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; J. ERIC BOYETTE, in his official capacity as Secretary, NCDOT; FEDERAL HIGHWAY ADMINISTRATION; and EDWARD T. PARKER, in his official capacity as Assistant Division Administrator, FHWA,	)
Defendants.	)

STATE DEFENDANTS' MEMORANDUM OF LAW OPPOSING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

(Fed. R. Civ. P. 56; Local Civil Rules 7.1 and 7.2)

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Federal

Regulations

Rules

Other

Table of Abbreviations

AR – Administrative Record

CAMA – Coastal Area Management Act

DEIS – Draft Environmental Impact Statement (identifies the Recommended Alternative)

DSA – Detailed Study Alternative

EIS – Environmental Impact Statement

EPA – Environmental Protection Agency

ER – Existing-Road Improvement

FEIS – Final Environmental Impact Statement (identifies the Preferred Alternative)

FHWA – Federal Highway Administration

GARVEE – Grant Anticipation Revenue Vehicle

ICE – Indirect and Cumulative Effects

INFRA – Infrastructure for Rebuilding America

LOS – Level of Service (as related to the quality of traffic)

MCB – Mid-Currituck Bridge

NCDOT – North Carolina Department of Transportation

NCTA – North Carolina Turnpike Authority

NEPA – National Environmental Policy Act

PUD – Planned Unit Development

ROD – Record of Decision (identifies the Selected Alternative)

STI – Strategic Transportation Investments

STIP – State Transportation Improvement Program

TEAC – Turnpike-Environmental Agency Coordination

TIFIA – Transportation Infrastructure Finance and Innovation Act

VMT – Vehicle Miles Traveled

State Defendants North Carolina Department of Transportation ("NCDOT") and Secretary J. Eric Boyette (collectively, "State Defendants") respectfully submit this Memorandum of Law Opposing Plaintiffs' Motion for Summary Judgment and in Support of State Defendants' Cross-Motion for Summary Judgment.

I. NATURE OF THE CASE

After completing an exhaustive study and analysis period that spanned over a decade, the Defendant Agencies published the Record of Decision ("ROD") for the Mid-Currituck Bridge project ("Project") on March 6, 2019. MCB069443. Plaintiffs brought suit shortly thereafter. DE[1] 1. In their Complaint, Plaintiffs allege that, in doing this multi-year study and analysis, State Defendants along with the Federal Highway Administration ("FHWA") and Edward T. Parker, in his official capacity as Assistant Division Administrator for FHWA (FHWA and Mr. Parker are referred to as the "Federal Defendants" and, together with the State Defendants, as the "Defendants" or "Agencies") violated the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*, ("NEPA") and the Administrative Procedure Act, 5 U.S.C. § 500, *et seq*, ("APA") in selecting to build a toll bridge across the Currituck Sound to alleviate traffic congestion, reduce travel times, and reduce hurricane evacuation times in the surrounding area.

Federal Defendants lodged the Administrative Record ("AR") in December 2019. DE 20. In March 2020, Plaintiffs filed a "Motion to Complete and Supplement the Administrative Record," arguing that the AR was not complete. DE 46. The Motion was granted in part and denied in part. DE 74. As a result, the parties submitted an Amended Case Management Order, which this Court then entered. DE 76. This Order called for Federal Defendants to supplement the AR, which they did, and established a schedule for summary judgment. DE 76, 77. Plaintiffs

[1] DE refers to "Docket Entry." Therefore, "DE 1" refers to Docket Entry 1 in this matter, Plaintiffs' Complaint.

then filed a Motion for Summary Judgment and supporting memorandum. DE 88, 89. State Defendants ask that the Court deny Plaintiffs' Motion for Summary Judgment and allow the project to move forward by granting summary judgment in favor of Defendants.

II. STATEMENT OF THE FACTS[2]

A. Project History

The transportation infrastructure in northeastern North Carolina is in need of improvement and plans began in the early 1990s to specifically address the increasing congestion and traffic flow issues in Dare and Currituck Counties. MCB069449. The area's main thoroughfares, US 158 and NC 12, are becoming increasingly congested, causing travel times between the Currituck County mainland and Outer Banks to increase, and as build-out of existing Outer Banks lots continue, they are only expected to get worse. MCB04595-96, 68838. Additionally, hurricane evacuation times on two of the area's evacuation routes, US 158 and NC 168, far exceed State standards. MCB04596.

After analyzing numerous options, a new bridge across the Currituck Sound, known as the Mid-Currituck Bridge ("MCB" or "Bridge"), was selected to address these issues. MCB069447. For the area's residents and the millions of vacationers who visit its beaches every year, the Bridge will substantially (i) improve traffic flow, (ii) reduce travel time, and (iii) reduce evacuation time in the event of a hurricane or other disaster. MCB03449-50, 4598, 69447. The selection of the Bridge was not made lightly – it was the result of years of careful and detailed analysis, including environmental study and public comment and consideration. MCB069449-66.

Plaintiffs now challenge the Bridge, alleging that the Agencies failed to satisfy NEPA in conducting their multi-year review and analysis of the project and its effects. This simply is not

[2] Pursuant to the Case Management Order entered in this matter, State Defendants are not required to submit a separate statement of facts as typically required by Local Civil Rule 56.1. DE 18.

true. As evidenced by the almost 79,000-page Administrative Record, the Agencies engaged in an extensive, detailed, and thorough review and analysis. Currituck and Dare Counties, and all of northeastern North Carolina, need the Mid-Currituck Bridge to ensure that they have the appropriate transportation infrastructure to support their citizens, visitors, and economies.

B. NEPA Process

1. Notices of Intent

This project had its beginnings on July 6, 1995, when FHWA issued a Notice of Intent to prepare an environmental impact statement for a Mid-Currituck Bridge in Currituck County. MCB069449. Subsequently, a draft environmental impact statement ("DEIS") was published in 1998. Id. After the 1998 DEIS was published, there were several changes in the Project including the expansion of the project study area, modification of the purpose and need statement, and analysis of additional alternatives. MCB069449-50. These changes, along with others, led to the decision to rescind the 1995 Notice of Intent and the 1998 DEIS and, on June 16, 2008, to issue a new Notice of Intent for the updated project. MCB03686-87, 69450.

2. Project Coordination, Development, and Analysis

i. Coordination with Other Agencies

Pre-2006, while the Project was under NCDOT, project studies were coordinated through NEPA/Section 404 Merger Team meetings, through which NCDOT, FHWA, the U.S. Army Corps of Engineers, and several other state and federal environmental resource and regulatory agencies collaborated throughout the decision-making process. MCB09468-72.

The Project was adopted by the North Carolina Turnpike Authority[3] ("NCTA") in 2006 and it choose to replace the NEPA/Section 404 merger process with a similarly robust Project

[3] Prior to 2009, NCTA existed independently from NCDOT. As of 2009, NCTA is located within NCDOT and subject to the supervision of the Secretary of Transportation. N.C.G.S. § 136-89.182(b). For purposes of this matter, NCTA and NCDOT are synonymous unless specified otherwise.

Coordination Plan. MCB09472. Agencies were invited to participate in regular meetings called Turnpike-Environmental Agency Coordination ("TEAC") meetings. MCB04215. In all, over twenty TEAC meetings were held between 2006 and 2011. MCB033065-69, 53792.

ii. Development and Analysis

The development and analysis of the Mid-Currituck Bridge Project took years to complete. Along the way, the Agencies prepared numerous technical reports and supplemental materials, along with 'benchmark' documents like the Statement of Purpose and Need, Alternatives Screening Report, Indirect and Cumulative Effects Technical Report, DEIS, Final Environmental Impact Statement ("FEIS"), and ROD. MCB036049-80.

3. Statement of Purpose and Need

NCDOT began drafting a statement of the purpose and need for the Project in early 2007. MCB0107. By April 2008, after numerous public comments[4], a citizens' informational workshop (MCB01704-12, 1815-25), and resolutions from the Towns of Duck, Southern Shores, Nags Head, the Currituck County Board of Commissioners, and the Albemarle Rural Planning Organization in support of a bridge (MCB02143, 2156, 2178, 2373, 3449), the draft Statement of Purpose and Need was published. MCB03073. After additional rounds of public comment and agency coordination on the draft Statement of Purpose and Need, a final Statement of Purpose and Need was published in October 2008. MCB04588, 4600-01. In the Statement of Purpose and Need, the Agencies identified three underlying needs in the project area: (i) US 158 and NC 12 are becoming increasingly congested and congestion will only continue to get worse; (ii) the increasing congestion is causing increasing travel times between the Currituck County mainland and Outer Banks, especially during the summer; and (iii) evacuation times for residents and

[4] Examples of public comments can be found at MCB0265, 1427, 1587-99, 1602-24, 1680-1703, 1713-1722, 1874-2142, 2144-55, 2166-77, 2182-94, 2204, 2320-25, 2339-44, 2368-69, 2375, and 3121-24.

visitors that utilize US 158 and NC 168 as an evacuation route far exceed the State-designated standard of 18 hours[5]. MCB04595-96. Given these identified needs, the purpose of the Project is to:

i) Substantially[6] improve traffic flow on US 158 and NC 12. MCB04597. The ability of an alternative to meet this purpose is measured in terms of (a) the reduction in annual millions of vehicle-miles travelled under congested conditions, also referred to as level of service[7] E or F, on the project area's thoroughfares in 2035, (b) the reduction in miles of NC 12 and US 158 operating at LOS F during the summer weekday and weekend in 2035, and (c) the reduction in miles of NC 12 and US 158 at a Poor LOS F[8] during the summer weekday and weekend in 2035. Id.;

ii) Substantially reduce travel times between the Currituck County mainland and Outer Banks. Id. The ability of an alternative to meet this purpose is measured in the percent reduction in summer travel time (weekday and weekend) in 2035, via the Wright Memorial Bridge, between Aydlett Road on the mainland and Albacore Street on the Outer Banks (the approximate endpoints of a Mid-Currituck Bridge). Id.; and

(iii) Substantially reduce hurricane evacuation times for those using US 158 and NC 168 as an evacuation route. MCB04598. The ability of an alternative to meet this purpose is

[5] While Plaintiffs characterize the 18-hour evacuation standard as "arbitrary" (DE 1 ¶ 131), it is, in fact, a statutory standard for any bridge or highway construction project that is based on the National Hurricane Center's warning timeframe. N.C.G.S. § 136-102.7; MCB068832. Furthermore, this standard was updated in the reevaluation of the FEIS to 30 hours based on changes to the warning timeframe. MCB068832, 68845.

[6] As used for the purpose and need, an improvement is considered substantial if the improvement is great enough to be largely noticeable to typical users of the transportation system and if the improvement offers some benefit across much of the network, as opposed to offering only a few localized benefits. MCB014733.

[7] Level of service ("LOS") is a qualitative measure of traffic, ranging from LOS A, representing unrestricted traffic flow, to LOS F, representing severe delays and congestion. MCB04616, 57477-78. For this project, the goal is LOS D on a summer weekday and at least LOS E on a summer weekend. MCB057478.

[8] "Poor LOS F" is defined as peak hourly traffic demand that is 30% higher than the hourly capacity of the road. MCB04625.

measured in terms of the potential reduction in hurricane evacuation time in 2035 as compared to North Carolina's legislated standard of an 18-hour evacuation time[9]. Id.

4. Alternatives Screening Report

The Agencies drafted an Alternatives Screening Report, which lays out the process used to determine which alternatives would be studied in detail in the DEIS. MCB09370, 9375. The analysis of alternatives is a cornerstone of the environmental analysis performed under NEPA. *See* 40 C.F.R. § 1502.14.

For the Project, the Agencies considered five basic alternative concepts:

i) No-Build Alternative[10];
ii) Existing-Road Improvement (ER) Alternatives;
iii) Mid-Currituck Bridge (MCB) Alternatives;
iv) Several low capital investment and operational alternatives; and
v) Ferry (F) alternatives.

MCB09375. These alternatives were analyzed based on a range of factors, including the ability to meet purpose and need, economic feasibility, and their community and natural resource impacts. MCB09376. The Agencies continued to solicit public and agency comments on multiple occasions during the alternatives analysis process. MCB09423. After a thoughtful and detailed analysis, alternatives ER2, MCB2, MCB4[11], along with the No-Build Alternative, were selected as detailed study alternatives ("DSA") for further analysis in the DEIS. MCB09376, 9440-43, 14703; 40 C.F.R. § 1502.14(d).

Detailed study alternative ER2 consists of: (i) either adding a third outbound lane on US 158 as a hurricane evacuation lane or using the center turn lane on US 158 as a third

[9] As noted earlier, this standard was updated in the reevaluation of the FEIS to 30 hours. MCB068832, 68845.
[10] The No-Build Alternative assumes that (i) the proposed Project would not be implemented but (ii) other reasonably foreseeable, unrelated, transportation improvements would be implemented. MCB09375.
[11] Alternatives MCB2 and MCB4 were further refined in the DEIS to MCB2/C1, MCB2/C2, MCB4/C1, and MCB4/C2 to take into account two different proposed corridors (C1 and C2) for the Bridge's terminus on the Outer Banks. MCB09429-35, 14703-04. So, in total, five build alternatives were considered in the DEIS: ER2 and the four MCB alternatives, along with the No-Build Alternative. MCB014703-04.

outbound evacuation lane; (ii) widening US 158 to eight lanes between the Wright Memorial Bridge and the NC 12 intersection; and (iii) widening NC 12 to three lanes between US 158 and the Dare-Currituck County Line and to four lanes between the Dare-Currituck County Line and Corolla. MCB09440-42.

Detailed study alternative MCB2 consists of: (i) constructing a two-lane toll bridge across Currituck Sound in Currituck County; (ii) either adding a third outbound lane on US 158 for hurricane evacuation or using the center turn lane as a third outbound evacuation lane; (iii) widening US 158 to six lanes between the Wright Memorial Bridge and Jupiter Trail/Wal-Mart entrance and eight lanes from Jupiter Trail/Wal-Mart entrance to NC 12; and (iv) widening NC 12 to three lanes between US 158 and the Dare-Currituck County Line and to four lanes between the Dare-Currituck County Line and Corolla. MCB09442.

Detailed study alternative MCB4 consists of: (i) constructing a two-lane toll bridge across the Currituck Sound in Currituck County; (ii) either adding a third outbound lane on US 158 for hurricane evacuation or using the center turn lane as a third outbound evacuation lane; (iii) adding a third outbound lane on US 158 between the Wright Memorial Bridge and NC 12; and (iv) widening NC 12 to four lanes for approximately two to four miles south of the intersection with a Mid-Currituck Sound Bridge. MCB09442.

The following alternatives were considered but ultimately eliminated because they did not meet the purpose and need of the Project:

(i) Shifting Rental Times: Foremost, neither the Agencies nor any other government agency have the authority to compel vacation rental check-in and/or check-out times and the market demands weekend check-ins and check-outs. MCB09412; 68871-72. Additionally, shifting rental times would provide traffic relief only during peak vacation rental check-in and

check-out time, would overall reduce congestion and summer travel time by only one percent (1%), and would not reduce hurricane evacuation times. MCB09413.

(ii) Transportation Systems Management: Changes to the project area's transportation systems management such as additional turn lanes, traffic light coordination, etc., would provide insubstantial (5%) congestion relief / reduction. MCB09413-14.

(iii) Bus Transit: The project area is not urban, does not have a central business district or other concentrated destination area that makes bus travel attractive, buses would operate on the same congested roads that already exist, and the types of visitors most common to the area – tourists with luggage and families – would not find bus service more convenient than personal vehicles. MCB09414-15. The result is that bus transit would provide no congestion relief, no reduction in travel times, and would not reduce hurricane evacuation times. MCB09416.

(iv) Ferry Service: The four ferry alternatives considered would provide minimal additional benefits at a much higher cost than the ER and MCB alternatives. MCB09421. For a ferry to offer the same level of service as a bridge, it would require: (a) eight typical ferry services on a summer weekday and ten on a summer weekend (a typical ferry service consists of four ferries operating out of two ferry terminals); (b) substantial land (30 to 40 acres) with associated impacts for the construction of ferry terminals; (c) substantial impacts to the sound bottom for dredging the channels needed for ferries; (d) higher initial capital costs than an MCB alternative; and (e) extensive operating costs. MCB09419-20. Additionally, a ferry service would still require some aspects of a bridge alternative, such as an approach road from US 158 to the ferry terminal. MCB09419. Given all of these reasons, the Agencies determined that a ferry service was not practical due to minimal additional benefit and higher environmental impacts and cost than comparable ER and MCB alternatives. MCB09421.

5. Indirect and Cumulative Effects Technical Report

In November 2009, after the Agencies published the final Alternatives Screening Report identifying the DSAs, the Agencies published an Indirect and Cumulative Effects ("ICE") Technical Report. MCB012383. The ICE Technical Report lays out an extensive eight step process for assessing indirect and cumulative effects[12] and then goes on to discuss the findings of each of the eight steps for each of the DSAs. MCB012393, 35594.

Comments made on the November 2009 ICE Technical Report and the March 2010 DEIS, discussed below, were taken into consideration in developing the final November 2011 ICE Technical Report. MCB035584. The 2011 ICE Technical Report has two notable differences from the 2009 ICE Technical Report: (i) it incorporates the Preferred Alternative MCB4/C1 identified in the DEIS and (ii) it considers two additional impact causing activities not originally considered in 2009 – beach driving and accelerated sea level rise. MCB035601-04.

Following the 2011 ICE Technical Report, the Agencies continued to perform additional indirect and cumulative effects analyses based on comments received on the January 2012 FEIS. MCB046077. These additional analyses resulted in the October 2012 ICE Technical Report Addendum, which focuses primarily on (i) the potential for increase in the number of trips to the non-road accessible Outer Banks (MCB046085-92); (ii) the indirect and cumulative effects of induced change on notable environmental elements and cultural and socioeconomic conditions (MCB046093-106); and (iii) the potential impacts of an increase in permanent residents and day visitors on the Outer Banks as well as increased demand for residences on the non-road-accessible Outer Banks (MCB046107-111).

[12] As used in NEPA regulations, the terms "effects" and "impacts" are synonymous. 40 C.F.R. § 1508.8.

While the Agencies' analysis of indirect and cumulative effects is comprehensive and extensive, of particular importance to this matter is the discussion of potential growth induced by the Project ("induced growth"), and how, if at all, each DSA would affect development trends. MCB035682-708. For each DSA, the Agencies analyzed the potential for induced growth by answering five questions as indicated in the chart below:

Potential for Induced Growth as Compared to the No-Build Alternative[13]

	ER2	MCB2	MCB4 (including the Preferred Alternative)
Question #1: Permanent residents (MCB035684)	No or negligible increase	Negligible or slight increase	Negligible or slight increase
Question #2: Day trips (MCB035688)	No or negligible increase	Some potential for an increase over No-Build with the potential higher in the non-road accessible area	Some potential for an increase over No-Build with the potential higher in the non-road accessible area
Question #3: Development in paved road accessible areas (MCB035692)	No reasonably foreseeable change in the overall type and density of development	No reasonably foreseeable change in the overall type and density of development, however may change order in which lots develop.	No reasonably foreseeable change in the overall type and density of development, however may change order in which lots develop.
Question #4: Development in non-paved road accessible areas (MCB035700)	No reasonably foreseeable change in the overall type and density of development	No reasonably foreseeable change in the overall type and density of development	No reasonably foreseeable change in the overall type and density of development
Question #5: Development in Currituck County mainland (MCB035704)	Not reasonably foreseeable that ER2 would shift expected new business development to a concentrated location	Reasonably foreseeable that bridge would alter location of some future Outer Banks service-oriented businesses at bridge terminus	Reasonably foreseeable that bridge would alter location of some future Outer Banks service-oriented businesses at bridge terminus

[13] As discussed later, a differential in realized development could occur if traffic congestion becomes a constraint on development. Potential constraint would only occur with the No-Build and ER2; there would be no such constraint with MCB2 and MCB4. MCB035692.

The 2012 ICE Technical Report Addendum added a sixth question to the analysis: what is the potential for an increase in the number of vehicular trips on the non-road accessible Outer Banks between now and 2035? MCB046082. The Agencies concluded that, for all DSAs, including the No-Build, such trips would increase between now and 2035. MCB046082.

6. Draft Environmental Impact Statement and Preferred Alternative Report

The Mid-Currituck Bridge Study Draft Environmental Impact Statement was signed on March 10, 2010 and made available for public and agency review and comment. MCB014693; *see also* 40 C.F.R. §§ 1502.9(b), 1503.1. The 2010 DEIS considered the five build DSAs and the No-Build, then identified MCB4 as the Recommended Alternative, with no recommendation for which corridor (C1 or C2) should accompany MCB4. MCB014719-20.

In addition to welcoming public and agency comment on the 2010 DEIS, the Agencies held three open houses / public hearings in May 2010 with the specific purpose to give the public an opportunity to review project documents, ask questions, and offer comments. MCB052589-90. The Agencies received a total of 597 comments during the comment period. MCB053789.

After careful review and consideration of the agency and public comments, in January 2011 the Agencies published the Preferred Alternative Report, which recommends MCB4/C1 with Option A and reversing the center turn lane for hurricane evacuation as the preferred alternative for the project.[14] MCB053779-81.

7. Final Environmental Impact Statement

The Mid-Currituck Bridge Study Final Environmental Impact Statement was signed on January 12, 2012. MCB034865-67; *see also* 40 C.F.R. § 1502.9(c). Based on public and agency

[14] For each of the bridge DSAs, two design options (Option A and Option B) for the mainland approach bridge were under consideration. MCB014737. For each of the five build DSAs, the 2010 DEIS considered two hurricane evacuation options: adding a third outbound lane on US 158 for evacuation use only or reversing the existing center turn lane on US 158 when needed for evacuation. MCB014704.

comments received on the 2010 DEIS, refinements to the Preferred Alternative were made to help avoid and minimize impacts. MCB034876-77.

The FEIS also discusses numerous challenges with ER2 which lead to it not being chosen as the preferred alternative. Some of these challenges are:

(i) ER2 has the least traffic flow and travel time benefits (MCB034953);

(ii) ER2 and the MCB alternatives have substantially similar reductions in hurricane evacuation times, but the improvements required with ER2 to reduce hurricane evacuation time have much greater cost and environmental impacts than those required with an MCB alternative (MCB034954, 34965);

(iii) the MCB alternatives have the potential for fewer impacts relating to future improvements to the area's roadways (MCB034963); and

(iv) ER2 has fewer potential funding sources (MCB034955-59).

While not required to do so, the Agencies again invited agency and public comment on the FEIS. MCB034872, 36290; 40 C.F.R. § 1503.1(b). At the time, the Agencies anticipated that FHWA would issue the Record of Decision, known as the "ROD," soon after the comment and review period. MCB034872. However, because of statutory changes affecting funding and financing, discussed in detail in Section IV.B.4 herein, the ROD was not soon issued.

8. Reevaluation and Record of Decision

Pursuant to FHWA's own regulations, when three or more years pass between the approval of an FEIS and 'major steps to advance the action,' the FEIS must be reevaluated to determine if it remains valid or if it requires a supplemental or new analysis. 23 C.F.R. § 771.129(b). Although project development activities occurred in the years following the FEIS, because the Agencies did not issue a ROD within three years of the FEIS, pursuant to FHWA

regulations they reevaluated the FEIS, including an extensive corresponding study report. MCB069453, 68784 (Reevaluation Study Report), 69480 (Reevaluation).

The FEIS reevaluation began in 2015 and considered changes in the project setting, travel demand, area plans, laws and regulations, and other information or circumstances since the approval of the FEIS in January 2012. MCB069483. The Reevaluation also considered the comments received on the FEIS (MCB069008-251) as well as comments received during the reevaluation period. Even though the Agencies are not required to formally accept or respond to comments on the Reevaluation, Plaintiffs and their counsel submitted informal comments[15] and the Agencies responded (MCB069252-372). *See* 40 C.F.R. § 1503.1. Additionally, during the reevaluation period the Agencies contacted various resource agencies, Dare and Currituck Counties, and the Towns of Duck, Kitty Hawk, and Southern Shores to request and gather updated information. MCB069491.

The Reevaluation reassesses three alternatives: No-Build, ER2, and the FEIS Preferred Alternative: MCB4/C1 with Option A. MCB069487. The No-Build Alternative was redefined based on the 2018-2027 State Transportation Improvement Program ("STIP") to include a new, unrelated project. MCB069487. The Agencies revised the designs for ER2 and the Preferred Alternative to reflect revised traffic forecasts and to further minimize impacts by taking into consideration changes in the project setting since the release of the FEIS. MCB069457, 69487. In addition to design, costs and financing strategies were revisited as well. MCB069487.

The Reevaluation also revisited the four alternatives eliminated in the Alternatives Screening Report – shifting rental times, transportation systems management, bus transit, and ferry service – and considered a new a composite alternative combining ER2 with shifting rental

[15] Plaintiffs' counsel was actively involved during the reevaluation period, including being given a draft of the Reevaluation and submitting comments thereon. MCB045382, 69513.

times, bus transit, and ferry service. MCB068870-82. Each of the four revisited alternatives were deemed to still be unreasonable, and the composite alternative was also deemed unreasonable due to high cost and high impacts as compared to relatively small travel benefits. MCB068882.

Taking all new information into account, including updated traffic forecasts and highway capacity models, the Preferred Alternative continued to offer greater overall traffic flow benefits than ER2 (particularly on the most congested summer weekends), greater travel time benefits than ER2, and both the Preferred Alternative and ER2 provide a substantial reduction in hurricane clearance times. MCB068852, 68867, 68869.

The Reevaluation concluded that there were no new issues of significance associated with the Project and, consequently, that a supplemental EIS was not required because there were no substantial changes in the proposed action and no significant new circumstances or information relevant to environmental concerns. MCB069492; 23 C.F.R. § 771.130; 40 C.F.R. § 1502.9(d).

With the Reevaluation concluded, the Agencies issued the ROD on March 6, 2019. MCB069443. In the ROD, the Agencies chose the Preferred Alternative, MCB4/C1 with Option A, with the design revisions detailed in the Reevaluation, as the Selected Alternative for the Project. MCB069447, 69448 (map of Selected Alternative). Construction is currently anticipated to begin in summer 2022.

III. STANDARDS OF REVIEW

A. Administrative Procedure Act

Plaintiffs brought this lawsuit seeking review of a NEPA action under the APA, alleging that the Agencies' NEPA analysis was arbitrary and capricious. DE 1 ¶¶ 11, 45, 221-61; 5 U.S.C. § 702; *see* Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 186 (4th Cir. 1999) (NEPA claims lie under the APA). Plaintiffs bear the burden of proof under the APA and under NEPA. N.C. All. For Transp. Reform, Inc. v. United States DOT, 151 F. Supp. 2d 661, 679

(M.D.N.C. 2001); *see* Vill. Of Bensenville v. FAA, 457 F.3d 52, 70 (D.C. Cir. 2006) (a party seeking to have an agency action declared arbitrary and capricious carries a heavy burden).

A NEPA action can be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid," particularly in matters involving not just simple findings of fact, but complex predictions based on special expertise. Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009) (internal citations and quotations omitted). With a presumption that the NEPA action is valid, the reviewing court then scrutinizes it and determines whether the record shows that a rational basis exists for the action, or, in other words, that the agency took a 'hard look' at the potential environmental consequences of its actions. Friends of Back Bay v. United States Army Corps of Eng'rs, 681 F.3d 581, 587 (4th Cir. 2012). Because NEPA only "prohibits uninformed – rather than unwise – agency action", the reviewing court does "not sit as a scientific body, meticulously reviewing all data under a laboratory microscope," and it does not "undertake comparative evaluations of conflicting scientific evidence." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989); Manufactured Hous. Inst. V. United States EPA, 467 F.3d 391, 399 (4th Cir. 2006) (internal quotations omitted). Instead, the APA requires the reviewing court to uphold agency decisions if the agency explained its "course of inquiry, its analysis, and its reasoning, and show[ed] a rational connection between its decision-making process and its ultimate decision." Id.

B. Summary Judgment

Summary judgment is proper if the evidence "shows that there is no genuine [issue] as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A duly authenticated administrative record is presumed true and, unless contradicted,

satisfies the initial burden of showing an absence of a genuine issue of material fact. Am. Arms Int'l v. Herbert, 563 F.3d 78, 86 n.12 (4th Cir. 2009). "Where there are no disputed facts and review is based solely on the administrative record, summary judgment is appropriate for the party entitled to judgment as a matter of law." Reed v. Salazar, 744 F. Supp. 2d 98, 110 (D.D.C. 2009).

IV. ARGUMENT

The Agencies have worked on the NEPA process for the Mid-Currituck Bridge project for over a decade. This process has spanned from the initial development of potential alternatives to evaluating, and then reevaluating, data to ensure that the Agencies took the required 'hard look' at the environmental consequences. The result is a complete, thorough NEPA analysis that culminated in the selection of a Mid-Currituck Bridge as the alternative that best meets the purpose and need of the Project.

As discussed in detail below, each of Plaintiffs' three arguments against the validity of the Agencies' NEPA process, that there is (i) no supplemental EIS, (ii) an alleged failure to objectively analyze and compare alternatives, and (iii) the use of an allegedly faulty baseline, fails upon review of the Administrative Record and consideration of the totality of the Agencies' NEPA analysis. Consequently, the Record of Decision should be upheld.

A. The Reevaluation Demonstrates that a Supplemental EIS is Not Required.

The Agencies are not required to supplement the FEIS simply because it was reevaluated. The Council on Environmental Quality's regulations state that a supplemental EIS is required when there are *significant* new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(d) (emphasis added). Similarly, FHWA's regulations require a supplemental FEIS when (i) changes to the proposed project would result in *significant* environmental impacts that were not evaluated in the FEIS or

(ii) new information or circumstances relevant to environmental concerns and bearing on the proposed project or its impacts would result in *significant* environmental impacts not evaluated in the FEIS. 23 C.F.R. § 771.130(a) (emphasis added). None of these have occurred.

In line with the regulations requiring supplementation in certain situations, NEPA requires the Agencies to take a hard look at the environmental consequences of their proposed action even after an EIS is prepared. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 373-74 (1989); *see also* N.C. All. for Transp. Reform, Inc. v. United States DOT, 713 F. Supp. 2d 491, 506 (M.D.N.C. 2010). An agency takes a sufficient 'hard look' when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny, and responds to all legitimate concerns that are raised. Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999). A supplement to an EIS is not required each time new information comes to light – "[t]o require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Marsh, 490 U.S. at 373. Instead, the Agencies are expected to apply a 'rule of reason' to determine the value of the new information to the decision-making process. Id. at 373-74. To rise to the level of requiring a supplementation, the new information must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned. Hickory Neighborhood Def. League v. Skinner, 893 F.2d 58, 63 (4th Cir. 1990); *see also* Marsh, 490 U.S. at 374 (a supplemental EIS must be prepared "if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered").

The Fourth Circuit uses a two-part test to review an agency's decision to not prepare a supplemental EIS. 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. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996).

Here, due to the passage of time, the Agencies undertook an extensive reevaluation of the FEIS to consider whether supplementation was needed. MCB069453. This reevaluation considered a myriad of new studies, updates, and changes including new traffic forecasts, regulatory changes, environmental studies, and changes in the project setting and resulted in updates to the purpose and need and project benefits, alternatives screening, DSAs, project impacts, project commitments, and an updated explanation of why the Preferred Alternative was chosen. MCB069453-54. Plaintiffs use this list of new information that was considered and the resulting updated documents and analysis to imply that, because there was new information and because there were updates, surely a supplementation is required. DE 89 p 22. But, the law does not require supplementation merely because new information is considered or because certain analysis and explanations have been updated based on this new information. The law requires supplementation *only* if the new information presents ". . . a seriously different picture of the environmental impact of the proposed project from what was previously envisioned" or the new information shows that the project will have a significant affect that has not already been considered. Hickory Neighborhood Def. League, 893 F.2d at 63. After years of taking a hard look and analyzing new traffic forecasts, regulatory changes, environmental studies, and changes in the project setting, and updating all necessary documents and analyses, what the Agencies discovered is that all of this new information did not present "a seriously different picture" and did not reveal an unconsidered significant effect. Consequently, the Agencies did not need to supplement the FEIS. MCB069453.

1. Updated Traffic Forecasts Show that a Bridge Still Provides the Most Overall Benefit.

The Agencies have been taking a hard look at traffic forecasts for the Project since the early 2000s. MCB057455. Through an iterative process that consistently assesses new and updated traffic information, the Agencies have developed traffic reports that build upon each other and consider traffic forecasts for the project area for 2025, 2035, and 2040. Id. The Reevaluation was the latest step in this process as it took a hard look at the most up-to-date traffic information available – including 2040 traffic forecasts and updated models – and concluded, as with the FEIS, that the Preferred Alternative provides the greatest overall benefit. MCB068852, 68866-69. Because the Reevaluation did not present a "seriously different picture" of the project from the FEIS and did not present any new effects that had not already been considered in the FEIS, no supplemental EIS was required. *See* Hickory Neighborhood Def. League, 893 F.2d at 63.

During development of the FEIS, traffic forecasts for 2035 were the most up-to-date data available and the FEIS summarizes the anticipated 2035 travel benefits of each of the DSAs in Table 2-3. MCB034954. Overall, the FEIS shows that the Preferred Alternative has: (i) lower congested vehicle miles traveled ("VMT") than ER2; (ii) lower VMT when traffic demand is at or above road capacity than ER2; (iii) lower VMT when traffic demand is 30% or more above road capacity than ER2; (iv) during the summer, a lower number of miles of road operating with traffic demand at or above road capacity than ER2; and (v) during the summer, a lower number of miles of road operating with traffic demand at or above road capacity than ER2. Id.; *see* MCB05850-51, 34955. Considering these travel benefits, the Preferred Alternative was favored because it offered substantial congestion reduction while minimizing impacts. MCB034963.

The Reevaluation does an updated congestion analysis using 2040 traffic forecasts, updated highway capacity and hurricane evacuation models, and revised designs for ER2 and the

Preferred Alternative. MCB068838, 68850-51. The Reevaluation's traffic numbers also consider two scenarios for 2040 – unconstrained and constrained development[16] – that were not considered comparatively when addressing travel benefits in the FEIS.[17] MCB068847. Since the 2035 traffic analysis in the FEIS considered unconstrained development, the Reevaluation first revisits the 2035 traffic numbers and evaluates them in the light of both constrained and unconstrained development and then evaluates the 2040 traffic numbers under both scenarios as well. MCB068847-51.

The Reevaluation discusses how changed development and traffic growth conditions in Currituck and Dare Counties resulted in the 2040 forecast future traffic volumes being lower than anticipated in the FEIS and its 2035 forecast. MCB068826-27. However, these lower future traffic volumes did not change the purpose and need of the project – even though future traffic volumes are now anticipated to be lower than originally forecasted in the FEIS, the project area still expects traffic volumes to increase from current, already congested, conditions and the need to substantially improve traffic flow, substantially reduce travel times, and substantially reduce hurricane evacuation times remains. MCB068838-47.

After addressing the updated traffic forecasts, the Reevaluation then takes these lower forecasted traffic volumes and conducts the same analysis as in the FEIS as to how well the No-Build Alternative, ER2, and the Preferred Alternative would meet the purpose and need of the project. MCB038848-51. As in the FEIS, the Reevaluation concludes that, overall, the Preferred Alternative outperforms the No-Build and ER2. MCB068852, 68867-69. This does not present a

[16] Unconstrained development is the anticipated, expected, and forecasted development in the project area. MCB065074. Constrained development is the potential for a reduction in unconstrained development due to heavy traffic congestion on NC 12. MCB035074-75.

[17] While the FEIS does consider constrained growth, MCB035074-77, 35081-87, the FEIS does not present constrained versus unconstrained growth in a reader-friendly comparative format as in the Reevaluation. *See, e.g.* MCB034954, 68848-49.

"seriously different picture" of the Project and does not present any new effects that have not already been considered. Hickory Neighborhood Def. League, 893 F.2d at 63. In fact, it presents a similar picture of the Project as in the FEIS and, so, a supplemental EIS is not required. Id.

Despite the actual analysis of the updated traffic and other data showing that the Preferred Alternative continues to outperform the others in reducing traffic congestion and travel time, Plaintiffs argue two other points to try to persuade this Court that the updated traffic forecasts requires a supplemental EIS: (i) congestion relief can now be met through 'less expensive and damaging solutions' and (ii) the new traffic forecasts 'severely undercut the financial feasibility' of the project. DE 89 p 23.

First, Plaintiffs offer the general statement that the new traffic forecasts show that there are 'less expensive and damaging solutions' to the needed congestion relief and that the new 2040 traffic forecasts undermine the Agencies' objection to the ER alternative. DE 89 p 23.

Foremost, contrary to Plaintiffs' arguments, the Alternatives Screening Report does not preclude the selection of an ER alternative. DE 89 p 23. In fact, the Alternatives Screening Report 'selects' ER2 to move forward as a detailed study alternative. MCB09400-06.

To the extent that Plaintiffs are arguing that each of the original alternatives in the Alternatives Screening Report, even those not chosen to be a DSA, should be reevaluated using the updated 2040 traffic forecasts, the Reevaluation does that. MCB068869-82. Reevaluating these alternatives with the updated forecasts did not change any of the conclusions regarding these alternatives and there is no "seriously different picture" or unconsidered new effects and no supplementation is needed. Id.; *see* Hickory Neighborhood Def. League, 893 F.2d at 63.

Second, Plaintiffs argue that the new 2040 traffic forecasts used in the Reevaluation 'severely undercut the financial feasibility' of the Project. DE 89 p 23. This argument ignores the

obvious – the traffic forecasts used for NEPA analysis are not the same traffic forecasts used for revenue projections. The Reevaluation explains

> A new investment grade traffic and revenue forecast is being prepared and, when complete, will take into consideration development and traffic growth trends since the development of the original report. It is important to note that the investment grade traffic and revenue forecast is not the basis of decision-making pursuant to NEPA because the revenue forecasts assume a "worst-case" toll generating scenario to determine whether the project is still financially feasible based on conservative toll revenue projections. Whereas, traffic forecasts for the NEPA study are used to inform environmental impacts, and therefore those forecasts do not assume reduced traffic volumes so that environmental impacts are not unreasonably minimized.

MCB068823. So, Plaintiffs' statement that the Reevaluation "refused to analyze and disclose the exact impact' the new 2040 traffic forecasts would have on toll revenue is misleading. DE 89 p 24. The Reevaluation does not 'refuse' to analyze or disclose anything – it simply is not the place where such analysis is required or done. MCB068823; *see also* MCB044541-42 (NEPA traffic forecasts were developed separately from, and use different methodologies than, traffic forecasts for examining financial feasibility of tolls). "The effects of changes of 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 forecast being prepared independent of" the Reevaluation.[18] MCB068827. And if this traffic and revenue forecast shows that the toll revenue is insufficient to the point where a financial plan is not feasible, then project planning will be halted. MCB069279.

In short, as of 2015 the project area's main thoroughfares were congested and still expected to get worse. MCB068838. In the Reevaluation, the Agencies took an extensive, hard

[18] Comprehensive project financial plans are not required under NEPA and, therefore, are not required for an EIS. NEPA requires an EIS to evaluate environmental consequences. 40 C.F.R. § 1502.10. While general funding concepts can certainly be a consideration in evaluating environmental consequences, NEPA does not require the EIS to include detailed plans of finance. *See, e.g.*, Coal. for the Advancement of Reg'l Transp. v. FHA, 576 F. App'x 477, 483 (6th Cir. 2014).

look at the new traffic forecasts as to all alternatives and, while the lower 2040 traffic forecasts and updated highway capacity model affected traffic flow findings for both ER2 and the Preferred Alternative, the Reevaluation showed that the Preferred Alternative continues to offer a greater overall benefit than both the No-Build Alternative and ER2 in both constrained and unconstrained development scenarios, particularly on summer weekends. MCB068852, 68866-69. Because this does not present a "seriously different picture" from the FEIS and does not present any unconsidered new effects, no supplemental EIS is required and the Agencies' decision to not prepare one is, consequently, neither arbitrary nor capricious. Hughes River, 81 F.3d at 443; *see* Hickory Neighborhood Def. League, 893 F.2d at 63.

2. Even with Slowed Development Trends, a Bridge is Still Needed.

It is no secret that, recently, growth and development trends have slowed in Currituck and Dare Counties. MCB068825. However, a decrease in these trends does not mean that growth and development are not happening, just that growth and development are happening slower than originally projected. Current conditions already result in significant traffic congestion and any future growth, regardless of its rate, only reinforces the purpose and need of the Project.

Plaintiffs make a two-pronged argument to try to convince the Court that the updated growth and development information undermines the need for the Bridge. DE 89 p 25.

First, Plaintiffs argue that the Agencies did not disclose the updated growth and development information. Plaintiffs' own brief belies this argument, as Plaintiffs themselves point to the various places in the Reevaluation and related documents where the Agencies address the updated growth and development data. DE 89 p 25.[19]

[19] Plaintiffs refer to the correct information in their brief, however some of the citations are incorrect. Citations to AR-68784 on page 25 of Plaintiffs' brief should be to AR-68825 and AR-68786 to AR-68827.

Second, Plaintiffs argue that the Agencies did not evaluate, or take a "hard look," at this updated data. DE 89 p 25. Again, Plaintiffs are incorrect. The Reevaluation expressly states that the updated growth and development information was used in developing updated traffic forecasts. MCB068823-27. The Reevaluation goes on to state that

> The effect of the forecast lower volumes on congestion and travel time as it relates to project need and project benefits is discussed in Section 3.0. The 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 forecast being prepared independent of this reevaluation.

MCB068827. This does not, as Plaintiffs argue, mean that the Agencies did not analyze the updated data in the Reevaluation. DE 89 pp 25-26. It, instead, means exactly as it says – that the effects of the updated data *as it relates to toll revenue and financing* was not analyzed in the Reevaluation as it will be analyzed in a non-NEPA investment grade traffic and revenue forecast. MCB068827 (emphasis added).[20] However, the updated data as it relates to the NEPA analysis was evaluated and the Agencies took the required "hard look."

The Reevaluation makes clear that the Agencies properly considered the updated growth and development information for Currituck and Dare Counties and that it was appropriately factored into the NEPA analysis for this project.

3. The Agencies Properly Considered Sea Level Rise Projections.

NEPA requires the Agencies to take a hard look at the environmental consequences of their proposed action even after an EIS is prepared. Marsh, 490 U.S. at 373-74. Sea level rise is not an environmental consequence of the Project, rather it is an external environmental factor which will occur regardless of the Project. Nonetheless, in both the FEIS and Reevaluation, the Agencies considered the potential effects of sea level rise. MCB035047-49, 68930-31.

[20] As detailed above, the traffic forecasts used for NEPA analysis are not the same traffic forecasts used for revenue projections. MCB068823.

As the 2012 FEIS makes clear, existing roads will be affected by sea level rise and the Bridge will be a useful asset in reducing the impact of sea level rise on the project area's road system. MCB035047-48. This is particularly true because under all sea level rise scenarios considered, NC 12 would eventually be inundated at the Dare/Currituck County line, thereby making the Bridge the only way off of the Currituck County Outer Banks. MCB035048.

The 2019 Reevaluation revisits the issue of sea level rise because, in 2016, the NC Coastal Resources Commission Science Panel released an updated report on the issue.[21] MCB068930, 78023. Upon consideration of the updated report, the Agencies concluded that the findings of the FEIS relating to sea level rise remained unchanged. MCB068930-31.

Plaintiffs' argument does not point to a single environmental consequence or impact relating to the Bridge and sea level rise which the Agencies allegedly failed to consider. Essentially, Plaintiffs argue that the Project is unwise in light of sea level rise predictions. Plaintiffs are entitled to this opinion, but Plaintiffs' opinion is not a determining factor under NEPA. *See* Robertson, 490 U.S. at 351 (NEPA prohibits uninformed, rather than unwise, agency action). The Agencies are aware of the risks and uncertainty regarding sea level rise, believe the Project is useful despite these risks and uncertainty, and are committed to following FHWA's policies and guidance to minimize risks from climate and extreme weather events. MCB068931.

4. Alternatives Which Were Previously Unreasonable Are Still Unreasonable.

The Reevaluation takes a hard look at all alternatives, including the suggested alternatives untimely submitted by Plaintiffs in late 2016. MCB068838-947. In taking this hard look, the Agencies met the requirements of NEPA.

Plaintiffs argue that the Agencies failed to consider "Improved ER2," a conceptual plan

[21] Plaintiffs argue that the Agencies should have used a 2017 report instead of the 2016 report. DE 89 p 28. NEPA does not require that the Agencies continuously consider new information, otherwise a decision could never be made. *See* Marsh, 490 U.S. at 373.

by Walter Kulash, a transportation planning consultant hired by Plaintiffs, which utilizes the major concepts of ER2 but adds in other refinements. DE 1 ¶ 233; MCB045562-64. So, as its name suggests, "Improved ER2" is simply ER2, but with some variations. MCB045562-64.[22] ER2 was subjected to years of analysis and fully vetted through the NEPA process. *See generally* MCB05752, 5978, 9370, 14693, 34865, 35584, 44531, 57449, 68784. It is not rational to expect agencies to fully analyze every potential variation of every alternative, especially when the scope of the project could mean a potentially infinite number of variations and combinations thereof. As the Council on Environmental Quality has explained, NEPA does not require consideration of all alternatives and the Council has long advised that only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed in the FEIS. 85 FR 43304, 43330; *see* N.C. Wildlife Fed'n v. N.C. DOT, 677 F.3d 596, 602 (4th Cir. 2012) (agencies have discretion to identify the range of "reasonable alternatives").

Additionally, the Agencies' ". . . duty under NEPA is to study all alternatives that 'appear reasonable and appropriate for study at the time' of drafting the EIS, as well as 'significant alternatives' suggested by other agencies or the public during the comment period." Roosevelt Campobello Int'l Park Com. v. United States EPA, 684 F.2d 1041, 1047 (1st Cir. 1982); *see also* Dubois v. United States Dep't of Agric., 102 F.3d 1273, 1286 (1st Cir. 1996). Plaintiffs submitted "Improved ER2" to the Agencies in December 2016, more than four years after the FEIS was published (January 2012) and the comment period closed (March 2012). MCB034865, 34872, 36290, 45382. The Agencies appropriately considered reasonable alternatives, and were not required to re-start the study to consider Plaintiffs' variant alternative. However, to further put the issue of "Improved ER2" to rest, during the reevaluation process the Agencies actually

[22] Unlike the Agencies' extensive analysis of ER2, Plaintiffs' "Improved ER2" concept consists of two pages of description and a map, submitted in December 2016, and four pages of cost estimates submitted in March 2017. MCB045562-64, 46022, 46024-28

did consider variations to ER2, just not the exact ones suggested by Mr. Kulash (MCB069297-99), and also responded to Plaintiffs' comments regarding Mr. Kulash's report. MCB69254-56, 69270, 69278-83, 69285-88, 69295-303, 69335.

The Agencies took a hard look and performed considerable analysis as to all reasonable alternatives. The Agencies then reevaluated these alternatives when updated information became available. This reevaluation did not present any new information or change the reasons for the selection or elimination of the alternatives. This is what NEPA requires and this is what the Agencies have done. *See* Marsh, 490 U.S. at 373.

B. The Agencies Thoroughly Analyzed and Compared Reasonable Alternatives.

In the FEIS, the Agencies are required to explore and evaluate all reasonable alternatives for the Project and, for the alternatives eliminated from detailed study, briefly discuss the reasons for their elimination. 40 C.F.R. § 1502.14(a)[23]. The term "reasonable alternatives" is defined as ". . . a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant." 40 C.F.R. § 1508.1(z); *see* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 551 (1978) (alternatives must have "some notion of feasibility" and it is common sense that the "'detailed statement of alternatives'" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the

[23] The language of 40 C.F.R. § 1502.14(a), as well as certain other regulations concerning NEPA, was amended effective September 14, 2020. 85 FR 43304, 43372; 40 C.F.R. § 1506.13. Because the Agencies conducted the NEPA process for this Project, and prepared all related documents, analysis, and reports, pursuant to the pre-September 2020 NEPA regulations, all citations in this brief refer to the pre-September 2020 versions of the cited regulation(s). However, it is notable that in the September 2020 amendments to Section 1502.14(a), the Council on Environmental Quality removed the word "all" from the regulation because NEPA does not require consideration of all alternatives and does not provide specific guidance concerning the range of alternatives an agency must consider for each proposal. 85 FR 43304, 43330. The Council further explained that it "has long advised that '[w]hen there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS.'" Id; *see also* N.C. All. for Transp. Reform, Inc. v. United States DOT, 713 F. Supp. 2d 491, 501 (M.D.N.C. 2010) (CEQ's interpretation of NEPA is entitled to substantial deference).

mind of man"). Alternatives that do not meet the purpose and need of the action are deemed 'unreasonable' and, therefore, require only a brief explanation for their rejection. Webster v. United States Dep't of Agric., 685 F.3d 411, 427 (4th Cir. 2012). Also, no analysis of environmental consequences is required for alternatives that the Agencies have, in good faith, rejected as too remote, speculative, impractical, or ineffective. Id.

1. Shifting Rental Times was not a Reasonable Alternative and was Properly Eliminated.

Implementation of staggered rental times is not reasonable because it is not feasible and does not meet the purpose and need of the Project. MCB068872; 40 C.F.R. § 1508.1(z).

Most importantly, rental times are determined by property owners and neither NCDOT, FHWA, nor any other governmental agency has the authority to force private parties to implement staggered rental times. MCB09412, 68871-72. NCDOT interviewed local property management companies who generally agreed that the rental market demands weekend rentals. MCB068871-72. In designing a transportation project, it is not reasonable to assume that private property owners will ignore market demands and stagger rental times just because NCDOT asked for them to do so.[24] MCB068872. In other words, this alternative is not feasible.

Not only is shifting rental times not feasible, it does not meet the purpose and need of the Project because, even if it were implemented, the benefits would be marginal at best.

In the 2009 Alternatives Screening Report, when the Agencies first considered shifting rental times, the Agencies noted that 100% of rental unit check-ins and check-outs occurred on Friday, Saturday, or Sunday, with the vast majority on Saturday. MCB09411. With no ability to force rental unit check-in and check-out days and times to change, the Agencies conducted their analysis of the potential effects of shifting rental unit times within the realm of reason, and

[24] Even if NCDOT wanted to provide a monetary incentive to private property owners in an attempt to encourage staggered rental times, that would require changes to state and federal law. MCB068872.

reality, and considered how shifting rental times evenly over Friday, Saturday, and Sunday would affect traffic flow, travel times, and hurricane evacuation times – the three stated purposes and needs for the Project. MCB09412. The analysis determined that shifting rental times evenly over the weekend would provide some reduction in congestion during summer weekends but provide no benefits during any other time, including summer weekdays. MCB09413. Overall, shifting rental times would reduce congestion by 1%[25], reduce summer travel time by 1%, and not reduce hurricane evacuation times at all. Id.

Of note, Plaintiffs argue that the Agencies used "deceptive math" and "data manipulation" in determining that shifting rental times would provide only minimal congestion relief by averaging the impact of shifting rental times over the calendar year as opposed to considering the impact just during peak traffic congestion in the summer months. DE 89 pp 5, 33-4. It seems that Plaintiffs are mistaken about what is presented in Table 4 in the Alternatives Screening Report. DE 89 pp 5, 33-4; MCB09411. Table 4 does not state that any impact to traffic flow benefits is averaged over every day in a calendar year. MCB09411. Instead, Table 4 states that the average impacts to traffic flow benefits are shown in relation to either (i) a summer weekday; (ii) a summer weekend; or (iii) the annual number of *congested* vehicle miles traveled (known as "VMT"). Id. Congested VMT are miles traveled when the road is operating at LOS E or F – i.e., Table 4 does not address, or average, every VMT over the course of a calendar year, but only those VMT when the roads are congested. Id. Therefore, the impacts are not averaged

[25] Plaintiffs state that shifting rental times would provide a "massive" 28% reduction in congestion during summer weekends by 2035. DE 89 p 33. This statistic is offered out of context and, consequently, is misleading because the 28% metric does not apply to all traffic congestion. The Agencies' analysis shows that shifting rental times would provide a 28% percent reduction in "miles of road operating at a poor LOS F" on a 2035 summer weekend. MCB09412. Congested traffic includes LOS E, LOS F, and poor LOS F, not only poor LOS F as Plaintiffs imply. MCB04624. "Poor LOS F" is defined as peak hourly traffic demand that is 30% higher than the hourly capacity of the road. MCB04625. By 2035, poor LOS F level of congestion, and any reduction thereto, is expected only during the summer and only in very specific locations. MCB04625. Shifting rental times provides minimal reduction to congestion experienced at LOS E and LOS F, which are anticipated to occur more often and in more locations than poor LOS F. MCB04625, 9412.

over every day (or every VMT) in the calendar year as Plaintiffs would have the Court believe, but actually are averaged over (i) a summer weekday; (ii) a summer weekend; or (iii) VMT when the project area experiences heavy traffic congestion at LOS E or F, which occurs primarily, if not entirely, during the summer months. Id.

With such small benefits coupled with the difficulty in implementation, the Agencies rightly found that shifting rental times was not a reasonable alternative, provided a brief explanation of why, and eliminated it from further consideration. Id.; Webster, 685 F.3d at 427.

When Plaintiffs raised concerns about the Agencies considering shifting rental times only over Friday, Saturday, and Sunday, the Agencies alleviated these concerns by reevaluating this alternative to consider shifting rental times over the entire calendar week. DE 89 pp 5, 33; MCB68870-71. Even with the assumptions that private property owners would (i) voluntarily stagger rental times and (ii) additionally stagger them over the entire week, shifting rental times only provides a 1.7% reduction in traffic congestion. MCB068870. This updated analysis still showed that the impact of shifting rental times is minimal to non-existent over the No-Build Alternative. MCB068871; Webster, 685 F.3d at 427.

In short, just as NEPA requires, the Agencies considered an alternative of shifting rental times, found it unreasonable, then reevaluated the alternative and again found it be unreasonable.

2. The Agencies Considered a Combination of Alternatives.

To ensure their NEPA analysis was full and complete, in both the Alternatives Screening Report and the Reevaluation, the Agencies considered not only individual alternatives but also combinations of alternatives.

In light of comments from the Environmental Protection Agency ("EPA") in 2007, the Agencies undertook an extensive analysis of whether a ferry service, combined with different road improvement alternatives, could meet the purpose and need of the Project. MCB0673,

9416-23. The Agencies published their findings in the 2009 Alternatives Screening Report, and concluded that any alternative with a ferry, no matter what other alternatives it may be combined with, was not reasonable.[26] MCB09416-23; *see also* Defs. of Wildlife v. N.C. DOT, 971 F. Supp. 2d 510, 531 (E.D.N.C. 2013), *aff'd in part, rev'd in part, remanded on other grounds by* Defs. of Wildlife v. N.C. DOT, 762 F.3d 374 (4th Cir. 2014) (finding that NCDOT properly eliminated ferries from detailed study after NCDOT found them to be an unreasonable alternative).

In the 2019 Reevaluation, the Agencies revisited each of the DSAs as well as the alternatives that were deemed unreasonable in 2009. MCB068869-82. The Reevaluation also considered a new "Composite Alternative," as suggested by Plaintiffs' counsel. MCB068882, 69295-99, 69306-09. The Composite Alternative combined ER2, shifting rental times evenly over the summer week, bus transit, and a ferry. Id. The congestion analysis of the Composite Alternative showed that the combination of these alternatives resulted in a small travel benefit over any single alternative, but when you consider the costs, impacts, and feasibility of each component of the Composite Alternative, it was simply not reasonable. MCB068871, 68882.

Ignoring that the Agencies did, in fact, consider combinations of alternatives, Plaintiffs cite to a Tenth Circuit case, Davis v. Mineta, to argue that the Agencies did not do so. DE 89 p 34; Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002). Foremost, Davis is easily distinguishable from this matter because, in Davis, the defendant agencies analyzed only two alternatives – the project as conceptualized and the no-build – and, therefore, failed to meet even the basic principles of NEPA by effectively ignoring other reasonable alternatives. Davis, 302 F.3d at

[26] The EPA agreed that a ferry alternative was not reasonable. MCB03189. The EPA went on to imply that the Agencies may want to consider other unreasonable alternatives - shifting rental times, bus transit, and traffic systems management - in combination not with themselves, as Plaintiffs argue should have been done, but with ER and MCB alternatives. Id. The Agencies did look at some unreasonable alternatives in combination with ER2 in the Reevaluation and found this "Composite Alternative" to also be unreasonable. MCB068882.

1120-21. And while Davis does stand for the proposition that agencies should consider combinations of alternatives, it stands for this proposition only for alternatives that are not so "remote, speculative, impractical or ineffective" that they can be properly eliminated from further analysis. Davis, 302 F.3d at 1122. In other words, if the Agencies can properly eliminate an alternative because it is unreasonable, the Agencies do not have an ongoing duty to consider that unreasonable alternative in combination with others. *See* Webster, 685 F.3d at 427; *see, e.g.*, Utahns v. United States DOT, 305 F.3d 1152, 1172 (10th Cir. 2002) (finding that alternative land use scenarios were unreasonable and, therefore, agencies properly removed alternative land use scenarios, alone and in combination with mass transit, as a reasonable alternative).

Here, the Agencies did exactly as required and more. The Agencies analyzed alternatives and combinations of alternatives, eliminating those that were not reasonable. MCB09416-23. And when public comment requested an analysis of a combination of unreasonable alternatives, the Agencies did that analysis to honor their commitment to public involvement and ensure that the NEPA process for this Project was as extensive and thorough as possible.

3. The Agencies Properly Compared Hurricane Evacuation Benefits.

As EPA made clear to the Agencies, reducing hurricane evacuation times is generally a desirable goal, but it should be reasonably weighed against other costs, benefits, and adverse environmental effects. MCB053806. In a potential constrained growth scenario, ER2 and its new third outbound lane will likely provide for shorter hurricane evacuation times than the Preferred Alternative and its reversed center lane. But, the costs and impacts of ER2 and its new third outbound lane are simply too great. MCB068850-51.

Plaintiffs first take issue with the analysis of hurricane evacuation times in the 2012 FEIS and allege that the Agencies purposely obscured information. DE 89 pp 35-36. The FEIS provides a table, Table 2-3, which discusses the overall travel benefits of each DSA – the

No-Build Alternative, ER2, MCB2, and MCB4, which is a part of the Preferred Alternative – including the anticipated 2035 hurricane evacuation times for the DSAs with each of the two hurricane evacuation options (a new third outbound lane on US 158 and reversing the center lane on US 158). MCB034954. Table 2-3 evaluates the Preferred Alternative with a third outbound lane but makes clear that the Preferred Alternative does not actually include a third outbound lane on US 158, a fact that is repeated throughout the FEIS. MCB034954; *see, e.g.,* MCB034877, 34888-91, 34977, 34993, 34996. Plaintiffs argue that this is the Agencies attempting to 'obscure' hurricane evacuation information. DE 89 p 36. This is not true.

Table 2-3 evaluates the Preferred Alternative with a new third outbound lane for the same reason that Table 2-3 evaluates ER2 with a reversed center lane – to ensure a complete comparison of the DSAs. The purpose of the FEIS is to identify the *preferred* alternative, not to decide the "Selected Alternative" that will actually be built – that decision is made in the ROD. MCB034963; 69447. When the FEIS compares hurricane evacuation times for a third outbound lane with the Preferred Alternative and a reversed center lane with ER2, it does so because the final decision as to which alternative to build had not yet been made and the Agencies had a duty to take a hard look at each DSA and provide analysis and information on every potential hurricane evacuation alternative – including options like ER2 with a reversed center lane and the Preferred Alternative with a third outbound lane.[27] That is what Table 2-3 does. MCB034954. It obscures nothing. Instead, it provides the reader with hurricane evacuation data for each DSA for both potential hurricane evacuation scenarios while making clear to the reader which of those evacuation scenarios is actually included in the Preferred Alternative. MCB034954.

[27] Reversing the center turn lane on US 158 is practical only with the MCB alternatives, because with ER2 it would require reversing the center lane for an unreasonable length – 27 miles. MCB034954; *see also* MCB053806, 68868.

The Project has three purposes and needs, one of which is to substantially reduce hurricane evacuation times. MCB04596. The 2012 FEIS and Table 2-3 make no secret of the fact that, with any of the DSAs, the then-current data showed that a new third outbound lane on US 158 would provide a greater reduction in hurricane evacuation times than reversing the center lane of US 158. MCB034953. However, the same Table 2-3 shows that the MCB alternatives, particularly MCB4 and the Preferred Alternative, outperform the No-Build and ER2 alternatives in every other travel benefits category. MCB034954.

Additionally, any reduction in evacuation times from a new outbound lane must be weighed against the costs and impacts of the new lane. MCB053806. Local emergency management officials expressed concern about a new third outbound lane because of its visual impact and also potential misuse when not needed for hurricane evacuation.[28] MCB053855. The general public also expressed a preference for reversing the center lane over a new third outbound lane. MCB035098, 53790. And, a third outbound lane would have greater impacts overall as compared to reversing the center turn lane, including required relocations of residences and gravesites, a greater increase in impervious surface, and greater wetland impacts. MCB034888-91, 34976-77, 68888-89, 68900-02. In plain terms, the FEIS concludes that the costs and impacts of constructing a new 27-mile outbound lane do not justify the minimal benefits it provides over the Preferred Alternative and its reversed center lane.

Plaintiffs cite to one particular subsection of the FEIS, the explanation of the financing and design considerations that led the Agencies to choose the Preferred Alternative, and take it out of context in an attempt to bolster an argument that the Agencies did not 'squarely consider' the benefits of ER2's new outbound lane versus the Preferred Alternative's reversed center lane.

[28] Currituck County Emergency Management expressed an overall preference for the Bridge because it provides the opportunity to re-route traffic off of NC 12 during an evacuation. MCB034950.

DE 89 p 36; MCB034965. While Plaintiffs argue that the Agencies' discussion of financing concerns in this subsection, as opposed to a discussion of actual hurricane evacuation times, shows a failure to conduct a proper overall analysis of hurricane evacuation times, what Plaintiffs fail to mention is that this subsection is prefaced with the explanation that it does not address all benefits and impacts of the Preferred Alternative, just those that differentiate the Preferred Alternative from other DSAs. MCB034963. As the costs of a new outbound lane are greater than reversing the center lane, this issue is appropriately addressed in the "financing and design considerations" subsection and differences in hurricane evacuation times are addressed elsewhere in the FEIS, such as Table 2-3. MCB034965.

The 2019 Reevaluation reconsiders the hurricane evacuation times in the 2012 FEIS in light of updated network congestion measures from 2040 traffic forecasts (the FEIS considered 2035 traffic forecasts) as well as updated hurricane clearance modeling and times. MCB068831-32, 68847-51. The Reevaluation assumes that the Preferred Alternative will have a reversed center lane and that ER2 will have a new third outbound lane, but looks at two scenarios not considered in the FEIS: (i) constrained versus unconstrained growth and (ii) the effect on evacuation times if Virginia closes its border to evacuees heading north on NC 168. Id.

In light of the updated traffic forecasts and data, the Reevaluation found the following:

2040 Evacuation Times with Unconstrained Growth (MCB068850)

	ER2	Preferred Alternative
NC 168 open into Virginia	32.3 hrs	32.3 hrs
NC 168 closed into Virginia	43.2 hrs	43.2 hrs

2040 Evacuation Times with Constrained Growth (MCB068851)

	ER2	Preferred Alternative
NC 168 open into Virginia	30.7 hrs	32.3 hrs
NC 168 closed into Virginia	41.4 hrs	43.2 hrs

In their brief, Plaintiffs are correct in noting that, in a constrained growth scenario, ER2 will likely result in shorter hurricane evacuation times than the Preferred Alternative. DE 89 p 36; MCB068850-51. Although ER2 may provide a shorter hurricane evacuation, the ROD details the myriad of reasons for choosing the Preferred Alternative and these reasons outweigh ER2's shorter hurricane evacuation time. MCB069458-61. Additionally, the Preferred Alternative offers the unique added benefit of providing a second way off of the Outer Banks to northbound evacuees, which is true only if a new bridge is built. MCB068868.

When the Statement of Purpose and Need formally identified reduced hurricane evacuation times as a purpose and need of the Project, the Agencies began an in-depth analysis of the potential hurricane evacuation options and how each alternative may or may not perform. The Agencies spent over a decade analyzing and reanalyzing this information, taking an extensive hard look at the data so that all alternatives could be fairly compared, and determined that the Preferred Alternative, in light of all benefits, costs, and impacts, was favored.

4. The Agencies Properly Compared how Alternatives could be Funded and Financed.

In both the FEIS and the Reevaluation, the Agencies met their NEPA obligations by careful consideration and comparison of how each DSA could potentially be funded and financed. *See* Hughes River, 81 F.3d at 446 (NEPA requires agencies to balance a project's economic benefits against its adverse environmental effects). And, each time, the Preferred Alternative, while not the least expensive alternative, provided the greatest traffic benefits and

proved to have the most viable funding and financing opportunities, in part due to its unique ability to generate revenue.

i. Funding and Financing in the FEIS

In the 2012 FEIS, the Agencies took a hard look at how much each DSA would cost and how it could be paid for. MCB034955-59. The Agencies openly acknowledge that ER2 would be the least expensive of the DSAs, but the analysis must go further to consider whether there are adequate sources of funding and financing for each DSA, no matter its cost. MCB034955-56.

For the Preferred Alternative, the FEIS identifies two funding sources, state appropriations from highway user taxes and toll revenues, and then discusses three correlating financing techniques: (i) state appropriation bonds; (ii) toll revenue bonds[29]; and (iii) private equity through a proposed public-private partnership that would be repaid with toll revenue. MCB034957-58. At the time of the FEIS, there was also some additional "gap" funding available only to NCTA, and not NCDOT, for the Preferred Alternative. MCB034958. Through a combination of these funding sources and financing techniques, the Preferred Alternative could be fully funded and financed. MCB034965.

ER2, on the other hand, could be funded using only traditional highway financing methods – i.e., motor vehicle and fuel taxes. MCB034958. So, even though ER2 was less expensive than the other alternatives, including the Preferred Alternative, it did not have as many funding and financing options and, accordingly, it was unlikely that NCDOT would be able to construct ER2. MCB034958.

[29] Included in 'toll revenue bonds' is a loan from the federal government under the Transportation Infrastructure Finance and Innovation Act ("TIFIA"). MCB034958. Any TIFIA loan would be repaid with toll revenue. MCB068808.

However, after the FEIS was published, the North Carolina General Assembly enacted new laws that affected the funding and financing analysis in the FEIS. Consequently, the Agencies reevaluated the funding and financing aspects of each DSA. MCB068804-08, 68812.

ii. Funding and Financing in the Reevaluation

In 2013, after the FEIS was published, the North Carolina General Assembly passed the Strategic Transportation Investments ("STI") law that, in part, withdrew the "gap" funding available for the Preferred Alternative and also established the Strategic Mobility Formula. MCB068807. The Strategic Mobility Formula was a new way of allocating NCDOT's major revenue sources based on a data-driven scoring system and local input. MCB068807.

Because the Strategic Mobility Formula instituted a new scoring system not considered in the FEIS, the Agencies scored the Preferred Alternative under the new formula. MCB068807. Contrary to Plaintiffs' argument that the Preferred Alternative scored 'poorly' just because it did not receive funds at the statewide level, the formula is designed to consider statewide, regional, and divisional needs and the Preferred Alternative scored favorably at the divisional needs level, meaning that it addresses the needs of local communities on a Division-wide[30] perspective as opposed to statewide or regional needs. N.C.G.S. § 136-189.11(d).

In response to these changes and taking into account how the Preferred Alternative scored in the Strategic Mobility Formula, the Agencies created a new draft preliminary finance plan for the Preferred Alternative that combined four financing techniques to demonstrate one possible way of financing the Preferred Alternative: (i) a TIFIA loan backed by toll revenue; (ii) toll revenue bonds; (iii) GARVEE[31] bonds; and (iv) state matching funds. MCB068808. With these financing techniques combined, the Preferred Alternative can be fully funded and financed

[30] For organizational purposes, NCDOT divides the State of North Carolina into 14 divisions, with Currituck and Dare Counties being located in Division 1. *See, e.g.,* MCB034958.
[31] GARVEE stands for "Grant Anticipation Revenue Vehicle." MCB068808.

through a combination of state funds and financing options that are only available because the Preferred Alternative will generate revenue. MCB068808. In other words, generating toll revenue provides multiple potential financing options for the Preferred Alternative that would not be available for any non-revenue generating alternative like ER2.

Because toll revenues would not be available to fund ER2, the only options available to finance it are GARVEE bonds and state matching funds, neither of which depend upon a revenue stream for repayment. MCB068808. Due to these limited funding sources, ER2 would have a funding deficit of approximately $86-$96 million. MCB068808. In other words, just as with the FEIS, the Reevaluation concluded that ER2 could not be fully funded and financed.[32]

Plaintiffs argue that because ER2 was not formally scored under the Strategic Mobility Formula, the Agencies do not know what funding sources would be available for ER2. DE 89 p 38. This argument demonstrates a lack of understanding of how the scoring system works. Based on the Preferred Alternative's score under the Strategic Mobility Formula, NCDOT allocated funds that demonstrate the State's reasonable ability to fund and deliver the Project. MCB068807. Taking into account this allocated funding, the Agencies' preliminary plan of finance assumes that NCDOT will issue $140.0 million in GARVEE bonds and that the State will provide matching funds of $44.7 million, for a total of $191.7 million. MCB068808. GARVEE bonds and matching funds are allocated pursuant to the STI scoring process and, for the purposes of the reevaluation analysis, the Agencies assumed that ER2 would receive the

[32] Plaintiffs cite to Muckleshoot to argue that the Agencies should have explored additional funding options. DE 89 p 41; Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 814 (9th Cir. 1999). Muckleshoot presents a very different factual scenario than what we have here. In Muckleshoot, the agency failed to consider a funding source that it itself could not appropriate, but it could request. Id. Here, the Agencies considered the request-able funding sources available, ranging from state funds to federal loans and grants, and Plaintiffs have not cited to any potential funding sources that the Agencies allegedly did not consider. Additionally, NEPA does not require the Agencies to seek out new funding laws or speculate as to how funding might be obtained if that were successful. Defs. of Wildlife, 971 F. Supp. 2d at 530.

same score under the STI as the Preferred Alternative and, therefore, receive the same state funds. MCB068808. The assumption that ER2 would receive the same amount of funding from GARVEE bonds and state matching funds as the Preferred Alternative is giving ER2 a benefit that perhaps it does not deserve. GARVEE bonds and state matching funds are allocated under the Strategic Mobility Formula and, as discussed above, this formula is based on data and local input. MCB068807. The Project scored favorably at the Division level under the formula, and local input is half of the scoring consideration. N.C.G.S. § 136-189.11(d)(3)(a). "Local input" is defined by statute as the rankings identified by NCDOT's Division Engineer and any relevant Metropolitan Planning Organization or Rural Transportation Planning Organization. Id. Currituck County falls under the Albemarle Rural Planning Organization, which supports the construction of a bridge. MCB03449, 68973, 72863. In fact, overall, local support is for the construction of a bridge. MCB02143, 2156, 2373, 3449, 72864. By assuming ER2 would receive the same state funding as the Preferred Alternative, the Agencies are assuming that ER2 would receive the same local support under the Strategic Mobility Formula as the Preferred Alternative, which would almost certainly be untrue. MCB03449, 68973, 72863. However, by making this assumption, the Agencies do exactly what Plaintiffs argue they are not – they analyze the Preferred Alternative and ER2 in the same light.

Furthermore, Plaintiffs make four erroneous arguments to try to convince the Court that the Agencies have taken a 'skewed' approach to their funding and financing analysis. DE 89 p 39. First, Plaintiffs state that the Preferred Alternative can only receive $173 million in state funds. DE 89 p 39. Plaintiffs got this figure from "Prioritization 3.0," which was last updated in October 2015, more than three years before the Reevaluation. MCB045607, 70168. As stated in the 2019 Reevaluation, the Agencies anticipate receiving $191.7 million, almost $20 million more than the 2015 amount cited by Plaintiffs, in funding from the State. MCB068808. Second,

while Plaintiffs argue that the preliminary plan of finance in the Reevaluation shows a $17.8 million shortfall, Plaintiffs are incorrect – there is no shortfall. MCB068808. What Plaintiffs cite to support this erroneous statement is a draft preliminary finance plan from 2018 that was updated and revised before being included in the 2019 Reevaluation, where there is no shortfall. DE 89 p 39; MCB068808, 75483, 78902. Third, Plaintiffs err by arguing that a grant proposal estimate of project costs of $632,823,478 would also mean a shortfall. DE 89 p 39. In making this argument, Plaintiffs cite to the project cost estimate in a November 2017 INFRA grant proposal submitted for a different financing model than that in the Reevaluation, where the total project cost is estimated to be $586.8 million. MCB068808, 75499, 75512-13. The grant proposal simply presents a different potential financing model that includes more debt service, and therefore a higher project cost, than the financing model ultimately included in the Reevaluation. MCB068808, 75512-13. However, the grant proposal's financing model covers the higher project cost, and therefore there would be no shortfall under the grant proposal's model. MCB075512-13. Fourth, Plaintiffs argue that the Agencies did not properly consider new traffic forecasts, which show reduced traffic counts, on toll revenue projections. DE 89 p 39. As explained in detail above in Section IV.A.1., the traffic forecasts used for NEPA analyses are not the same traffic forecasts used for toll revenue projections and those projections are being done in a separate investment grade traffic and revenue study.

Plaintiffs also argue that the Agencies "irrationally ignored" sea level rise when considering how the Project could be funded. DE 89 p 39. As discussed above in Section IV.A.3, the Agencies did not ignore sea level rise and Plaintiffs' argument is essentially that, in light of potential sea level rise, the Project is financially unwise. Even if so, NEPA only "prohibits uninformed – rather than unwise – agency action" and an allegedly 'unwise' financial decision does not lead to vacating the Record of Decision. *See* Robertson, 490 U.S. at 351.

In the end, the Preferred Alternative and ER2 are fundamentally different in that one generates revenue and one does not. Even though the Preferred Alternative has unique financing options that are not available to ER2, for the sake of comparison and taking a hard look at the funding and financing options for each alternative, the Agencies gave ER2 the benefit of the doubt and assumed ER2 would receive the same state funding as the Preferred Alternative. Even assuming this same funding, ER2 is not financially viable while the Preferred Alternative is because it can combine these state funds with revenue-backed financing options.

C. The Agencies Properly Considered the Potential for Induced Growth and Its Impacts.

NEPA requires that an alternatives analysis include a "no action" or "no build" alternative. 40 C.F.R. § 1504.14(d). A No-Build Alternative provides a baseline so that the environmental consequences of each "build" alternative can be compared to the status quo. Defs. of Wildlife, 971 F. Supp. 2d at 527. So, the question becomes, what is the status quo? The answer to that question just requires basic logic. *See, e.g.*, Id. at 528. In terms of anticipated and expected growth and development in Currituck and Dare Counties, the logical place to look is local land use plans created by local planning experts who are most familiar with the project area. *See* 23 C.F.R. Part 450 Appendix A (describing local land use, growth management, and development plans as "valuable inputs to the discussion of the affected environment and environmental consequences" in a NEPA analysis).

The paved, NC 12 accessible areas of the Currituck County Outer Banks are either fully subdivided or future development is defined by planned unit development ("PUD"). MCB068824. Streets and utilities are already installed in most subdivisions, most public facilities are already planned for or in place, and most planned major commercial areas have developed. MCB068824. Therefore, the characteristics of build-out in the paved NC 12 accessible areas are known because the characteristics of existing subdivided land, PUD

agreements, CAMA land use plans, zoning, development ordinances, and the commitment of local government to following these plans and agreements when permitting new development are known. Consequently, the Agencies felt it is reasonable to assume that new development and build-out will be implemented as planned and expected pursuant to these various resources.

For the non-road accessible portions of the Currituck County Outer Banks, in addition to land use, zoning, and other restrictions, future development is subject to several unique factors that mean that there would be no reasonably foreseeable change in the location, rate, or type of development with any of the alternatives. MCB035700-04, 68824. Again, because so much is already known about growth and development in this area, it is reasonable to assume that it will continue as planned and expected.

For Dare County, the Agencies looked particularly at the towns of Kitty Hawk, Southern Shores, and Duck. MCB035630. Pursuant to its land use plan, notable additional development on vacant land is not expected in Kitty Hawk. MCB035630. Southern Shores and Duck both anticipate additional development in the form of developing or redeveloping existing lots. MCB035634.

Based on their land use plans, all four of these areas, the Currituck County Outer Banks, Kitty Hawk, Southern Shores, and Duck, have similar objectives in terms of the desired type and density of development. MCB035697. The driver of this development is the draw of the Outer Banks themselves, not transportation infrastructure. MCB035697. While transportation infrastructure may influence this development in terms of location and timing, it is not likely to change the demand for or character of the development. MCB035698, 46100.

Currituck and Dare Counties have long planned for specific types of growth and development in specific areas. These plans are, logically, the status quo because they are the current state of anticipated growth and development in the project area – the Agencies cannot

ignore the reality that Currituck and Dare Counties have growth and development plans. So, as NEPA contemplates, the Agencies used these plans as the no-build baseline because, even without the implementation of this Project, per their land use plans, Currituck and Dare Counties would still be anticipating and expecting this growth and development.

The Reevaluation states that the planned and expected development and build out of the Outer Banks portion of the project area is expected to occur by 2040 only if there are no constraints due to NC 12 not having adequate capacity to serve the traffic generated by this development. MCB068832. In the Reevaluation, the Agencies state that the 2040 traffic forecasts used to assess project needs and benefits of the DSAs assume, based on current land use plans and development trends, that 2040 will see full build out of the road accessible Outer Banks in the project area and a continuation of current building trends in the non-road accessible area. MCB068941. These two combined, full build out of the road accessible area and continuing trends in the non-road accessible area, equate to an estimated 85 percent of maximum build out in the entire Outer Banks project area by 2040. MCB068941. Any constraint on development due to traffic congestion on NC 12 would decrease the percentage of build out. For the No-Build Alternative, traffic congestion is estimated to constrain 2040 development to 70 percent of maximum build out and ER2 traffic congestion would constrain 2040 development to 75 percent of maximum build out. MCB068941. As of 2014, the project area is at approximately 62 percent of maximum build out.[33] MCB068833.

At its core, Plaintiffs' argument is that the Agencies chose the wrong baseline. Plaintiffs believe that the no-build baseline should be constrained development, i.e., not the development

[33] In footnote 14 of their brief, Plaintiffs present differences in build out numbers based on the 2007 estimate of 9,000 homes and hotel rooms having already been developed. DE 89 p 43. This estimate was updated in the Reevaluation to include 2014 estimates of 9,565 homes and hotel rooms having already been developed and this percentage is based upon the updated 2014 estimates. MCB035075, 68833.

anticipated and expected in Currituck and Dare Counties' land use plans. DE 89 p 43. The Agencies properly chose to establish the baseline as the unconstrained development because "[t]he best starting point for planning a new transportation project is to ask, based on land use plans and development trends, what level of development needs to be served and how well will the various alternatives serve that development." MCB044557, 69102.

Plaintiffs' argument for a 'constrained development' status quo baseline has two major flaws. First, and perhaps most importantly, the Agencies analyzed exactly that scenario. In both the FEIS and the Reevaluation, the Agencies analyze the No-Build Alternative with 'constrained growth' or 'reduced growth'. MCB035074-77, 35081-87, 68832-82. This is exactly the scenario that Plaintiffs argue the Agencies ignored. DE 89 p 42. Second, constrained development is not the status quo because it is not the current state of anticipated and expected development. With no plans for constrained development, it is not properly considered the status quo.

Additionally, one of the cases Plaintiffs cite in support of their argument, N.C. Alliance for Transp. Reform, Inc., does not support Plaintiffs' argument at all, but instead demonstrates its weaknesses. N.C. All. for Transp. Reform, Inc. v. United States DOT, 151 F. Supp. 2d 661 (M.D.N.C. 2001). In N.C. Alliance for Transp. Reform, Inc., the plaintiffs argued that defendant agencies erred in using the same socioeconomic data to evaluate the build and no-build alternatives and defendants argued that this was acceptable because the build alternative would not spur new growth, but instead accommodate existing and anticipated growth. Id. at 689. In analyzing this argument, the court sided with plaintiffs, but only because defendants ". . . failed to produce evidence to support their claim that the area to be affected by the [project] is already 'accounted for by either existing or committed land uses.'" Id. at 689-90 (citing Laguna Greenbelt v. United States Dep't of Transp., 42 F.3d 517, 525-26 (9th Cir. 1994)). That is the exact opposite scenario than what is at issue in this matter. Here, the Agencies have produced

ample evidence that the project area in both Currituck and Dare Counties is subject to land use plans that guide the anticipated and expected growth and development in the area. Consequently, N.C. Alliance for Transp. Reform, Inc. supports the Agencies' position that the no-build baseline premised on known land use plans is the correct baseline for this project. Id.

Similarly, Plaintiffs reliance on N.C. Wildlife Fed'n to support their argument that constrained development should be the baseline is misplaced. DE 89 p 44. In N.C. Wildlife Fed'n, despite being asked many times defendant agencies did not reveal during the NEPA process that the growth projections for the no-build baseline assumed construction of the challenged roadway. N.C. Wildlife Fed'n v. N.C. DOT, 677 F.3d 596, 599-602 (4th Cir. 2012). The Fourth Circuit Court of Appeals, in discussing that ". . . NEPA procedures emphasize clarity and transparency of process over particular substantive outcomes," held that the defendant agencies failed to take a hard look at the environmental consequences of the project because they relied on the growth projections without disclosing their underlying assumptions when asked or, in other words, they failed to be transparent. Id. at 603-605. In reaching this holding, the Court specifically stated it ". . . need not and do not decide whether NEPA permits the Agencies to use [the data that assumes construction of the roadway] in this case." Id. 605. Here, there are no allegations that the Agencies have not been transparent throughout the NEPA process as to the underlying assumptions used. Because N.C. Wildlife Fed'n goes to the issue of transparency, and not the assumptions themselves, it is not applicable to this matter.

Plaintiffs' argument boils down to the fact that Plaintiffs do not like the Agencies' methodology for establishing the no-build baseline, i.e., Plaintiffs do not like that the Agencies gave deference to Currituck and Dare Counties' land use and development plans and the status of their implementation. The Agencies are entitled to select their own methodology as long as that methodology is reasonable and the reviewing court must give deference to the Agencies'

decision. *See* Hughes River, 165 F.3d at 289. This Court's role is ". . . simply to ensure that the procedure followed by the [the Agencies] resulted in a reasoned analysis of the evidence before it, and that the [the Agencies] made the evidence available to all concerned." Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985). The Court's role is limited in this way because the question of which methodology is used ". . . is a classic example of a factual dispute the resolution of which implicates substantial agency expertise" and ". . . [b]ecause analysis . . . 'requires a high level of technical expertise,' [the judiciary] must defer to 'the informed discretion of the responsible federal agencies.'" Marsh, 490 U.S. at 376-77.

1. The No-Build Baseline Properly Discusses Both Indirect and Cumulative Effects.

Pursuant to NEPA, the Agencies' environmental analyses must include a detailed statement on any adverse environmental effects which cannot be avoided if the proposed project is implemented. 42 U.S.C. § 4332(c); 40 C.F.R. §§ 1502.15-.16. "Effects" is defined to include direct effects, which are caused by the action and occur at the same place and time, and indirect effects, which are also caused by the action but are later in time or farther removed in distance and still reasonably foreseeable. 40 C.F.R. § 1508.8. The environmental analyses must also consider cumulative impacts, which are impacts on the environment that result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7.

Plaintiffs argue that the Agencies failed to properly consider indirect and cumulative impacts because of an allegedly improper no-build baseline, but Plaintiffs entire argument is based on the false assumption that the Bridge will induce growth instead of meeting planned for and expected development as called for in local land use plans. DE 89 p 46. Once you remove this false assumption, Plaintiffs' argument falls apart.

As detailed above, the Agencies relied on local land use plans, zoning, and similar information to understand the anticipated development and growth expected in the project area. *See* MCB046079. When performing a NEPA analysis, the Agencies are entitled to select their own methodology as long as that methodology is reasonable. Hughes River, 165 F.3d at 289. Again, "[t]he best starting point for planning a new transportation project is to ask, based on land use plans and development trends, what level of development needs to be served and how well will the various alternatives serve that development." MCB044557, 69102; *see also* 23 C.F.R. Part 450 Appendix A (describing local land use, growth management, and development plans as "valuable inputs to the discussion of the affected environment and environmental consequences" in a NEPA analysis). Here, the reasonable, if not expected, methodology to perform an analysis of the effects and impacts of growth and development is to first consider what growth and development is anticipated. *See, e.g.*, Laguna Greenbelt, 42 F.3d at 525-26 (EIS properly relied on data relating to current and expected growth, including existing and committed land uses).

Furthermore, contrary to Plaintiffs' argument, the Agencies do address the indirect and cumulative effects of the project on the natural environment. DE 89 p 47. Plaintiffs rely on one source of information, the Agencies' response to comments on the FEIS, to cite to one section of the FEIS, Section 3.6.2.3., which addresses cumulative effects, to argue that the Agencies failed to study the effects on the natural environmental. Id. Plaintiffs' reliance on responses to comments on one section ignores the plethora of information regarding effects on the natural environmental contained elsewhere in the Administrative Record. For example, the 2011 ICE Technical Report discusses in detail the indirect and cumulative effects on notable landscape, waterscape, and environmental elements. MCB035716-22, 35730-44. This ICE analysis was updated in 2012 to reflect new information and new evaluations. MCB046093-105. As the FEIS is intended to do, it summarizes this information in a way that is concise, readable, and

understandable. MCB035081-87. *See* 40 C.F.R. § 1502.1 ("[In the FEIS,] [a]gencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point . . . ."). The Agencies did not fail to disclose indirect and cumulative impacts relating to the natural environment, instead they simply disclosed the information somewhere other than the one source Plaintiffs cite to, FEIS Section 3.6.2.3.

As required by NEPA, the Agencies established a no-build baseline, took a hard look at the indirect and cumulative effects of the project based on that baseline, and fully disclosed its conclusions about the effects in the NEPA documents. Despite Plaintiffs' disagreement with the conclusions, the Agencies' thorough analysis and transparency regarding indirect and cumulative effects complies with all NEPA requirements. *See* Laguna Greenbelt, 42 F.3d at 526.

2. The No-Build Baseline Does Not Favor Any Detailed Study Alternative.

Out of all of the DSAs, the Mid-Currituck Bridge was selected for construction based on a number of factors, including offering the greatest summer travel benefits, its ability to minimize community, cultural resource, and natural resource impacts, and other physical and financing and design considerations. MCB069458-61.

Here, Plaintiffs argue that the Agencies' selection of the Bridge, was, essentially, a foregone conclusion because the Agencies' traffic forecasts "erroneously use the skewed [no-build] baseline." DE 89 pp 48-49. This argument not only ignores the mountains of data supporting the construction of the Bridge, but also ignores that the Agencies' traffic analysis presents the DSAs under both the no-build baseline used by the Agencies (referred to as "unconstrained") and the no-build baseline that Plaintiffs argue the Agencies should have adopted (referred to as "constrained") and assumed the "constrained" baseline when selecting the Preferred Alternative. *See* MCB068836-37, 68863-67, 69458 (using data from MCB068858).

Similarly, just as the no-build baseline did not skew in favor of selecting a toll bridge, the no-build baseline did not skew in favor of eliminating other alternatives. The example given by Plaintiffs of this alleged phenomenon is a red herring. Plaintiffs argue that the existing roads alternative ER2 was rejected in the 2009 Alternatives Screening Report because it "would not improve system efficiency and offers a low level of benefit in terms of reducing congestion and travel time." DE 89 p 49, *citing* MCB09406. The Agencies did not reject ER2 in the 2009 Alternatives Screening Report. In fact, the opposite occurred. The 2009 Alternatives Screening Report selects ER2 as a detailed study alternative and, consequently, ER2 was considered throughout the entire NEPA process. MCB09440, 34874, 68802.

The Agencies appropriately used the no-build baseline which allowed for a thorough comparison of each of the detailed study alternatives across the range of topics analyzed under NEPA. The baseline did not favor one alternative over another, but instead allowed the Agencies to use the status quo to compare how each DSA would meet the purpose and need of the Project.

V. CONCLUSION

For the reasons stated herein, Plaintiffs' argument that the Agencies failed to comply with NEPA and the APA fail and, consequently, State Defendants' Cross-Motion for Summary Judgment should be granted and Plaintiffs' Motion for Summary Judgment should be denied.

Respectfully submitted this the 1st day of April, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 1, 2021, I electronically filed the foregoing STATE DEFENDANTS' MEMORANDUM OF LAW OPPOSING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to, and pursuant to Local Civil Rule 5.1(e) shall constitute service upon, the following:

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