider alternatives in comparative form. 40 C.F.R. § 1502.14.

In short, the Agencies took an alternative that would be effective in solving the traffic congestion that is a stated purpose of this project, diluted its impact by looking at times of the year when it was not needed, and then used the diluted effects determination as a reason to exclude the alternative from further review. This type of “unjustified leap of logic” and data manipulation is not the “hard look” that NEPA requires. *Friends of Back Bay v. U.S. Army Corps of Eng’rs*, 681 F.3d 581, 587-88 (4th Cir. 2012).

2. The Agencies Violated NEPA Because they Failed to Consider a Combination of Alternatives.

The Agencies also violated NEPA because they failed to study how a number of smaller scale alternatives could work together to solve the stated purpose and need. Rather than look at a combination of alternatives such as ferries, public transit, minor road improvements and shifting rental times, the Agencies looked at each one standing alone, and eliminated each from detailed study. AR-34949-50; 9411-23. The existence of such “viable but unexamined alternative[s] renders an environmental impact statement inadequate.” *Muckleshoot Indian Tribe*, 177 F.3d at 814 (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)).

The Tenth Circuit rebuked Defendant FHWA for exactly such arbitrary and capricious action in *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002). In that case, the FHWA eliminated options involving transportation solutions early in the NEPA process, rejecting the alternatives because each, “standing alone, . . . would not meet the purpose and need of the Project.” *Id.* at 1121. The Court found that the failure to “consider [smaller alternatives] *together* and/or in conjunction with alternative road expansion as a means of meeting Project goals” was “one of the most egregious shortfalls” of the analysis. *Id.* at 1121-22 (emphasis in original).

Since the Agencies first began project planning, resource agencies and the public have called attention to the fact that a combination of alternatives could work in concert to replace the need for the \$600 million Toll Bridge. AR-671-73; 69763; 3189. For example, shifting rental times would

reduce traffic on the most congested days and ferries would provide another transportation alternative to cars passing on the road. AR-3189; 665; 673. The Agencies' failure to do so was arbitrary and capricious.

3. *The Agencies Violated NEPA Because they Failed to Objectively Compare how Alternatives would Assist Hurricane Evacuation.*

Having added the dubious justification of hurricane evacuation to the purpose and need for the project, the Agencies proceeded to ignore key advantages of the Existing Roads alternative over the Toll Bridge for hurricane evacuation. Rather than taking a hard look at this information, the Agencies attempted to minimize and obscure it. Because the Agencies relied on hurricane evacuation as a primary purpose of the project, their failure to objectively disclose this information to decisionmakers and the public was arbitrary and capricious.

The Agencies stated that one of the project's purposes is "[t]o reduce substantially hurricane clearance time for residents and visitors," AR-34909, despite significant controversy and pushback from the public and other agencies on this point. For decades, many state and federal agencies refused to concur with the purpose and need for the project because they believed the Toll Bridge would hinder, not help, hurricane evacuation. *See, e.g.*, AR-69934; 69941; 69943; 69948; 69954. Indeed, the Corps refused to sign off on initial project documents until hurricane evacuation was removed from the project's purpose. AR-74890; 69759; 69761. It was only after significant political wrangling and a turnover in staff and administration that state and federal agencies agreed to move forward with documents that used hurricane clearance times as justification for the Toll Bridge. AR-69971; 69977; 69978.

In the Final EIS, the Agencies determined that because the Toll Bridge would not include a third outbound lane on US 158,¹² it would achieve a hurricane clearance time of twenty-seven hours.

¹² The Agencies considered adding a third outbound lane to US 158 for other bridge options (MCB2 and MCB4), but not for their Preferred Alternative; instead, the Preferred Alternative involves only "reversing the center turn lane on US 158." AR-34877.

AR-34954. The Existing Roads alternative, using a third outbound lane, would achieve a significantly faster hurricane clearance time of twenty-two hours. *Id.* However, the Agencies obscured this information by grouping the preferred Bridge together with another Bridge alternative: MCB4 (which *does* include the evacuation benefits of a third outbound lane), and presenting both bridges as having the same hurricane evacuation times, making it seem as if the preferred Bridge could perform equally well. *Id.* In fact, however, that is not the case: the crucial third outbound lane that allows for the speedier twenty-two hour evacuation time for bridge MCB4 and the Existing Roads alternative is “not included” with their preferred alternative. *Id.* Instead, the preferred alternative would have a very significant additional five hours of evacuation time over the Existing Roads alternative. This was not clearly disclosed.

The Agencies’ rationale for their preferred Bridge alternative in the Final EIS (Section 2.6, “For what reasons did you choose the Preferred Alternative?”) does not cite hurricane evacuation, despite this being one of the project’s key purposes and needs. The Final EIS rationale notes only that “hurricane evacuation improvements” would be needed on fewer miles of highways with the Toll Bridge versus the Existing Roads alternative, in order to make the factually incorrect assertion that this would “reduc[e] costs.” AR-34965. In reality, the opposite is true: the Existing Roads alternative “would be the least expensive alternative,” as the Agencies admitted elsewhere in the Final EIS. AR-34955. The Agencies’ failure to squarely consider the significant benefits of the Existing Roads alternative over the Toll Bridge for hurricane evacuation prevented a reasoned comparison of alternatives.

Moreover, updated projections now demonstrate that the Existing Roads alternative continues to outperform the Toll Bridge in terms of evacuation time, and would thus still better meet the Agencies’ identified hurricane evacuation purpose of the project. AR-68850-51; 68867-69. The Existing Roads alternative continues to outperform the Toll Bridge with an evacuation time of 30.7 hours, compared to the Toll Bridge’s time of 32.3 hours. AR-68851. This difference is significant:

the Agencies noted in the Reevaluation that “[a] 2-hour clearance time reduction could translate into roughly 9,000 additional evacuees being able to reach a point of safety.” AR-68869. In addition, the Reevaluation notes that “based on a change in the National Hurricane Center warning timeframe that was the basis for the 18-hour clearance time goal [at the time of the Final EIS], 30 hours is now the appropriate standard to use.” AR-68845. The Existing Roads alternative, at 30.7 hours, comes much closer to meeting this goal than the Toll Bridge. But again, the Agencies failed to weigh this superior hurricane evacuation performance in their comparison of alternatives, even as they used the hurricane evacuation issue to eliminate other alternatives from consideration. AR-9413-22; *see supra* p. 7.

4. The Agencies Violated NEPA Because they Failed to Objectively Compare how Alternatives could be Funded and Financed

The Agencies improperly used supposed financing obstacles to reject a viable and far less expensive alternative, while ignoring similar issues in their evaluation of the Toll Bridge. This biased approach prevented the objective comparison of alternatives required by NEPA.

Due to “the potential for misleading economic assumptions to defeat the functions of an EIS,” courts must review “the economic assumptions underlying a project to determine whether the economic assumptions were so distorted as to impair fair consideration of the project’s adverse environmental effects.” *Hughes*, 81 F.3d at 446 (internal quotation marks omitted). Reliance on significantly inaccurate information constitutes a failure to take the requisite hard look and defeats the dual purposes of NEPA: informed decision-making and public disclosure. *Id.* at 443.

The Agencies acknowledged in the Final EIS that the Existing Roads alternative meets the purpose and need for the project and “would be the least expensive alternative.” AR-34953; 34955. According to the latest estimates, the Toll Bridge could cost \$316 million more than the Existing Roads alternative, and potentially even more. AR-68806. That extra cost for the Toll Bridge is far more than the *total* cost of another major bridge construction project recently completed in the Outer

Banks, the \$252 million replacement of the Bonner Bridge to Hatteras Island.¹³

The Agencies' analysis of the economic viability of the Existing Roads and Toll Bridge alternatives in the Final EIS—and their subsequent refusal to supplement this analysis and instead issue the 2019 ROD—was arbitrary and capricious. Throughout the NEPA process, the Agencies persistently refused to fairly and consistently compare the economic viability of the Existing Roads alternative with that of the Toll Bridge.

First, the Agencies relied on funding considerations that were unreasonable at the time of the Final EIS and were subsequently rendered moot. In the Final EIS, the Agencies rejected the Existing Roads alternative, citing this alternative's ineligibility for state "gap funding" (\$35 million annually for thirty years, or over \$1 billion) that was earmarked for the Toll Bridge. AR-34958; 34965. However, in 2013, the North Carolina General Assembly stripped the Toll Bridge alternative of its earmarked "gap funding," eliminating this basis for disfavoring the Existing Roads alternative. 2013 N.C. Sess. Laws 183, §§ 1.1(a), 4.9.

Likewise, the Agencies stated in the 2012 Final EIS that the funding available to the Existing Roads alternative would be subject to the state's "equity formula" for allocating transportation funding, that this funding would be "minimal" due to the upcoming replacement of the nearby Bonner Bridge, and that as a result, "it is unlikely NCDOT would be able to construct" the Existing Roads alternative. AR-34958. However, after the Final EIS, in 2013 the General Assembly eliminated this "equity formula," replacing it with a "Strategic Transportation Investments" scoring system that allocates statewide and local funds according to a new data-driven system. 2013 N.C. Sess. Laws 183 § 1.1(a). The Agencies scored the Toll Bridge (where it fared poorly, receiving only limited funding at the local level), but made no attempt to determine how the Existing Roads alternative would score and what sources of funding would be available under the new system. As a result, the Agencies have no basis

¹³ *Replacing the Bonner Bridge*, NCDOT, <https://www.ncdot.gov/projects/bonner-bridge/Pages/project-facts.aspx> (last visited Feb. 4, 2021).

for drawing conclusions about the availability of state funding for this alternative, and certainly not for continuing to rely on the outdated analysis in the Final EIS.

Moreover, the Agencies' speculative 2012 concern about the funding of the Bonner Bridge replacement cannot justify their decision, because the new scoring system allows projects to compete for funding statewide. And in any event, the concern is moot: the Bonner Bridge has already been replaced and was opened to traffic before the Record of Decision for this project was issued. *See supra* note 13. These out-of-date funding assumptions were faulty to begin with, but they subsequently became entirely irrelevant and cannot justify the Agencies' decision.

The Agencies' more recent documents only continued their skewed approach. Because the Toll Bridge scored poorly under the new state transportation funding system, it was eligible for only \$173 million in state funds. AR-70168. But the Agencies did not document any plan to fund the full cost of the Toll Bridge. Their Reevaluation summarized a draft Plan of Finance from 2018, but it was never finalized. AR-68807. And the limited state funding available to the Toll Bridge meant that the finance plan cited in the Reevaluation fell short by at least \$17.8 million. AR-75483. Moreover, the Toll Bridge cost of \$632,823,478 listed in the Agencies' own grant proposal would mean even greater shortfalls. AR-75499.

In addition, as discussed above, the Agencies used new traffic forecasts for the ROD, AR-68757, which determined that the design year traffic forecasts are significantly lower, by some 40%, than the design year forecasts used in the Final EIS. AR-68757; 68797. NCDOT acknowledged that if "the [Toll Bridge] would generate insufficient toll revenue to be financed, the bridge project planning would be terminated." AR-29279. But the Agencies failed to consider and disclose the effect of this reduced traffic on the toll revenue predictions during the NEPA process.

Another of the obstacles to funding the Toll Bridge that the Agencies irrationally ignored was sea level rise. Again, as noted above, the Plan of Finance depends on toll revenue through 2073, well after current sea level rise models predict that much of Currituck County's coastline will be flooded.

AR- 75591-97. Chronic flooding on this scale is sure to impact development in Currituck County, and will likely significantly alter traffic patterns and toll revenue projections. Yet the Agencies failed to consider the disruption this updated sea level rise information would cause to their plan to finance the Toll Bridge.

In addition, state law mandates that NCDOT “maintain an existing, alternate, comparable nontoll route corresponding to each Turnpike Project[,]” N.C. Gen. Stat. § 136-89.197, yet the ROD states that “[u]nder all sea level rise scenarios considered, the entire barrier island would be inundated at the Dare/Currituck County line, creating a breach in the island and making a Mid-Currituck Bridge the only way off the Currituck County Outer Banks.” AR-68769. The Agencies did not consider that if the Toll Bridge were to become the only way off the Currituck County Outer Banks, it could no longer operate as a toll bridge.

The Agencies did not take the required “hard look” at these issues—indeed, they did not address at all the Toll Bridge’s funding shortfall the preliminary Plan of Finance, or the effect of increased sea level rise and decreased traffic forecasts on the ability of toll revenue to fund to the remainder of the Toll Bridge. These blind spots also violated NEPA’s public information requirements. “When relevant information is not available during the [impact statement] process and is not available to the public for comment[,] . . . the [impact statement] process cannot serve its larger informational role, and the public is deprived of [its] opportunity to play a role in the decision-making process.” *N.C. Wildlife Fed’n*, 677 F.3d at 604–05 (quoting *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011)).

Just as they had done in the Final EIS, the Agencies applied fundamentally different assumptions to the Existing Roads alternative in their Reevaluation. Despite the unaddressed obstacles to funding the Toll Bridge, the Reevaluation optimistically stated “[i]f one or more of the funding sources is not available in the amount assumed, then the additional funding will come from a combination of the remaining funding sources or other reasonably foreseeable funding sources.”

AR-68808. For the Existing Roads alternative, the Agencies assumed without justification (because they did not evaluate the Existing Roads alternative under the new “Strategic Transportation Investments” scoring system) that only certain bonds and the same state matching fund amounts from the Toll Bridge option would be available, and concluded that because the entire cost of this alternative was not already allocated, “available funding would not be adequate to construct” the Existing Roads alternative and rejected it. *Id.*

In other words, when faced with an actual shortfall in their finance plan for the Toll Bridge, as well as clear evidence that their toll revenue assumptions were faulty due to new traffic and sea level rise information, the Agencies assumed that existing funding would increase or unspecified “other reasonably foreseeable funding sources” would magically materialize. *Id.* At the same time, the Agencies treated a speculative funding shortfall for the Existing Roads alternative as a deal-breaker. Here and throughout the NEPA process, the Agencies treated these two alternatives fundamentally differently, ignoring financing obstacles for the Toll Bridge while relying on them to rule out other options. This was not reasoned decision-making and failed to comply with NEPA’s mandate to present alternatives in comparative form. 40 C.F.R. § 1502.14.

In addition to this unequal treatment, the Agencies’ reliance on assumptions about the funding picture for the Existing Roads alternative was unreasonable because NEPA prohibits an agency from dismissing an alternative simply because it may depend upon funding outside the agency’s direct control. *Muckleshoot Indian Tribe*, 177 F.3d at 814 (rejecting agency’s “selective willingness to rely upon the availability of funding sources beyond [its] direct control”). Similarly, the D.C. Circuit held that because “NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch,” alternatives dependent upon legislative action could not be dismissed on that basis. *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

Indeed, earlier in the process for this project, the Corps had explained to the Agencies that “[u]nder NEPA . . . requirements, alternatives may still be considered practicable even though current funding is not available for a specific project.” AR-70566. The Agencies’ refusal to determine whether adequate funding would be available for the Existing Roads alternative under the state’s transportation funding system—let alone to investigate additional funding if it would be needed was unreasonable. These problems were only compounded by the Agencies’ selective willingness to dismiss serious financing obstacles for the far more expensive Toll Bridge.

C. The Agencies Violated NEPA Because they Failed to Account for the Growth Inducing Impact of the Toll Bridge.

The Agencies further violated NEPA because they concluded that the same level of growth and development would come to the project area whether or not the Toll Bridge was constructed. This irrational conclusion—that a seven-mile Toll Bridge to a remote barrier island would have no impact on growth patterns—directly contradicted that Agencies’ own data and prevented a reasonable analysis of both impacts and alternatives.

NEPA requires agencies include a “No-Action” alternative to provide a baseline against which to compare alternatives for a proposed project. 40 C.F.R § 1502.14(d). “A no action alternative in an EIS allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action.” *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 623 F.3d 633, 642 (9th Cir. 2010). The no action alternative “is meant to provide a baseline against which the action alternative . . . is evaluated.” *Id.* As a result, “[a] material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision.” *Friends of Back Bay*, 681 F.3d at 588.

That is exactly what happened here. The Agencies admitted in the Reevaluation that their “baseline” actually assumed the Toll Bridge would be constructed: the traffic forecasts they relied on for their baseline “do not presume that development would be constrained by the lack of capacity in

the road system, *a lack that the proposed action is being proposed to address.*” AR-69102-03 (emphasis added). This is a convoluted way of saying the baseline assumed that full development would occur, even though it would not occur without the Toll Bridge.

By erroneously treating the increased development associated with the Toll Bridge as if it would occur anyway, the Agencies ignored it in evaluating both impacts and alternatives. This is the opposite of the analysis that NEPA requires: the No Action alternative should represent the baseline. *See Friends of Back Bay*, 681 F.3d at 588; *N.C. Wildlife Fed’n*, 677 F.3d, 677 F.3d at 600.

The Agencies’ approach, which assumes “that the proposed construction would not spur new growth, it would simply accommodate already existing growth or growth that was bound to occur whether or not the [project] was constructed” has been tried before and squarely rejected as unlawfully “fail[ing] to provide a reasonable basis for comparison of the[] alternatives.” *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep’t of Transp.*, 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001).

Here, the traffic forecasts used to study all alternatives assume an 85% build-out is the *baseline* for development. AR-69103 (updating AR-35074). The Agencies refer to this as “full build-out.” *See* AR-69103; 35074. However, such “full build-out” is expected to occur *only if the Toll Bridge is built*. Indeed, the Agencies elsewhere project that if the Toll Bridge is not built, there would be a markedly lower build-out of just 69%. *See* AR-69103. And this increase is far greater than it may appear—it does not represent a 16% difference, but rather represents *more than twice as much* development as the No-Build alternative.¹⁴ AR-68942. Similarly, the methodology underlying the Agencies’ traffic forecasts “did not consider potential effects of induced trip demand of increased day-trippers because of enhanced access associated with a new bridge.” AR-5428. Yet

¹⁴ Under the Toll Bridge scenario, the Final EIS predicts 4,200 homes or hotel rooms would be constructed, which is 2,400 more units than predicted for the No-Build alternative. AR-35074-75. The Reevaluation updates this to 4,100 units constructed under the Toll Bridge scenario, with the difference between the Toll Bridge and No-Build alternative being 2,500 units—an even greater increase. AR-69385.

despite acknowledging the Toll Bridge would accelerate growth, the Agencies treated the growth associated with the Toll Bridge as the baseline.

Because the Agencies treated the growth caused by the Toll Bridge as part of the baseline, the Final EIS irrationally concludes that “there would be no reasonably foreseeable change in the overall type and density of development” with the Toll Bridge and that “negligible or no increase in the demand for houses and businesses throughout the Outer Banks resort area would be foreseeable over the No-Build Alternative.” AR-35704. The Agencies proffered the same conclusion for the roadless area of the Northern Outer Banks: “there would be no reasonably foreseeable change in the location, rate, or type of development with implementation of the detailed study alternatives,” including the Toll Bridge. AR-35076. These conclusions are directly contrary to the actual growth projections, which show that full development is dependent on the project and would not occur if the Toll Bridge was not built.

These same Agencies have been rebuked by the Fourth Circuit for similar NEPA baseline manipulation in *N.C. Wildlife Fed’n*, 677 F.3d at 603. In that case, which involved a project analyzed during the same time period as the Toll Bridge, the same Agencies predicted land development patterns and travel time based on an anticipated roadway network that included the proposed highway project. *Id.* at 599-600. The court found the Agencies had “incorporated ‘build’ assumptions into the ‘no build’ baseline,” and the analysis was arbitrary and capricious and in violation of NEPA. *Id.* at 600-03. The Fourth Circuit later described such a “material misapprehension of the baseline conditions” as an “obvious and fundamental blunder” that violates the APA. *Friends of Back Bay*, 681 F.3d at 588. Here too, the traffic forecasts used as a baseline to assess the impacts of the Toll Bridge *assumed that the Toll Bridge would be developed*. AR-35074; 5429. Thus, the Agencies have once again violated NEPA by “incorporate[ing] ‘build’ assumptions into the ‘no build’ baseline.” *N.C. Wildlife Fed’n*, 677 F.3d at 600-03.

1. The Manipulated Baseline Obscures the Significant Damaging Indirect and Cumulative Impacts Associated with the Toll Bridge Construction.

NEPA requires that “to the fullest extent possible,” the Agencies must evaluate a proposal’s impacts and also “*any* adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. § 4332(C) (emphasis added). In particular, this includes “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8(b) (1978). The Agencies are also required to analyze cumulative effects, which are “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions[.]” *Id.* § 1508.7.

The Fourth Circuit has explained that “agencies *must* measure the indirect and cumulative environmental effects of proposed actions,” and “[c]onclusory statements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA.” *N.C. Wildlife Fed’n*, 677 F.3d at 602 (emphasis in original). “By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Id.* at 601–02 (quoting *Marsh*, 490 U.S. at 371).

In their earlier 1998 DEIS, the Agencies acknowledged that the Toll Bridge would cause a significant increase in development along the Currituck Outer Banks and the rest of the project area. The Agencies estimated that “the bridge would allow an estimated 2,743 additional homes along the Currituck Outer Banks.” AR-74825-26. In the same document, the Agencies acknowledged that in contrast to the Toll Bridge, maintaining the status quo would constrain development under the No-Build Alternative. AR-74821. However, despite the overwhelming evidence that a new bridge to this section of the Outer Banks would spur development and traffic, the Agencies went out of their way to avoid analyzing these effects and to select the Toll Bridge in the ROD.

The Agencies' claims that no additional development would occur with the Toll Bridge fall apart when compared to the actual projections and data hidden in the backwards, and purposefully obscure analysis in the Final EIS and accompanying documents. In both the Final EIS and the Reevaluation (internally updating the numbers used in the Final EIS), the Agencies acknowledged that, *2,500 additional homes or hotel rooms would be constructed due to the Toll Bridge* on the Outer Banks due to the Toll Bridge compared with the No-Build alternative. AR-68942 (updating AR-35074).¹⁵ This is far more than double the amount of development predicted with the No-Build alternative in the same document. *Id.* The Agencies' updated figures in the Reevaluation state that *830 additional acres would be developed* on the Outer Banks as a result of the Toll Bridge compared with the No-Build alternative. AR-68942. And most of this new development would occur in the roadless area of the northern Outer Banks.¹⁶ AR-35075. This information about the development caused by the Toll Bridge compared to the No-Build alternative shows the Toll Bridge would have major indirect impacts ignored by the Agencies, and it directly contradicts the Agencies' conclusions that the Toll Bridge would have no effect on new development on the Outer Banks.

The Agencies used their erroneous approach to ignore the environmental effects of the development caused by the Toll Bridge. In their response to comments on the Final EIS, the Agencies claimed their faulty baseline made no difference: according to the Agencies, if they had treated the No-Build alternative as the baseline,

the increase in development with the Preferred Alternative over the No-Build Alternative . . . would have been discussed in the indirect and cumulative impact assessment as an indirect impact instead of discussing the *decrease* in development with the No-Build Alternative . . . as an indirect impact. However, *either approach results in planned and expected development being assessed as a cumulative impact,*

¹⁵ The Final EIS phrases this in terms of the "reduction" attributable to the No-Build Alternative, when in reality, the development under the Toll Bridge scenario represents an *increase* above the No-Build Alternative baseline.

¹⁶ This information is contained in the Agencies' statement that the "reduction" in development with the No-Build Alternative would mostly occur in the non-road area. AR-35075. In other words, analyzed correctly, most of the *increase* in development caused by the Toll Bridge would occur in this non-road area.

so from the perspective of documenting cumulative impacts, *it makes no difference which starting point one uses.*

AR-69103 (emphases added). This assertion is false: the Agencies ignored the harmful environmental effects of the Toll Bridge by treating them as part of the baseline. The Agencies' assertion that they treated the *lack* of these effects as an "impact" of the No-Build Alternative means nothing, because a lack of development is not an "impact" that can be analyzed, and indeed, no part of their Final EIS analysis looked at the harmful environmental impacts of the development and traffic that would be caused by the Toll Bridge, as explained in more detail below. Contrary to the Agencies' claim, it makes a great deal of difference that they used the wrong baseline.

In their response to comments, AR-69103, the Agencies claim "[t]he potential impact of fewer lots being developed with the No-Build Alternative and ER2 is addressed in Section 3.6.2.3 of the FEIS," AR-35083-87. But that section contains no analysis of these impacts on the natural environment of the Outer Banks. Instead, it states that "the continuation of current development trends . . . would generally drive the extent of cumulative impacts, *irrespective of the implementation of one of the detailed study alternatives or the No-Build Alternative.*" AR-35084 (emphasis added). In the end, the Agencies conclude the "detailed study alternatives *would not notably contribute to cumulative impacts.*" AR-35085 (emphasis added). The Agencies' failure to study and disclose these impacts was arbitrary and capricious.

This increased development itself, as well as the increased beach driving that would accompany it in the roadless Northern Outer Banks, will harm wildlife and habitat. The Agencies themselves acknowledged that "private development and the provision of infrastructure to serve that development" and "beach driving" "[c]an alter habitat and ground cover, introduce exotic and invasive flora, alter groundwater recharge and drainage, generate noise, require cuts and fills, fill wetlands or open water, change motor vehicle operating characteristics via new thoroughfares or increased capacity of thoroughfares, and change access, circulation patterns, and travel times"

AR-35070-71. But despite this general acknowledgement, the Agencies made no attempt to analyze any of these indirect environmental impacts and violated NEPA.

2. *The Manipulated Baseline Biases the Selection of Alternatives in Favor of the Toll Bridge.*

The alternatives analysis is “the heart of the environmental impact statement,” and should “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. The manipulated baseline data resulted in a faulty alternatives analysis that prevented a fair understanding of the impacts associated with each alternative and how they compare to each other, violating NEPA.

The Agencies selected the Toll Bridge based on its purported ability to, among other things, “substantially improve traffic flow” and “substantially reduce hurricane clearance time for residents and visitors.” AR-9397-98. Because the traffic forecasts used to measure the performance of the alternatives erroneously use the skewed baseline, the traffic models used to assess alternatives were all tilted in favor of the Toll Bridge. The forecasts assumed the presence of people and cars in the amount that only the Toll Bridge would facilitate. This manipulated baseline biased the alternative selection in favor of the Toll Bridge in two key ways.

First, it obscured the fact that the Toll Bridge actually contributes to the traffic concerns.¹⁷ The Bridge alternative entails more people coming to the area for permanent residency and visitation, which increases the strain of traffic congestion and hurricane evacuation clearance. However, by treating this traffic as part of the baseline, the Agencies failed to weigh the Toll Bridge’s significantly higher traffic flow and hurricane clearance time in comparing the Toll Bridge to other alternatives. AR-5428; 5442. Therefore, the Agencies ignored significant downsides of the Toll Bridge alternative in their alternatives analysis.

¹⁷ This point was made early on in the development of Bridge by several state and federal resource agencies. *See, e.g.*, AR-69930; 69905; 69922; 69795.

Second, the Agencies used the skewed baseline to eliminate non-Bridge alternatives. For example, the Agencies rejected the Existing Roads alternative because it “would not improve system efficiency and offers a low level of benefit in terms of reducing congestion and travel time.” AR-9406. But the traffic demands under full-build out that were used to reject the Existing Roads alternative *would not occur* if the Existing Roads alternative was the option selected—according to the Agencies’ own figures. *See* AR-35074; 69102-03. This type of manipulation prevents a fair analysis of an alternative’s performance and is exactly the reason “courts not infrequently find NEPA violations when an agency miscalculates the ‘no build’ baseline or when the baseline assumes the existence of a proposed project.” *N.C. Wildlife Fed’n*, 677 F.3d at 603; *see Friends of Back Bay*, 681 F. 3d at 588 (holding that a failure to compare alternatives with an appropriate no-build baseline is arbitrary and capricious).

VII. CONCLUSION

For the forgoing reasons, the Conservation Groups respectfully request the Court grant Plaintiffs’ Motion for Summary Judgment, declare the ROD is arbitrary and capricious and not in accordance with law, vacate the ROD, and enjoin the Agencies from taking any further actions to proceed with the construction of the Toll Bridge until they have complied with NEPA.

Respectfully submitted this 5th day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to counsel for Defendants.

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This the 5th day of February 2021.

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