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

Case No. 2:19–cv–000014–FL

NORTH CAROLINA WILDLIFE FEDERATION and NO MID-CURRITUCK BRIDGE-CONCERNED CITIZENS and VISITORS OPPOSED TO THE MID-CURRITUCK BRIDGE, Plaintiffs, v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; ERIC BOYETTE in his official capacity as SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; and EDWARD PARKER in his official capacity as DEPUTY DIVISION ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION. Defendants.	**FEDERAL DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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APA	Administrative Procedure Act
CEQ	Council on Environmental Quality
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ER	Existing Roads
FEIS	Final Environmental Impact Statement
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration
GARVEE	Grant Anticipation Revenue Vehicle
LEDPA	Least Environmentally Damaging Practicable Alternative
MCB	Mid-Currituck Bridge
NCDOT	North Carolina Department of Transportation
NCTA	North Carolina Turnpike Authority
NEPA	National Environmental Policy Act
NOAA	National Oceanic and Atmospheric Association
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement
STI	Strategic Transportation Investment Act
STIP	State Transportation Improvement Program
TEAC	Turnpike Environmental Agency Coordination
TSM	Transportation System Management
USACE	United States Army Corps of Engineers
VMT	Vehicle Miles Traveled

INTRODUCTION

There is only one bridge connecting the northern Outer Banks of North Carolina to the mainland. Federal Highway Administration ("FHWA") and North Carolina Department of Transportation ("NCDOT")[1] have determined that this one bridge is becoming increasingly congested and does not adequately support current traffic and that this problem will only be exacerbated by the passage of time. This congestion contributes to increased travel time between the Currituck County mainland and the Currituck County Outer Banks, especially during the summer months. Additionally, hurricane evacuation times for users of US 158 and NC 168 are lengthy and far exceed the state-designated standards. In an effort to improve these conditions, FHWA and NCDOT studied the feasibility and potential environmental impacts of constructing a toll bridge across the middle portion of Currituck Sound. In 2012, after years of working to complete a comprehensive environmental review of the project, FHWA selected a toll bridge that minimizes environmental impacts while achieving project needs as the Preferred Alternative for the project. In 2019, FHWA re-evaluated its 2012 Final Environmental Impact Statement ("FEIS") and reasonably concluded that there had been no significant changes to the Mid-Currituck Bridge ("MCB") project on the effected environment that would require additional environmental review.

Plaintiffs, North Carolina Wildlife Federation and No Mid-Currituck Bridge-Concerned Citizens and Visitors Opposed to the Mid-Currituck Bridge argue that FHWA unreasonably refused to supplement its FEIS because of significant new circumstances and that the agency's Record of Decision ("ROD") relied on an arbitrary and capricious analysis of alternatives, and

[1] Prior to 2006, the State agency managing the project was the NCDOT in 2006 management of the project transferred to the North Carolina Transportation Authority ("NCTA") which was then a separate agency. In 2009 NCTA was relocated as a sub-agency of NCDOT. For the purposes of this brief NCTA and NCDOT are used interchangeably.

relied on an invalid analysis of environmental impacts. Because Plaintiffs fail to carry their heavy burden of showing that FHWA's determination that a supplemental environmental impact statement ("SEIS") was unnecessary and that its reliance on the 2012 FEIS was arbitrary and capricious, the defendants are entitled to summary judgment on all claims.

BACKGROUND

I. Legal Framework

A. The National Environmental Policy Act

Congress enacted The National Environmental Policy Act ("NEPA") to ensure federal agencies make informed decisions by considering the environmental consequences of "major Federal actions" in "environmental impact" statements. 42 U.S.C. §§ 4321, 4332(2)(C); 40 C.F.R. § 1500.1(c). The Council on Environmental Quality ("CEQ") promulgates regulations that govern federal agency NEPA compliance. 42 U.S.C. § 4342; *see* 40 C.F.R. §§ 1500.1-1517.7; 43 Fed. Reg. 55,978 (Nov. 29, 1978); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989).[2] If an agency proposes to undertake a "major Federal action[] significantly affecting the quality of the human environment," NEPA requires the preparation of an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). An EIS examines the impacts of the action, any adverse environmental effects of the action that cannot be avoided, and alternatives to the action considered by the agency. *Id.* § (2)(C)(i)-(iii); *see also Robertson*, 490 U.S. at 349.

[2] The CEQ promulgated regulations implementing NEPA in 1978, 43 Fed. Reg. 55,978 (Nov. 29, 1978), and a minor substantive amendment to those regulations in 1986, *see* 51 Fed. Reg. 15,618 (Apr. 25, 1986). More recently, the Council published a new rule, effective September 14, 2020, further revising the 1978 regulations. The claims in this case arise under the 1978 regulations, as amended in 1986. All citations to the Council's regulations in this brief refer to those regulations as codified at 40 C.F.R. Part 1500 (2018).

When a proposed major federal action may affect the environment, the 1978 regulations require the acting agency to scope the project, or solicit comments and input, from the public and other state and federal agencies about specific issues to address and to study. 40 C.F.R. § 1501.7; *see Webster v. USDA*, 685 F.3d 411, 418 (4th Cir. 2012). If the agency determines that the environmental impacts are likely to be significant and an EIS is necessary, 40 C.F.R. § 1501.4, it prepares a draft EIS, *id.* § 1502.9(a), and presents it to the public and other agencies for comment. *Id.* § 1503.1(a). The 1978 NEPA Regulations direct the agency to "present the environmental impacts of the proposal and the alternatives in comparative form," so it can "sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14 (2019). The regulations require agencies to analyze the "no action" alternative, *id.* § 1502.14(d), and to compare not only the direct effects of the project, but also their indirect and cumulative effects. *Id.* § 1508.8. After it evaluates and responds to the comments it receives, the agency prepares and circulates a FEIS. *Id.* § 1502.9(b).

Under the 1978 NEPA regulations, once an agency has prepared a FEIS, NEPA requires further analysis only if the agency makes substantial changes in the proposed action relevant to environmental concerns, or if significant new information arises that will affect the quality of the environment "in a significant manner or to a significant extent not already considered[.]" *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989); 40 C.F.R. §1502.9(c)(1)(ii) (2019). Certain agencies, including FHWA, use a process known as a "reevaluation" to analyze whether a SEIS is required. *See* 23 C.F.R. §§ 771.129-130; *Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990).

Although NEPA requires agencies to analyze and to disclose any significant environmental effects of proposed major federal actions, it does not require agencies to choose

the most environmentally benign alternative. *See Robertson*, 490 U.S. at 350. NEPA "merely prohibits uninformed – rather than unwise – agency action." *Id.* at 351. A court "cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken," and the Supreme Court has cautioned courts against "substitut[ing] [their] judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21(1976) (citations and quotations omitted).

II. Factual Background

The Outer Banks attracts millions of vacationers each year. MCB4684. There are limited means of traveling to and from the Outer Banks. There is only one highway crossing of the Currituck Sound[3] along the North Carolina coast: the Wright Memorial Bridge on US 158 at the southern end of Currituck County into Dare County. MCB68868.

FHWA in cooperation with NCDOT first published a Draft Environmental Impact Statement ("DEIS") for the Mid-Currituck Bridge ("MCB") in 1998. MCB69449. In 2008, the 1998 DEIS was rescinded as a result of changes to the project footprint, modification of the purpose and need statement, and analysis of new alternatives; and the project was reactivated with a new notice of intent published in the Federal Register. MCB03686-87; MCB69450. A project coordination plan was established to facilitate coordination with various agencies and the public. MCB69450. Agency participation occurs primarily through regular coordination meetings called Turnpike Environmental Agency Coordination (TEAC) meetings. MCB69450.

[3] The Currituck Sound area is located in northeastern North Carolina, and includes the Currituck County peninsula on the mainland and its Outer Banks, as well as the Dare County Outer Banks north of Kitty Hawk. MCB69448. The Currituck County peninsula is bounded by the North River on the west, Albemarle Sound on the south, and Currituck Sound on the east. *Id*. The Outer Banks are bounded by the Currituck Sound on the west and Atlantic Ocean on the east. *Id*. The project area encompasses two thoroughfares, US 158 from NC 168 to NC 12 (including the Wright Memorial Bridge) and NC 12 North of its intersection with US 158 to its terminus. MCB2671.

Public involvement was solicited in the scoping process through citizen information workshops and small group meetings. MCB14881 and MCB14883. The project enjoys widespread local support. *See e.g.*, MCB68971-69005 (local letters of support for the project); *see also* MCB02143, MCB02156, MCB02373, MCB03449, and MCB72864.

A. Project purpose and need

FHWA and NCDOT in coordination with the TEAC determined that the project statement of purpose and need would be developed in accordance with the interagency coordination plan. *See e.g.*, MCB09472. For this reason, FHWA commissioned a 46 page Statement of Purpose and Need technical report published in 2008. MCB4680-4725. This report found US 158 and NC12 are becoming increasingly congested and congestion will become more severe, that travel time between the Currituck County mainland and the Outer banks is increasing especially during the summer, and that evacuation times for residents and visitors who use US 158 and NC 168 as an evacuation route are far greater than the state standard. MCB4687-4688. Both the DEIS and FEIS utilized the information contained in the 2008 Statement of Purpose and Need in discussing project needs. MCB14703 (DEIS) and MCB35808 (FEIS). The FEIS describes three project needs: 1) to "substantially improve traffic flow on the project areas' thoroughfares;" 2) to "substantially reduce travel time for persons traveling between the Currituck County mainland and the Currituck County Outer banks;" and 3) to "substantially reduce evacuation times from the Outer Banks for residents and visitors who use US 158 and NC 168 as an evacuation route." MCB35808. An improvement is considered substantial rather than minor if it is great enough to be largely noticeable to typical users and if the improvement offers benefits across much of the network opposed to a localized area. MCB35841.

B. Early Alternatives Evaluation

The FHWA and NCDOT considered a wide variety of alternatives for meeting the purpose and need. In complying with NEPA's obligation to analyze alternative actions, the agencies completed a 93 page Alternatives Screening Report in 2009. MCB9370-9462. This report documented the selection of detailed study alternatives and evaluated numerous other alternatives not carried forward for detailed study by using a multi-step process. MCB69457. FHWA and NCDOT considered multiple alternatives and combinations of alternatives in the 2009 Alternatives Screening Report including: the no-build alternative; shifting rental times; Transportation Systems Management ("TSM"); bus transit; four different ferry alternatives; two existing road ("ER") improvement alternatives; nine different Mid-Currituck Bridge ("MCB') corridor locations across Currituck Sound including one southern corridor, two northern corridors, and six central corridors (C1-C6); multiple alignment refinements, two design options (Option A and Option B); and four different combinations of a MCB and improvements to existing roads (MCB1-MCB4). MCB69456-57.

In addition to evaluating the conclusion made in the Alternatives Screening Report, FHWA and NCDOT discussed its findings in TEAC meetings and evaluated written comments from agencies and the public before selecting which alternatives would be considered in detail in the DEIS. MCB35812. FHWA used the following factors to screen alternatives: 1) an alternative's ability to meet the project purpose and need and its level of benefit in relation project purposes; 2) an alternative's ability to improve system efficiency; 3) an alternative's economic feasibility; and 4) an alternative's potential impacts on communities and natural resources. MCB35812. Alternatives eliminated from detailed study included: ER1, MCB1, and MCB3; Shifting Rental Times, TSM, Bus Transit, and Ferry Alternatives; and several additional

bridge corridors. MCB35812. ER1 and MCB1 were excluded from detailed study because these alternatives would result in "more than 200 total displacements. MCB35896. MCB3 was excluded from detailed study because hurricane clearance time benefits were not as robust as other alternatives considered and would require the building of a third outbound lane. MCB35896. Shifting rental times, TMS and bus transit were eliminated from detailed consideration because none of them would make more than a minimal reduction in congestion and travel time. MCB35896. Shifting rental times were also eliminated because FHWA, NCDOT, nor any other government agency can compel check out times and the market favors weekend check-ins/check-outs. MCB68871-72. The ferry alternatives were eliminated because they would not have noticeably reduced congestion or travel times, would be costly, and would require substantial dredging with resulting negative impacts on Currituck Sound. MCB35896. The alternative bridge corridor alternatives C1 and C2 were selected for further study because they best balanced community and natural resource trade-offs while meeting the project's purposes and needs. MCB 35896-97.

C. 2010 DEIS

In March 2010, FHWA circulated a new, fully revised Draft Environmental Impact Statement (DEIS). MCB14693-14929. FHWA evaluated five build alternatives in detail in the DEIS; ER2, MCB2/C1, MCB2/C2, MCB4/C1 and MCB4/C2. MCB69457; MCB14703. MCB4 was identified as the recommended alternative, but no recommendation was made between the two bridge corridor alternatives. MCB14719-20. Three public hearings were held in May 2010. MCB69450. Total attendance was about 386. MCB36030. NCDOT and FHWA received approximately 600 written comments between April 5 and June 7, 2010. MCB36031. A detailed summary of all public comments received, NCTA's responses, and copies of the public

hearing transcripts and original written comments received are presented in the *Stakeholder Involvement for Final Environmental Impact Statement Technical Report (MCB53124-53768))*. MCB36033.

D. 2012 FEIS

In January 2012, following public comment, FHWA responded to comments and issued a Final EIS. MCB69452; MCB35799-36092. FHWA and NCDOT preformed additional studies as part of the FEIS process to "assess the potential impacts of the Preferred Alternative and its refinements and to respond to DEIS comments." MCB69452. Additional studies performed included a biological assessment for federally protected species, a terrestrial and underwater archaeological survey, water quality studies, a quantification of the potential constraints on development associated with the no-build and ER2 alternatives, a revised noise impact assessment, and refined natural resource impact assessments to reflect stormwater management and construction plans. MCB69452; MCB36050-36080 (2012 FEIS Appendix D – List of Technical Reports and other Supplemental Materials).

In addition to the no-action alternative, the FEIS analyzed five additional alternatives: ER2, MCB2/C1, MCB2/C2, MCB4/C1, MCB4/C2. MCB35808-10. Two design alternatives were also considered for MCB2 and MCB4, Options A and B. MCB35810. These design options differ in terms of location of the toll plaza, and whether Maple Swamp is crossed by bridge or fill, among other things. MCB35810. These alternatives were evaluated with respect to 1) their effectiveness at meeting the project's purpose and need; 2) their cost and affordability; 3) their ability to meet a variety of state and federal regulatory requirements; and 4) the degree to which they minimize impacts to communities, cultural resources and natural resources. MCB35814.

To compare the impacts of the different alternatives, FHWA and NCDOT published an 187 page Indirect and Cumulative Effects Technical Report ("ICE Report") in 2009. MCB12383. The Ice Report sets forth an eight step process for assessing the indirect and cumulative effects of the alternatives considered and then discusses the Agencies findings. MCB12393; MCB35594. Based on comments received the ICE Report was revised in 2011 to consider the impacts of beach driving and accelerated sea level rise. MCB35601-35798. The ICE Report was revised again in 2012 to discuss the potential for impact related to an increase in trips to road-less areas and the potential for increased impacts resulting from an increase in permanent residents and day visitors to road-less areas. MCB46073-46114. The ICE Reports discuss induced growth from the project and compare each alternative for its potential to induce growth. *See e.g.*, MCB35684-5704.

As a result of the analysis discussed above along with public comment on the DEIS and continued coordination with environmental resource and regulatory agencies[4] (MCB69451; MCB69295), "MCB4/C1 with Option A and limited improvements to existing NC 12 and US 158 and primarily reversing the center turn land on US 158 between the Mid-Currituck Bridge interchange and NC 168 was selected as the project's Preferred Alternative. MCB69458. The Preferred Alternative also included refinements made to avoid or minimize impacts. MCB35810. Additionally, in 2011, the United States Army Corps of Engineers ("USACE") representatives indicated at a TEAC meeting that this alternative could be found to be the Least Environmentally Damaging Practicable Alternative ("LEDPA") in the context of Clean Water Act permit evaluation. MCB69450. Although not required to do so, the Agencies invited public comment on the FEIS prior to issuing a ROD. MCB34872; MCB36290.

[4] Between 2006 and 2011 over twenty TEAC meetings were held. MCB33065-69; MCB53791-92.

Work on the Record of Decision was paused following the approval of the Final Environmental Impact Statement for NCDOT to establish the state, regional and local transportation improvement funding priorities in accordance with the Strategic Transportation Investments legislation, which was signed into law in June 2013. MCB68807-68808. The MCB project was ranked using this funding formula and as a result, it was initially funded in the 2016-2025 State Transportation Improvement Program ("STIP") for right of way acquisition and construction to begin in 2019. The project remains funded in the current 2018-2027 STIP. MCB69483.

E. Re-evaluation.

In March 2019, the 2012 FEIS was re-evaluated because it had been more than three years since its approval. MCB69482; MCB68792; 23 C.F.R. § 771.129. The re-evaluation considered changes regarding the project, its surroundings, impacts and any new issues, circumstances or information that was not considered in the original document. MCB69483. It also considered any changes in laws or regulations that apply to the project. *Id*. In support of its reevaluation, FHWA prepared a 659 page Re-evaluation of the Final Environmental Impact Statement Study Report, ("Re-evaluation Study Report") discussing in detail new and updated information from the 2012 FEIS. MCB68784-69442. In its Re-evaluation, FHWA considered and responded to comments made on the 2012 FEIS and to comments received during the re-evaluation process. Id; MBC69483; MCB6952-MCB69337; MCB69010-69150 (responses to comments on the 2012 FEIS); and MCB69254-69337 (responses to comments made during the Re-evaluation preparation). Based on its review, FHWA found "that there were no new significant issues or impacts identified" and that therefore, the 2012 FEIS remained valid. MCB69479.

i. Re-evaluation of Project Purpose and Need

In the Re-evaluation Study Report, FHWA considered whether changes in travel forecast travel time updates, and hurricane evacuation predictions resulted in changes that would affect FHWA's reasoning for eliminating alternatives considered in the 2012 FEIS and found that it did not. MCB68870-82. In the Re-evaluation study report FHWA also considered whether additional alternatives proposed were reasonable and found that they were not. MCB68881. In re-evaluating the project, FHWA concluded that while "the specifics of the travel conditions generating each of the project needs have changed," the project area needs identified in the 2012 FEIS "still warrant improvements to the transportation system." MCB68838.

1. Updated traffic flow and congestion data still demonstrated project need.

In their Re-evaluation Study Report, FHWA evaluated updates to predicted traffic flow and congestion using 2040 traffic forecasts an updated 2016 Highway Capacity Manual ("HCM") and found that the main thoroughfares were still congested as of 2015 and forecast to become worse. MCB68838. Importantly, FHWA determined that the updated lower traffic forecast reduces the severity, but not the extent of congestion. MCB68840.

For existing conditions, the Re-evaulation Study Report documented that there would be an increase in total annual congested Vehicle Miles Traveled ("VMT") and a decrease in the miles of road operating with travel demand at or above road capacity from what was evaluated in the 2012 FEIS. MCB68841. Additionally, the Re-evaluation Study Report identified that, for the existing condition, the combination of updated traffic forecasts and road capacities indicated that assuming either constrained or unconstrained development, congested VMT will increase from the 2015 existing conditions. MCB68842; *see also* MCB57594-57626. Further, according

to the Re-evaluation Study Report in the existing condition, "[t]he updated congestion analysis found that in 2040 traffic demand greater than road capacity would not occur on the summer weekdays assuming constrained development" but would occur "on the summer weekdays from just north of the Duck commercial area to US 158" assuming unconstrained development. MCB68842. For the existing condition in summer weekends, the updated congestion analysis found that "2040 traffic demand generally will not exceed the capacity of NC 12 in Currituck County with the exception of the Pine Island area in the unconstrained development condition. MCB68843.

FHWA in its Re-evaluation Study Report also found that assuming either constrained or unconstrained development, by 2040, the miles of road with traffic demand exceeding capacity will increase in the no-build scenario. MCB68843. Further the Re-evaluation Study Report revealed that the "[m]iles of road with travel demand at or exceeding road capacity in the summer is expected to increase" under either the constrained or unconstrained development scenario. MCB68843-44. In its reevaluation, FHWA further determined that since the 2012 FEIS "there were no changes in the type and location of planned and expected development that would affect the future traffic forecasts." MCB69486. Thus, FHWA concluded that "with either unconstrained or constrained development, the project area's main thorough fares (US 158 and NC 12) are becoming increasingly congested, and congestion will become even more severe in the future. Therefore, the need to reduce future congestion levels remains." MCB68844.

2. Projected Travel time updates continue to demonstrate a need for the project

FHWA and NCDOT conducted an updated travel time analysis for the 2019 Re-evaluation using updated travel time studies conducted in the summer of 2015 and updated traffic forecasts. MCB68844-45. The updated summer travel time was slightly less than what

was predicted in the 2012 FEIS but are still higher than travel time without congestion. *Id*. Therefore FHWA determined that the findings from the FEIS that "[i]ncreasing congesting is causing travel time between the Currituck County mainland and the Currituck County Outer Banks to increase, especially in the summer" remains true and the project purpose of reducing travel time remained valid. *Id*.

3. Updated hurricane evacuation data

The Federal Emergency Management Agency ("FEMA") and United States Army Corps of Engineers ("USACE") hurricane clearance model used by emergency management officials to 'determine when to issue evacuation orders" was utilized by FHWA and NCDOT to model hurricane evacuation patterns in the 2012 FEIS. MCB68831. This model was revised in 2016. *Id*. The "primary change" from the previous model is that "the updated model assumes that two-thirds of evacuees choosing to evacuate northbound on US 158 will continue north to Virginia on NC 168 from the US 158/NC168 intersection" rather than the one-third assumed for the previous model. *Id*. The Re-evaluation Study Report also analyzed hurricane evacuation clearance times in the event NC 168 is closed at the Virginia boarder by the Commonwealth of Virginia to facilitate safe evacuation of the Hampton Roads area. MCB68832. To estimate 2040 clearance times for the Re-evaluation, FHWA and NCDOT added clearance times and STIP projects to the model. MCB68831. The National Hurricane Center warning timeframe on which the state requirement was based also changed from 24 to 36 hours for tropical storm warnings. MCB68832. Given this change, FHWA and NCDOT evaluated the new standard using the same six hour difference the state used in implementing its 18 hour requirement indicating that in addition to the State standard of 18 hours, 30 hours is also an appropriate standard to use as a measure of need. *See id* and MCB68845.

In the 2012 FEIS, FHWA and NCDOT found "Hurricane evacuation times for residents and visitors who use US 158 and NC 168 as a hurricane evacuation route far exceed the state-designated standard of 18 hours." MCB68845. The updated modeling preformed for the Re-evaluation shows that clearance time exceeds both the 18 and 30 hour goals, indicating there is still a need to reduce hurricane evacuation times. MCB68846; MCB69486; *cf.*, MCB68973-75 (sampling of 2019 Letters from the Rural Transportation Advisory Committee, Camden County, North Carolina, Currituck Chamber of Commerce, describing the existing single bridge crossing and the hurricane clearance time benefits of the project).

ii. Re-evaluation of Redesigned alternatives

In addition to reassessing the need for the project and the ability of alternatives to meet project needs, FHWA's Re-evaluation considered whether any changes to project design or changes within the project area resulted in significant new environmental impacts beyond what was considered in the 2012 FEIS. MCB68952. The Re-evaluation redefined the no-build alternative to remove projects within the project area that were no longer considered reasonably foreseeable and to add projects that had become reasonably foreseeable. MCB68794-97; MCB69485. The design of both the Preferred Alternative and ER2 were revisited in the Re-evaluation Study Report because "updated design year (2040) traffic forecasts were lower than the design year (2035) forecasts used in defining the Preferred Alternative and ER2 in the FEIS." MCB68794. As a result, FHWA's analysis showed that changes primarily reduced the area of impact for the alternatives considered. MCB69488; MCB68952; MCB68953-68955 (Table 6-1).

1. Preferred Alternative

Two primary changes were made to the Preferred Alternative from what was evaluated in the 2012 FEIS. MCB68800. First, a design revision eliminated the need for a median acceleration land at US 158's intersection Waterlily Road on the mainland. *Id*. Second, most of the improvements to NC 12 South associated with the Outer Banks bridge terminus were eliminated from design. *Id*. For most impact categories, there was either no change or changes decreased. MCB69487. For example, noise impacts from the Preferred Alternative have been reduced from 23 in the 2012 FEIS to just five, resulting in the least number of homes impacted of all alternatives. MCB68811. A few changes resulted in minor increases in impacts. The United States Fish and Wildlife Service ("FWS") determined that the Preferred Alternative "May Affect, Likely to Adversely Affect the northern long-eared bat and "May Affect Not Likely to Adversely Affect" the rufa red knot. MCB69488. With respect to the rufa red knot, the Re-evaluation found that increased beach traffic could be a source of increased effects, but that the potential increase in beach driving "would not likely create a new form of impact." *Id.* Additionally, the area used for beach driving would not change under the Preferred Alternative. *Id*. With respect to the northern long-eared bat, an already existing programmatic biological opinion would insure compliance with the Endangered Species Act. *Id*. Impacts to cultivated land increased by 6.7 acres primarily at the US 158/Mid-Currituck Bridge interchange, but when evaluated along with other changes there was a reduction in farmland impact. MCB69489. There is also a minor increase in wetland clearing associated with the Maple Swamp bridge associated with the change in the US 158/Mid-Currituck Bridge interchange configuration. *Id*. This change was made in part to minimize wetland fill impacts which were reduced by nearly half from 8.3 to 4.2 acres. *Id*.

The re-evaluation analysis revealed that the Preferred Alternative would result in reduced congestion by "eliminating travel demand above the capacity of the road through the project area's road network with only one exception. MCB68866. Additionally, FHWA found that the Preferred Alternative would result in substantially reduced travel times even beyond what was forecast in the 2012 FEIS. MCB068867. The re-evaluation study report found that with respect to hurricane clearance times in 2040, the Preferred Alternative would be substantially better than the no action alternative, but not as good as ER2 so long as Virginia's borders remain open. MCB68867-69. However, the Preferred Alternative was the only alternative that offered a second route off of the Outer Banks for Northbound evacuees if Virginia were to close its borders to evacuees. MCB68868; MCB69071.

2. ER2

The ER2 alternative was revised to add a third outbound evacuation lane on US 158 between NC 168 and the Wright Memorial Bridge. MCB68804. This lane would be for evacuation use only. *Id*. Additionally, the ER2 alternative design was revised to widen US 158 into a "six-lane superstreet between the Wright Memorial Bridge and Grissom Street east of the existing US 158/NC 12 intersection." *Id*. The ER2 revision also included improving the intersection of US 158, NC 12, and the Aycock Brown Welcome Center entrance and a widening of NC 12 to three lanes between US 158 and the existing three-lane section in Duck. *Id*.

The additional analysis performed for the re-evaluation made clear that ER2 would not address congestion on NC 12 and would make the unconstrained development scenario more likely. MCB68867. While the Re-evaluation Study Report showed that ER2 would result in reduced travel time, the reductions were substantially less than the Preferred Alternative and below what they were projected to be in the 2012 FEIS. *Id*. Additionally, the re-evaluation

showed that ER2 would result in increased relocations if the ER2 alternative were constructed. MCB69488; MCB68954. The ER2 alternative as revised would also result in additional shading impacts to Jean Guite Creek, which would need to be accounted for in any Coastal Management Act permit issued for the project. MCB69488. The FWS has designated the ER2 alternative as "May Affect, Likely to Adversely Affect" the northern long-eared bat. MCB69488. An already existing programmatic biological opinion would insure compliance with the Endangered Species Act. *Id*.

iii. Project cost and funding analysis

FHWA requires projects with a cost greater than $500 Million to undergo a cost review workshop. MCB68806. The Preferred Alternative underwent at cost review workshop in December 2011 for the 2012 FEIS, and underwent a second cost review workshop in 2018 for the 2019 Re-evaluation. *Id*. The workshops included subject matter experts from FHWA and NCDOT who reviewed the cost estimates for accuracy and reasonableness. *Id*. Projected project costs have decreased between the 2011 cost review workshop and the ROD. MCB68807. While annual state appropriations for the project were withdrawn in 2013, The Strategic Transportation Investment Act ("STI") established the Strategic Mobility Formula to allocate NCDOT's major revenue sources. *Id*. "The Mid-Currituck Bridge project was scored using the new criteria" and NCDOT has allocated project funding sufficient to demonstrate "the state's reasonability to fund and deliver the project." *Id*. FHWA determined that although state matching funds and GARVEE bonds would be available to implement both the Preferred Alternative and ER2, because some funding sources are toll dependent, funding sufficient to construct ER2 has not been identified. MCB68808.

iv. Updated Sea Level Rise Data

In May 2016, an update to the 2010 *North Carolina Sea Level Rise Assessment Report* and 2012 Addendum was released. MCB68930. It included an assessment of sea level rise over 30 years from 2015 – 2045. MCB69330. This report concluded that by 2045 sea level rise across North Carolina would vary from 2.4 inches at Southport to 5.4 inches at Duck. MCB68930. Additionally, the report found that considering the Intergovernmental Panel on Climate Change's assessment, sea level rise at Duck could range from 5.5 and 10.6 inches with a high mean estimate of 7.1 inches. *Id*. The highest estimate in the report for sea level rise in 2045 was 10.6 inches. MCB69330. If that rate of sea level rise were to continue over 50 years, sea level rise would be 17.7 inches below the 23.2 inches and 39.4 inches discussed in the FEIS. MCB69330. The FHWA determined that although there are some uncertainties with respect to sea level rise, the updated projections did not extend beyond what was considered in the FEIS. MCB68931.

After considering all updates and changes to the project alternatives and the project footprint, and after considering all comments received, FHWA concluded that an SEIS was not required "because there are no substantial changes in the proposed action nor are there significant new circumstances or information relevant to environmental concerns." MCB69492; *see also*, MCB68952. In response to comments on sea level rise, FHWA explained that based on the draft update to the "2010 North Carolina Sea Level Rise Assessment Report, and 2012 Addendum from the NC Coastal Resources Commission Science Panel, the highest estimate for seal level rise by 2045 was 10.6 inches and that even that trend were to continue sea level rise would be 17.7 by 2050, which is still within the range of sea level rise discussed in the FEIS. MCB69330.

F. ROD

The ROD was published March 6, 2019. MCB69443. The Selected Alternative identified in the ROD is the Preferred Alternative identified in the 2012 FEIS with the design revisions based on the findings in the 2019 re-evaluation. MCB69447; MCB69458. The ROD describes the Selected Alternative as:

> construction of a 4.7 mile-long, two lane toll bridge (the Mid-Currituck Bridge) across Currituck Sound between the communities of Aydlett on the mainland and Corolla on the Outer Banks, an interchange between US 158 and the mainland approach road to the bridge, a bridge across Maple Swamp as a part of the mainland approach road, limited improvements to existing NC 12 and US 158, and primarily reversing the center turn land on US 158 to improve hurricane clearance times.

Id. In its ROD, FHWA found that the selected alternative would 1) "substantially improve traffic flow on the project areas thoroughfares;" 2) "substantially reduce travel time for persons traveling between the Currituck County Mainland and the Currituck County Outer banks;" and 3) "reduce substantially evacuation times from the Outer Banks for residents and visitors who use US 158 and US 168 as an evacuation route." *Id*. Important to FHWA's decision were "travel benefits; community, natural resource, and other impacts; public involvement comments; and financing and design considerations included in the FEIS and the [re-evaluation] study report." MCB69449. With respect to improved traffic flow, FHWA determined using updated traffic forecasts described in the Re-evaluation that, compared to the no-build and ER2 alternatives, the Preferred Alternative offers less severe congestion, a shorter duration of congestion on NC 12 in Dare County, the best reduction in the severity of congestion on the summer weekends, and best prevents travel demand from exceeding the capacity of NC 12 on summer weekends resulting in a backup on US 158. MCB69490. FHWA also determined that the Preferred Alternative offered the best travel time reductions of all the alternatives. Traveling

over the MCB would only take 11 minutes. MCB69490. Summer travel time on existing roads would also be substantially reduced under the Preferred Alternative. MCB69490 (Re-evaluation finding that summer travel time on US 158 to Albacore Street on existing roads would be 64 minutes less in 2040 under the Preferred Alternative compared to 19 minutes less compared to the ER2 alternative).

FHWA relied on these factors in making its decision. MCB69458. FHWA further relied on the fact that the selected alternative will "reduce the impact of accelerated sea level rise" by "providing an alternate route to and from the Outer Banks," the only route if there is a breach in NC 12 near the Dare/Currituck County line. MCB69460; MCB68868. In reaching the conclusion described in its ROD, FHWA considered the 2019 R-evaluation, the Re-evaluation Study Report, the 2012 FEIS, the 2010 DEIS, and all correspondence received between the FEIS and the date of the ROD. MCB69478. Based on the above, FHWA selected the Preferred Alternative, MCB4/C1 with Option A as refined in the 2019 Re-evaluation as the proposed action. MCB69479.

III. Procedural History

On April 23, 2019, Plaintiffs filed a civil action against the NCDOT, James H. Trogdon III, in his official capacity as Secretary, NCDOT, FHWA, and Edward Parker in his official capacity as Assistant Division Administrator, FHWA. Plaintiffs allege that the defendant agencies violated the Administrative Procedure Act ("APA") and NEPA in approving the ROD for the MCB project. Compl., ECF No. 1. Plaintiffs claim that FHWA violated NEPA, by conducting an arbitrary analysis of project alternatives, *Id*. at 45, 51, and failing to include in the EIS information essential to a reasoned choice among alternatives, *Id*. at 46, 48, 49, and 52. Plaintiffs also claim that FHWA violated NEPA and the APA by failing to supplement its EIS.

Id. at 43-44. In December 2019, FHWA lodged an administrative record in support of its specifically challenged action. ECF Nos. 20-45. FHWA supplemented its administrative record on March 13, 2020. ECF Nos. 66-70. Plaintiffs moved this court to complete and supplement the administrative record with several categories of documents. ECF Nos. 46-65. In August of 2020, the Court directed supplementation of the record with the 1995 Alternatives Study Report, the 1998 DEIS, and two letters related to funding under the Transportation Infrastructure Finance and Innovation Act ("TIFIA"). Order, ECF No. 74 at 5, 8. The Court also allowed for the supplementation of the record with a post-decisional letter from Plaintiffs and its attachments, but cautioned that "such material will not be reviewed to determine the correctness of the decision made." *Id*. at 7 (citation omitted). The Court otherwise denied Plaintiffs' motion. On February 5, 2021 Plaintiffs moved for summary judgment. ECF No. 89 ("Pls.' Br.").

STANDARDS OF REVIEW

I. APA

Claims challenging final agency action under NEPA are subject to judicial review under the APA, 5 U.S.C. §§ 704, 706. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999). Under the APA, agency decisions may only be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under the "arbitrary and capricious" standard is "highly deferential, with a presumption in favor of finding the agency action valid." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co*., 556 F.3d 177, 192 (4th Cir. 2009) (citation omitted). The reviewing court's only role is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," and "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977)

(citations omitted). In other words, "[a] party seeking to have a court declare an agency action to be arbitrary and capricious carries a heavy burden indeed." *Vill. of Bensenville v. FAA*, 457 F.3d 52, 70 (D.C. Cir. 2006) (citations and quotations omitted).

Judicial review of an agency action is particularly constrained when the agency was required to weigh a number of competing factors such as the "interrelationship among proposed actions and practical considerations of feasibility [and therefore demanded] a high level of technical expertise [such that it] is properly left to the informed discretion of the responsible federal agencies." *Kleppe*, 427 U.S. at 412 (citation omitted). Indeed, a 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." *Manufactured. Hous. Inst. v. EPA*, 467 F.3d 391, 398-99 (4th Cir. 2006) (citations and quotations omitted). Instead, the APA requires courts 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*. (citations and quotations omitted).

II. 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). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Therefore, "courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Am. Arms Intern. v. Herbert*, 563 F.3d 78, 86 n.12 (4th Cir. 2009).

ARGUMENT

FHWA and NCDOT spent decades analyzing the feasibility and potential environmental effects of the MCB project. FHWA's environmental review of the MCB project is thorough, scientifically and technically sound, and fully complies with the law. Plaintiffs make two principle arguments. Neither have merit. First, Plaintiffs have failed to prove that an SEIS is required. Second, Plaintiffs' claims that FHWA and NCDOT violated NEPA by failing to appropriately assess project impacts and evaluate alternatives do not withstand scrutiny. The administrative record demonstrates that the agencies appropriately considered each alternative's environmental and economic impacts before reasonably concluding that a toll bridge across Mid-Currituck sound was the Preferred Alternative. At bottom, Plaintiffs' arguments establish only a disagreement on questions committed to agency discretion. Those arguments fail, however, because "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378.

I. FHWA properly concluded that a supplemental EIS was not required

Plaintiffs contend that FHWA violated NEPA because it declined to supplement FHWA's 2012 FEIS. Pls.' Br. 20. At the time FHWA acted, the 1978 NEPA regulations required agencies to supplement an existing EIS when "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here 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(c)(1) (2019). Plaintiffs do not argue that there were substantial changes to the project, but rather that there was significant new information. But, as discussed below, the record makes clear that that is not the case here.

A. There is no significant new information undermining the purpose and need of the project

Plaintiffs assert that the Agencies ignored "new, significant, and relevant information" in the years between the publication of the FEIS and the ROD that require a SEIS. Pls.' Br. 20. But as discussed below, FHWA considered project changes and new information that have emerged since the 2012 FEIS, and concluded that the purpose of the project is still valid and that the circumstances did not merit a supplemental EIS. MCB69492; MCB68845-68847.

"Not every new circumstance requires a supplemental EIS." *Hickory Neighborhood*, 893 F.2d at 63 (citation omitted). A SEIS is only required if changes or new information present a "*seriously* different picture of the environmental impact of the proposed project." *New River Valley Greens v. U.S. Dep't of Transp.*, 161 F.3d 3 (Table), No. 97-1978, 1998 WL 633959, at *4 (4th Cir. Sept. 10, 1998) (quoting *Hickory Neighborhood,* 893 F.2d at 63). FHWA regulations require the agency to issue a supplemental FEIS only when it identifies "[n]ew information or circumstances . . . [that] would result in significant environmental impacts not evaluated in the [FEIS]." 23 C.F.R. § 771.130(a)(2). The regulations also state that a supplemental EIS is not necessary where changes result in a lessening of adverse environmental impacts 23 C.F.R. § 771.130(b). The word "'significant' carries the weight of [the] regulation. Without it, NEPA compliance would paralyze executive agencies, forcing them to perpetually reevaluate proposed projects." *New River Valley Greens*, 1998 WL 633959, at *4 (citation omitted) ; *see also Habitat Educ. Center, Inc. v. U.S. Forest Service*, 673 F.3d 518, 528 (7th Cir. 2012) ("Supplementation is not required every time new information comes to light – otherwise, agency decisionmaking would be rendered 'intractable, always awaiting updated information only to find the new information is outdated by the time a decision is made.'") (citation and quotations omitted).

Plaintiffs contend that three new kinds of information warrant a SEIS: (1) new traffic forecasts; (2) updated growth and development projections and (3) new sea level rise data. Pls.' Br. 20. But, as discussed below, FHWA concluded that there was no such significant information warranting the preparation of an SEIS after analyzing updated traffic, hurricane clearance and sea level rise information and reports. MCB 69492; MCB68822; MCB46256-366 (2016 updated traffic forecasts); MCB68831; (2016 updated FEMA/USACE hurricane clearance model); MCB68930-931 (updated sea level rise projections).

i. FHWA and NCDOT took a hard look at updated traffic forecasts and determined that a SEIS was not needed

Plaintiffs' claim that updated traffic forecasts undermine the stated need for the toll bridge, raise questions about the financial viability of the project and demonstrate alternative solutions are more viable such that a SEIS was necessary. Pls.' Br. at 22-23. But, contrary to Plaintiffs' statements, FHWA in its re-evaluation process performed updated traffic modeling to provide updated traffic forecasts to 2040 (MCB57455, MCB68822; MCB68850-51) and considered each of the issues Plaintiffs identify. None have merit.

First, FHWA's updated traffic forecast showed that the project area needs identified in the 2012 FEIS "still warrant improvements to the transportation system." MCB68838. This is true even accounting for constrained growth. *See e.g*. MCB34954; MCB 68848049. Specifically, FHWA's Re-evaluation showed that traffic congestion, particularly during the summer weekends was still problematic and that travel time from the Currituck mainland to the Currituck Outer Banks still needed to be reduced. *See* supra at 5. For example, the total annual congested VMT as of 2015 was 16.4, but by 2040 under a no-build scenario it is projected to be 34.4 (an increase of 109 percent) assuming constrained development and 96.8 assuming unconstrained development (an increase of 490 percent). MCB68839; MCB68842. Thus,

FHWA reasonably concluded that the project's purpose and need of reducing congestion levels remained. MCB68844. The updated traffic forecast also showed that updated 2040 travel time projections were still high in the no-action scenario. MCB68844. Indeed, the 40.9 mile trip between the Currituck County mainland and the Currituck County Outer Banks was projected to take approximately 2 hours in 2040 on a summer weekday and just over three hours on a summer weekend in the no action scenario. MCB68845. Therefore, FHWA reasonably determined that the need to reduce travel time between the Currituck County mainland and the Currituck County Outer Banks still existed. MCB68844-45. This is true even though growth and development have slowed. MCB68825. This is because updated growth and development data were used in developing the updated traffic forecasts the results of which are described above. MCB68823-27.[5]

Second, changes in hurricane evacuation times did not warrant a SEIS. Plaintiffs suggest that the new data, showing that the hurricane clearance times do not meet state standards warrants the preparation of an SEIS because it undermines the need of the project and makes other alternatives more attractive. Pls.' Br. at 22 and 36-37. Yet, the fact that none of the alternatives meet state standards is not new. MCB34881. Further, the new data considered in the Re-evaluation, showed that the Preferred Alternative would reduce hurricane clearance time from 37.2 to 32.3 hours, a reduction of nearly five hours. *See* MCB68850. While five hours might not seem like much, it can make a big difference. *See* MCB68869 ("Four hours of clearance time could translate into roughly 16,000 additional evacuees being able to reach a point of safety"). Therefore, FHWA reasonably determined that there was no significant change

[5] Plaintiffs suggest that the Agencies did not consider the impacts of this new data, Pls'. Br. at 25-26, but Plaintiffs are incorrect. As the agencies have clearly stated, it is only with respect to toll revenue and financing that the Agencies have not yet considered updated growth and development projections. MCB68827.

in traffic data that "undermined" the Preferred Alternative's ability to meet the project purpose and need for hurricane evacuation. *See* supra at page 5 (describing how project needs were defined and met).

Third, Plaintiffs' incorrectly assert that new traffic data made the project "less financially viable" and required a SEIS. Pls.' Br. 24. FHWA explained that a new traffic and revenue forecast would consider new development and traffic growth trends in determining the toll revenue the bridge could generate. MCB68827. As explained above, if the new traffic and revenue forecast were to determine that toll revenue would be less than predicted in Re-evaluation, the reduced toll funding could be made up in other areas. *See* MCB68808. Therefore, the agency reasonably determined that there had been no change in the financial feasibility of the project. *Id*. In response to Plaintiffs' concerns about the financial viability of the project, FHWA further explained that the MCB project was scored using new state criteria and as a result, NCDOT allocated project funding that "demonstrates the state's commitment to fund and deliver the project." MCB69295.[6] Because the State has committed to funding the project, FHWA reasonably determined that the project is financially feasible. Where, as here, the agency, relied on evidence of the funding possibilities, and their conclusion is "well within the scope" of their routine determinations, so it is due deference. *Cf. Sierra Club v. Kenna*, No. 1:12-CV-1193-AWI-JLT, 2013 WL 144251, at *13 (E.D. Cal. Jan. 11, 2013); *see Lincoln v. Vigil*, 508 U.S. 182, 198 (1993) (holding that the "generality" of "feasibility and prudence" standards "underscores the administrative discretion inherent in th[ose] determination[s] . . . .") (citation omitted); *City of L.A. v. U.S. Dep't of Commerce*, 307 F.3d 859, 870 (9th Cir. 2002) (deferring under the APA to an agency's feasibility conclusion).

[6] FHWA further explained that should the revised revenue forecasts show that MCB could not generate sufficient toll revenue to be financed, project planning would be terminated. MCB 69279

Because the FHWA and NCDOT are the experts at predicting future transportation patterns, and because they relied upon methods relevant to their expertise, they are entitled to deference, *see Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426-29 (2011) ; *Marsh*, 490 U.S. at 377-78, deference to agency "experts performing traffic modeling . . . ." is appropriate. *See also Karst Envtl. Educ. & Prot., Inc. v. FHWA*, No. 1:10-CV-00154-R, 2011 WL 5301589, at *9 (W.D. Ky. Nov. 2, 2011). A court cannot "designate itself as a 'super professional transportation analyst . . . .'" *Druid Hills Civic Ass'n, Inc. v. FHWA*, 772 F.2d 700, 711 (11th Cir. 1985) (citation omitted); *Webster*, 685 F.3d at 422 ; *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999); *North Carolina Alliance for Transp. Reform Inc., v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 688 (M.D.N.C. 2001) ("The court defers to Defendants' conclusion that a need for the project existed even with the reduced traffic projections."). Instead, "[t]he NEPA process involves an almost endless series of judgment calls," and "[t]he line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts." *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987). The FHWA and NCDOT consulted experts, obtained comments from other state and federal agencies, and obtained public comment. *See e.g.,* MCB69394-69440 (Appendix H to the Re-evaluation Study Report – Agency Coordination); see also supra at 9 n.4 (describing agency coordination and TEAC meetings). By completing that work, the APA entitles them to deference in concluding that the MCB project still has utility and that therefore updated traffic projections were not significant. Indeed, determinations of significance, which are the same as determinations of negligibility, are "classic example[s] of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh*, 490 U.S. at 376. Because the FHWA made a factual

determination based upon the evidence before it, relied on expert analyses, and explained that decision, deference is appropriate. *See id*. at 376-77.

ii. FHWA rightly determined that updated sea level rise projections did not necessitate additional environmental review.

Plaintiffs claim that FHWA was required to issue an SEIS because new sea level rise data called in to question the utility and financial feasibility of a toll bridge over Mid-Currituck sound. Pls.' Br. 27. This argument is incorrect for at least three reasons.

First, FHWA and NCDOT considered changes in sea level rise projections in the FEIS and again in the Re-evaluation and acknowledged risk and uncertainty regarding future sea level rise but determined that the project was still useful and that the "findings of the FEIS related to sea level rise are unchanged." MCB35047-49; MCB68930-31. Specifically, in the 2012 FEIS, FHWA analyzed sea level rise in the project area and on the Preferred Alternative and concluded that by 2100 portions of the existing project road area would be inundated or at risk during a storm surge" and that "the only parts of the Preferred Alternative that would be affected by 1 meter of sea level rise are roadway components on the mainland along US158 in the Waterlily Road area." MCB68930. The 2016 Sea level rise assessment through 2045 did not indicate that sea level rise would increase beyond what FHWA already considered. MCB68930-31. Indeed, the MCB could provide a benefit in certain sea level rise scenarios by providing an alternative route off the Outer Banks if sea level rise were to result in a breach in NC 12 near the Dare/Currituck County line. MCB68811. Were such an event to occur, a bridge across the Mid-Currituck sound would be the only way off the Currituck County Outer Banks aside from driving

on the unpaved beach into Virginia *Id.*; MCB69071[7]. Thus, FHWA determined that sea level rise projections did not impact the project need or utility. MCB68931.

Second, FHWA made a reasoned determination regarding the financial feasibility of the Preferred Alternative and in doing so recognized that even if rising sea levels affected funding from toll revenues, other sources would be utilized to finance the bridge. *See* supra at 27.

Third, Plaintiffs' claim that this court should second guess FHWA and NCDOT's sea level rise predictions utilized in the 2019 Re-evaluation and instead rely on Plaintiffs chosen projections should be rejected. Pls.' Br. 27. Where, as here, the projections involve matters requiring special expertise, courts defer to the agency. *Friends of Capital Crescent Trail v. FTA*, 877 F.3d 1051, 1059 (D.C. Cir. 2017) ("If an agency's decision not to prepare a SEIS turns on a 'factual dispute the resolution of which implicated substantial agency expertise,' the court defers to the agency's judgment." (citation omitted)). Indeed, "[t]he Fourth Circuit has explained that 'in matters involving complex predictions based on special expertise, a reviewing court must generally be at its most deferential.'" *Ohio Valley Envtl. Coalition, Inc., v. U.S. Army Corps of Engineers*, 883 F. Supp. 2d 627, 636 (S.D.W.Va. 2012), *aff'd*, 716 F.3d 119 (4th Cir. 2013) (citation omitted). S*ee Am. Elec. Power Co.*, 564 U.S. at 428-29 (courts should defer in matters of technical expertise because "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.").

Here the Court should defer to the FHWA's use of the North Carolina Sea Level Rise Assessment Report because FHWA made reasonable conclusions based on this revised data to

[7] Such an evacuation route would present a challenge for anyone in a vehicle without four wheel drive. See. e.g., https://www.fws.gov/refuge/Currituck/visit/plan_your_visit.html ("Beach refuge roads are the only roads open to vehicles, which must be four wheel drive to access."). Without the bridge, it would be the only evacuation route in the unlikely event that Virginia closes its borders.

determine whether or not supplementation was required. *See Vill. of Bensenville*, 457 F.3d at 71 (upholding FAA's use of a 2002 as opposed to a 2003 Terminal Area Forecast in part because of the "administrative necessity of cutting off new data at some point"); *see also Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 442 (5th Cir. 1981) ("[A]n administrative process can never come to an end if the process must begin again every time new information is available."). And while Plaintiffs take issue with the fact that the FHWA did not utilize NOAA's 2017 data, FHWA reasonably acknowledged future risks and uncertainty regarding sea level rise and storm events and determined that the need for the project still existed. MCB68931.

Importantly, Plaintiffs' preferred sea level rise projections do not change the landscape so much that it would alter the need for the bridge. (*Compare* MCB78267 chart 6 showing an "extreme" 20 millimeter per year sea level rise rate in 2040 with MCB35047-49 evaluating sea level rise at .63 centimeters per year from 2008 to 2100). Regardless of which future sea level rise projections are more accurate fifty years from now, FHWA and NCDOT have demonstrated that a need for the project exists now and will continue to be needed given traffic projects until at least 2040. Thus, even if the Court were to accept Plaintiffs' argument that their preferred report presented more accurate sea level rise data fifty years into the future it, does not alter FHWA's finding of need. Nor does it change the landscape of environmental impacts resulting from the project or its alternatives. *Id*. Indeed since the FEIS concluded that much of the area will be inundated by 2100 at 23.3 inches of seal level rise, the conclusion that the area will be inundated at 81.1 inches instead is consistent with the findings considered in the FEIS and Re-evaluation that much of the area would be inundated by 2100. *Compare* MCB78267-68 with MCB68930-31. "[N]ew information is not significant because 'it merely confirmed concerns that . . . [were] already articulated and considered." *Protect our Communities Foundation v. LaCounte*, 939

F.3d 1029, 1041 (9th Cir. 2019) (citation omitted); *cf. Vill. of Bensenville*, 457 F.3d at 71 (upholding an agency's decision even though it did not used the most current data available when, among other things, the later data would not alter its conclusions).

In sum, Plaintiffs' focus on projections of inundation levels in 2100 misses the mark. Even if inundation levels are higher eight decades from now than predicted in the Re-evaluation, it doesn't negate the need for the project in 2021 or 2040. A supplemental FEIS is necessary only if the new circumstances present "a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned . . . ." *Jersey Heights Neighborhood Ass'n*, 174 F.3d at 190 (citations and quotations omitted). Because Plaintiffs' preferred report does not present a "seriously different picture" of the environmental impact of the MCB, FHWA rightly determined that it did not necessitate the preparation of an SEIS. "An agency need not conduct a new assessment 'every time it takes a step that implements a previously studied action, so long as the impacts of that step were contemplated and analyzed by the earlier analysis.' To require otherwise would be an exercise in superfluity." *Stand Up for Cal! v. U.S. Dep't of Interior*, 410 F. Supp. 3d 39, 57 (D.C. Cir. 2019) (citation omitted) (finding an SEIS unnecessary when a new parking structure increased parking but did not change environmental impacts because the new parking area was already mostly paved); *Friends of Capital Crescent Trail*, 877 F.3d at 1062 (finding an SEIS was not required when new information did not affect the environmental impact of the selected alternative nor did it have an effect that would alter the selection of one alternative over another).

B. FHWA is not required to re-evaluate previously rejected alternatives or consider Plaintiffs' commissioned alternative.

Plaintiffs further claim that an SEIS is needed because the new information indicates that other alternatives are more suited to fit the project purpose. Pls.' Br. 20. Plaintiffs wrongly state

that FHWA and NCDOT ignored new information about an alternative Plaintiffs submitted and suggests is viable Pls.' Br. 29 (describing the "Improved ER2" alternative Plaintiffs commissioned). But FHWA is not obligated to re-evaluate an already rejected alternative. This is especially true here where the agency had already articulated a reasoned basis for rejecting an alternative and responded to public comment regarding that alternative. *Friends of Capital Crescent Trail*, 877 F.3d at 1063 ("Agencies need not reanalyze alternatives previously rejected, particularly when an earlier analysis of numerous reasonable alternatives was incorporated into the final analysis and the agency considered and responded to public comment").

Nor is FHWA required to issue an SEIS because Plaintiffs commissioned a new study regarding a newly developed alternative. If all it took to trigger a SEIS was for a disgruntled party to commission a new study regarding a rejected or novel alternative, NEPA review would never be finished. *See, e.g., N. Idaho Cmty. Action Network v. U. S. Dep't of Transp.*, 545 F.3d 1147, 1155 (9th Cir. 2008) ("An agency is not required by NEPA to consider new alternatives that come to light after issuance of the EIS[.]") *See Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984) (supplementation only needed when "new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS"). *See also Protect our Communities*, 939 F.3d at 1040 ("Whether new information is sufficiently significant to necessitate an SEIS 'turns on the value of the new information to the still pending decision-making process.'" (citation omitted)).

C. FHWA Reasonably Determined that the FEIS' Conclusion with Respect to the Preferred Alternative did not Change

Nor did any new information require a SEIS to explore the continued viability of the Preferred Alternative. Having determined that the project purpose and need still remained,

FHWA re-evaluated whether the updated traffic information changed the Agencies' conclusion with respect to the Preferred Alternative and found that it did not. MCB68809.

First, FHWA compared the duration of congestion on NC 12 in Dare County, with the No-Build and ER2 alternatives and determined that while ER2 would not reduce congestion, the Preferred Alternative would result in between 1-5 fewer hours of congestion. MCB68809. Further, FHWA determined that the "shorter duration of congestion on NC12 on the summer weekend make it unlikely that the queues on NC 12 would back up on to US 58 . . . and disrupt US 158 traffic. MCB68809. The Preferred Alternative also resulted in significantly better travel time reduction from the mainland to the Outer Banks. MCB68809-10. Thus, after conducting the re-evaluation, FHWA determined that the Preferred Alternative still provided the greatest summer travel benefits. MCB68809.

Second, FHWA considered updated information related to project impacts and found that new information still supported the selection of the Preferred Alternative. In rendering this conclusion, FHWA considered a wide spectrum of impacts. MCB6884-68947. FHWA compared community impact considerations and determined the revised design of the Preferred Alternative in the Re-evaluation reduced the potential for adverse community impacts along NC 12 and thus was an improvement from the 2012 FEIS. MCB68810. After consultation with the State Historic Preservation Office, FHWA determined that the 2012 FEIS' conclusion that the Preferred Alternative would have "No Effect" or "No Adverse Effect" on properties listed on or eligible for inclusion in the National Register of Historic places had not changed. MCB68810. With respect to natural resource impacts, the Re-evaluation analysis showed that for most categories of impacts evaluated in the FEIS impacts decreased or did not change and the USACE indicated that the Preferred Alternative would be the LEDPA. Supra at 9. Noise impacts from

the Preferred Alternative would still impact the fewest homes, even fewer than projected in the 2012 FEIS. MCB68811. Finally, FHWA determined that the most recent preliminary Plan of Finance includes changes in funding sources from those discussed in the FEIS, North Carolina's ability to build operate and maintain the Preferred Alternative has not changed and the funds allocated in the preliminary Plan of Finance for the project not supported by toll revenues would be insufficient to fund ER2. MCB68812. Thus, after accounting for Post-FEIS changes to funding forecasts and comparing alternatives in light of the changes made, FHWA still selected the Preferred Alternative.

Third, FHWA analyzed whether changes in traffic projections warranted further evaluation of the previously rejected alternatives including the shifting arrival times alternative. MCB68870—72. Although not required to, FHWA and NCDOT also took a hard look at Plaintiffs newly proffered composite alternative. MCB68882. FHWA's analysis showed that after factoring in updated traffic projections, shifting rental times provided a 1.7 percent reduction in annual congested VMT as opposed to the 1 percent reduction estimated in the 2009 Alternatives Screening Report. MCB68870. However, FHWA reasoned that "[t]he most important factor on the viability of shifting rental times as a reasonable alternative is its likelihood to be implemented." MCB68871. In originally determining that this alternative was not reasonable, FHWA and NCDOT recognized that neither NCDOT nor any other state agency had authority to compel implementation of this alternative. *Id*. The possibility that legislation to implement this alternative would be politically palatable was also deemed to be highly unlikely given that interviews with property management companies conducted in 2015-2017 found that week long rentals were still necessary for rental companies to make a profit and that tourists preferred week-long Saturday to Saturday rentals. MCB68872. Therefore, FHWA reasonably

concluded that shifting rental times was not a viable alternative even with the marginal increase in this alternatives potential benefits. FHWA also reasonably eliminated Plaintiffs proposed composite alternative because it relied on, among other things, shifting rental times and a ferry operations[8] which the agency determined to be unreasonable because it neither reflected market realities not had acceptable environmental impacts. MCB68871-82. Plaintiffs may disagree, but simple disagreement with an agency's conclusions does not demonstrate the agency acted arbitrarily or capriciously.

Fourth, FHWA considered changes in growth and development projections when re-evaluating the purpose and need of the project and reasonably determined that the project was still needed. MCB68838- MCB68844. Contrary to Plaintiffs' assertion, FHWA analyzed changes in development projections as they related to project need. *Id*. The language from the Re-evaluations Plaintiff cite relates only to funding considerations, and resource impacts. See supra 26 n.5. FHWA also looked at revised land use plans in Currituck and Duck counties and determined that there had been no substantial changes in planned development in these counties. MCB46273, MCB46366. For these reasons, Plaintiffs' reliance on *La. Wildlife Fed'n., Inc. v. York*, 761 F.2d 1044 (5th Cir. 1985) is misplaced. In *La. Wildlife Fed'n.*, the Fifth Circuit considered whether supplementation was required when the Corps assumption with respect to the percentage of land that would be cleared regardless of the project changed. 761 F.2d at 1050-52. The Firth Circuit held that the decision not to file was unreasonable in light of new information. *Id*. at 1051. Importantly, it stated, "[a]lthough the Corps need not necessarily prepare a supplemental EIS, it must reconsider its assumption that these acres will be cleared regardless of the project." *Id*. at 1051, 1053. That's exactly what FHWA did in its 2019 Re-evaluation. The

[8] Ferry alternatives were reconsidered in the Re-evaluation Study Report and were determined to be unreasonable due to the potential community and natural resource impacts which were found to "substantially greater" than any of the other alternatives considered. MCB68881.

extensive record in the case makes clear that in its Re-evaluation of the FEIS and supporting documentation, FHWA took a hard look at new information and reasonably concluded that a SEIS is not required.

Finally, Plaintiffs point to *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, and claim that the new traffic forecasts constitute a change requiring a SEIS. Pls.' Br. at 24-25. But Plaintiffs' reliance on *Alaska Wilderness* is misplaced. In *Alaska Wilderness*, the Forest Service was required to prepare an SEIS before embarking on new timber sales when it eliminated the no action alternative primarily because it would not meet minimum contract requirements, when the contract was canceled. *Alaska Wilderness*, 67 F.3d 723, 730 (9th Cir. 1995). The court determined that because the Forest Service took into account other needs and uses only to the extent they permitted contract requirements to be met, the cancelation of the contract "clearly [] affects the range of alternatives to be considered." *Id*. Here there has been no such change that would "affect[] the range of alternatives to be considered." *Id*. FHWA did not eliminate alternatives from detailed consideration in the FEIS because they could not be tolled. *See* supra pg. 7-10 (detailed consideration of non-tolling alternatives). As described in detail supra 11-12, after taking a hard look at the changed traffic forecasts, FHWA determined that updated traffic projections have lessened the degree to which each project need remained, but it they by no means eliminated any of the project needs and certainly no alternatives were eliminated based on their inability to meet a need that no longer existed. Further, FHWA re-evaluated many alternatives, including those previously eliminated from detailed consideration and found that its ultimate conclusion did not change. MCB68882.

Indeed the D.C. circuit has recognized that "[o]ver the course of a long-running project, new information will arise that affects, in some way, the analysis contained in a prior FEIS.

NEPA does not require agencies to needlessly repeat their environmental impact analyses every time such information comes to light." *Friends of the Capital Crescent Trail*, 877 F.3d at 1060. In *Friends of the Capital Crescent Trail*, plaintiffs argued that new data related to a change in metro ridership necessitated the preparation of an SEIS. *Id*. at 1057. The Court disagreed and held that no SEIS was required even though under one of the new scenarios one of the project purpose and needs would not be met, because none of the alternatives would meet that need. *Id*. at 1059-60. Importantly, the court noted that unlike *Alaska Wilderness*, the case did not involve "a basic change [which] undercut the rationale upon which the agency action depended" finding that even with reduced ridership, the rail line still met some of the project purposes. *Id*. at 1061.

II. The FHWA and NCDOT's Alternatives Analysis Satisfied NEPA

Plaintiffs' arguments with respect to FHWA and NCDOT's alternatives analysis is nothing more than a re-packaging of their failed arguments that the project is no longer needed and are no more persuasive. Here, the FHWA and NCDOT analyzed a reasonable range of alternatives for satisfy NEPA. Ineffective alternatives were reasonably eliminated and the remaining alternatives were objectively analyzed. As the Fourth Circuit has recognized, "there must be an end to the process somewhere. Otherwise, so long as there are unexplored and undiscussed alternatives that inventive minds can suggest, there would never be a federal project." *Providence Rd. Cmty. Ass'n v. EPA*, 683 F.2d 80, 83 (4th Cir. 1982) (citation and quotations omitted).

A. FHWA and NCDOT analyzed a reasonable range of alternatives.

FHWA and NCDOT analyzed a full range of reasonable alternatives in compliance with NEPA. It prepared an in depth Alternative Evaluation Report. *See* supra at 6. The DEIS and

FEIS included several alternatives and combinations of alternatives. Supra 6-10. And the Re-evaluation considered Plaintiffs' newly proffered alternative even though the agency had no obligation to do so. MCB68882. Plaintiffs' argument that FHWA and NCDOT failed to consider a reasonable range of alternatives because the agency did not give detailed consideration to their preferred alternative ignores the record in this case. Pls.' Br. 29-31. The 1978 NEPA regulations provide that an EIS must "[r]igorously explore and objectively evaluate all reasonable [project] alternatives." 40 C.F.R. § 1502.14(a) (2019). Agencies have "substantial discretion in [their] evaluation of alternatives," *North Carolina v. Fed. Aviation Admin.*, 957 F.2d 1125, 1135 (4th Cir. 1992), and an EIS "is satisfactory if the treatment of alternatives, when judged against a 'rule of reason,' is sufficient to permit a reasoned choice," *Route 9 Opposition Legal Fund v. Mineta*, 213 F. Supp. 2d 637, 642 (N.D.W.Va. 2002) (citation omitted); *Hart & Miller Islands Area Envtl. Grp., Inc. v. Corps of Eng'rs of the U.S. Army*, 505 F. Supp. 732, 749 (D. Md. 1980). Overall, "[i]f the agency has followed the proper procedures, and if there is a rational basis for its decision, [a court] will not disturb its judgment." *Hodges v. Abraham*, 300 F.3d 432, 445 (4th Cir. 2002). To that end NEPA does not require an agency to evaluate every conceivable alternative. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council Inc.*, 435 U.S. 519, 551 (1978). Indeed, "[t]ime and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative." *Id.*; *See also Laguna Greenbelt, Inc. v. U. S. Dep't of Transp.*, 42 F.3d 517, 524-25 (9th Cir. 1994) ("Thus, while [Plaintiff] points to some alternatives that might have been considered or discussed more fully, the 'detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable.'" (citation omitted)).

Here, FHWA's analysis evinces that it made a "reasoned choice." *Route 9 Opposition Legal Fund,* 213 F. Supp. 2d at 642. The agency considered numerous alternatives in the 93 Page Alternatives Evaluation Report supra at 6. Moreover, five alternatives were considered in the DEIS, and the FEIS, including three bridge construction alternatives, a no-bridge alternative that widens the existing road, and a no-build alternative. Supra at 7-10. FHWA also explains why it rejected additional alternatives considered but eliminated from detailed study including three additional road and/or bridge alternatives, lower cost alternatives that attempted to make more efficient use of the available road capacity on US 158 and NC 12 (shifting vacation housing rental times, minor improvements to the road system, and bus transit), ferry alternatives, and multiple Mid-Currituck Bridge corridor alternatives. Supra 6-7. It then engaged in a thorough re-evaluation of the project before finally selecting the Mid-Currituck Bridge. Supra 11-18. In its Re-evaluation, FHWA considered Plaintiffs' newly proffered alternative although neither NEPA or its own regulations required this analysis. Supra 35. The Re-evaluation also assessed previously eliminated alternatives in light of new information. MCB68882. Thus, FHWA's analysis was reasonable and fully complied with NEPA. *See Nat'l Audubon Soc'y v. U. S. Army Corps of Engineers*, 420 F. Supp. 3d 409, 422 (E.D.N.C. 2019), *aff'd*, No. 19-2151, 2021 WL 1152922 (4th Cir. Mar. 26, 2021) ("If the agency has followed the proper procedures, and if there is a rational basis for its decision the court, will not disturb its judgment." (quoting *Abraham*, 300 F.3d at 445).

B. FHWA and NCDOT reasonably eliminated ineffective and unreasonable alternatives

Plaintiffs also argue that FHWA and NCDOT erroneously rejected some alternatives from detailed consideration. Specifically, Plaintiffs assert that the agency should have

considered alternatives with shifting rental times, ferries, public transit and minor road improvements or a combination of these alternatives, Pls.' Br. 31. However, where as here, alternatives do not meet the project's purpose and need, they may be eliminated from further study. *See Vermont Yankee*, 435 U.S. at 551 ("Common sense also teaches us 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 mind of man.").

Here FHWA and NCDOT reasonably discarded the shifting rental time alternative and Plaintiffs' newly identified alternative because it would not substantially reduce travel times and included components that were deemed to be unreasonable by the agencies. Supra 6-7. Plaintiffs offer no support for their claim that the agencies' dismissal of the shifting rental time's alternative was arbitrary. Pls.' Br. 33. Nor can they. The record clearly demonstrates that the agencies clearly articulated their rational for deeming this alternative unreasonable. *See* supra 7. Nor have Plaintiffs shown that FHWA and NCDOT obscured the merit of this alternative. Pls.' Br. 33. Even if the agencies had presented shifting rental times data in the manner Plaintiffs prefer, it would not have changed FHWA's and NCDOTs reasoned decision to exclude this alternative on the ground of impracticability. *See* supra 7 (FHWA explaining that the primary reason for eliminating the shifting rental time alternative was impracticability).

Nor must the agency consider a composite alternative. Plaintiffs' reliance on *Davis v. Mineta* to suggest otherwise is misplaced. 302 F.3d 1104, 1122 (10th Cir. 2002), *abrogated on other grounds by Audubon Soc'y of Greater Denver v. U.S. Army Corps of Engr's*, 908 F.3d 593 (10th Cir. 2018).; *see* Pls.' Br. 34. The agency in *Davis* summarily eliminated alternatives from its Section 4(f) analysis by merely stating that they did not meet the Project's purpose and need. 302 F.3d at 1120. The Court, evaluating the agencies action to see if it met Section 4(f)'s

standard for alternatives evaluation, therefore held that the agency acted arbitrarily not merely because it did not include a composite alternative, but also that it failed to provide any supporting analysis. *Id*. at 1122. That is simply not the case here. In addition to finding that the alternatives would not be as effective at meeting the project purpose and need as the alternatives considered in detail, FHWA and NCDOT eliminated shifting rental time because they were impractical and ferry alternatives because they were environmentally damaging. Supra 6-7. Plaintiffs' reliance on *NRDC v. Morton* is equally misplaced. Pls.' Br. 41. In determining that an agency issuing off shore oil leases was required to broaden its consideration of alternatives beyond measures which the agency or official could adopt, the court specifically distinguished single project cases like this one. 458 F2.d 827, 834-35 (D.C. Cir. 1972), (distinguishing single project cases and holding only that "[w]hen the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened.").

The agency therefore acted well within its discretion when it removed alternatives from further consideration that not only did not meet the project's purpose and need — which alone would suffice — but also had other significant flaws. *See City of Alexandria*, 198 F.3d at 867 (affirming the FHWA's decision to eliminate a ten-lane bridge alternative when only the proposed twelve-lane bridge would meet the capacity objectives of the project); *Ass'ns Working for Aurora's Residential Env't v. Colo. DOT*, 153 F.3d 1122, 1130 (10th Cir. 1998) (upholding the agency's decision to eliminate a mass transit alternative from detailed consideration under NEPA because it would not meet congestion relief goals); *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1541-42 (11th Cir. 1990) (same); *see also Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1140-42 (D.C. Cir. 1991) (Ginsburg, J.) (upholding an agency's decision

to eliminate 13 of 14 alternatives after preliminary analysis for failing to meet the purpose and need).

C. The EIS Reasonably Compared and Objectively Analyzed the Environmental Impacts of Alternatives.

Plaintiffs contend that FHWA violated NEPA because the EIS failed to objectively present alternatives in comparative form. Pls.' Br. 31. The record proves otherwise and Plaintiffs flyspecking is insufficient to overturn FHWA's reasoned NEPA analysis. There are at least three flaws with Plaintiffs' argument.

First, Plaintiffs' take issue with the discussion in the FEIS related to hurricane clearance times claiming that FHWA improperly compared alternatives with respect to a third outbound lane. Pls.' Br. 36. But here, the record contains the information FHWA deemed necessary to allow a reasoned choice among alternatives[9]. MCB034954; MCB72119. Contrary to Plaintiffs' assertions, FHWA did weigh the alternatives with respect to hurricane clearance times. The 2016 Alternatives Evaluation Report evaluates the ER1 and ER2 alternatives with a third outbound lane. MCB72119. FHWA also explained that although the Preferred Alternative did not outperform the ER2 alternative in hurricane clearance time reductions, neither alternative would meet either the 30 hour or 18 hour goals established in the FEIS and the Re-evaluation and both would achieve the project goal of reducing hurricane clearance time. MCB69490-91. In its re-evaluation, FHWA found that the ER2 alternative would save only a few additional hours from the Preferred Alternative and that both alternatives showed improvements from the no action alternative. *Id*. Because there was not much difference between the alternatives with respect to hurricane clearance times, FHWA and NCDOT reasonably selected the Preferred Alternative because it best met other project needs, not solely because the ER2 alternative could

[9] FHWA and NCDOT addressed Plaintiffs' concerns about costs associated with the hurricane evacuation improvements in the re-evaluation in their response to Plaintiffs' comments. MCB69458-69461

not be funded. This decision is entitled to discretion. For this reason, Plaintiffs' reliance on *Muckleshoot Indian Tribe* is misplaced. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 (9th Cir. 1999) (finding an agency's action arbitrary when the agency eliminated an alternative because it depended on funding sources outside of the agencies control).

Second, Plaintiffs point to the agencies' discussion of funding and claim that the agency improperly rejected alternatives based on funding constraints. Pls.' Br. 37. This is incorrect. As Plaintiffs admit, FHWA and NCDOT disclosed in the FEIS that the Existing Roads alternative met the purpose and need for the project and would be the least expensive. *Id*. The Re-evaluation also disclosed updated costs projections of the project and describes how each alternative could be funded. *See* supra 17. The Court should also defer to the FHWA's analysis of each alternatives' cost. FHWA's methods were reasonable and FHWA did not reject an existing roads alternative on the basis of cost alone. *See* supra 6-7.

Third, Plaintiffs claim that the FEIS' discussion of induced development did not allow for a reasonable analysis of impacts and alternatives. Pls.' Br. 42. Again, the record disproves Plaintiffs' claims. Essentially, Plaintiffs object because FHWA and NCDOT assumed construction of a toll bridge in their analysis of induced development. Pls.' Br. 43. Plaintiffs' argument is one of semantics rather than substance.

To evaluate the alternatives, the 2012 FEIS relied on a range of tools and datasets. *See* supra 8-10. Expected land use development was considered in the 2012 FEIS and again in the Re-evaluation. MCB68941-42.[10] FHWA and NCDOT utilized County land use plans and development trends to inform their assumptions about development that was reasonably likely to

[10] The only change related to land use and economic development noted as different in the 2019 Re-evaluation analysis from the 2012 FEIS is that the development constraint for the No-build and ER 2 alternative "is about 200 units more than was presented in the FEIS for the preferred Alternative." MCB68942-43. This results in only about 60 acres of undeveloped land. *Id*.

occur. MCB69102. In order to account for the absence of a bridge in the no-action and ER2 alternatives, FHWA and NCDOT clearly presented development reductions in the DEIS and FEIS. MCB33174-80. Plaintiffs commented on this during the DEIS comment phase. *Id*. To clarify for the public how the impacts were evaluated, FHWA and NCDOT responded explaining "that the starting point for planning a new transportation project is to assess and analyze land use plans and development trends" and that the Agencies did that here by analyzing the action alternatives at a different levels of development from the no-action alternatives for the indirect and cumulative impacts analysis. MCB69102-69103. Further, both the 2012 FEIS and the re-evaluation "recognized that not building the Mid-Currituck Bridge could place a constraint on the construction of planned and expected development." MCB68824. As a result, FHWA and NCDOT assessed an additional scenario to determine how congestion on NC12 might constrain development with the No-Build alternative and both ER2 designs and its' potential effect on future congestion. *Id*. Simply put, FHWA and NCDOT did consider the impacts of increased development associated with the toll bridge in their NEPA analysis. *See* MCB32242 (ICE Report consideration of induced development); MCB0000068838-68844; MCB68844-68845; MCB68845-68847 (Re-evaluation study report analysis of traffic projections in the constrained development scenario).

For this reason, this case is different from *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437 (4th Cir. 1996) where the court found that the agency violated NEPA because there was false information in the FEIS. *Id*. at 448. Here, the Plaintiffs admit that FHWA and NCDOT disclosed information about the impact of increased development. Pls.' Br. 46. For this reason, this case is also readily distinguishable from *North Carolina. Wildlife Federation v. North Carolina Dept. of Transp.*, 677 F.3d 596 (4th Cir. 2012). There, the court

invalidated an agency's NEPA analysis because the agency materially misrepresented baseline conditions. *N.C. Wildlife Federation*, 677 F.3d at 603. No such misrepresentation occurred here because FHWA and NCDOT disclosed information related to the projected induced development of the toll bridge and then took this development into account in its ultimate decision. MCB32242. *See Ohio Valley Envtl. Coalition Inc.*, 883 F. Supp. 2d at 643 (holding that the Corps did not materially misrepresent baseline conditions where the corps analysis discussed water quality issues and its ultimate conclusions took into consideration water quality impacts). *See also Webster*, 685 F.3d at 430-31 (holding there was nothing misleading or problematic about agencies NEPA documentation where it was evident that the agency considered the cost and benefit data and the public had the information to do the same). This case is also different from *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581 (4th Cir. 2012), where the court found the agency violated NEPA because it included in its baseline a no-wake zone that was unlikely to ever be enforced. *Id*. at 589. Here, FHWA and NCDOT reasonably relied on county land use plans to project expected development and then appropriately removed the development associated with a toll bridge from the non-toll bridge alternatives to assess project impacts. MCB69102-106.

A "rule of reason" applies not only to an agencies identification of available alternatives, but also to "its examination of their relative merits." *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 172 (D.C. Cir. 2014) (citations omitted). When evaluating alternatives, "[a]gencies are entitled to select their own methodology as long as that methodology is reasonable, and [courts] must defer to such agency choices." *Aracoma Coal Co.*, 556 F.3d at 201 (citations and quotations omitted). "In matters involving complex predictions based on special

[agency] expertise, a reviewing court must generally be at its most deferential." *Id.* (citation and quotations omitted).

Overall, the EIS relied on a reasonable method for analyzing potential increases in expected development within the project area. Contrary to Plaintiff's assertion, the EIS provided a rational explanation for why it's analysis of expected development assumed construction of a bridge and how it clearly and unambiguously identified reductions in expected development for the no-action and ER2 alternatives, and in this matter "involving complex predictions," the Court should defer to FHWA's analysis. *Aracoma Coal Co.*, 556 F.3d at 201. *National Audubon Society*, 420 F. Supp. 3d at 432 (No violation of NEPA where the agency adequately explained what it was doing, and readers of the FEIS and ROD were able to understand the agencies and its basis for making it).

CONCLUSION

FHWA and NCDOT are entitled to summary judgment on Plaintiffs' NEPA claims because the record shows the EIS and Re-evaluation contained a thorough and objective analysis of project alternatives, which relied on a range of methodologies to evaluate each alternative's economic and environmental impacts. FHWA's methodologies were reasonable, suitably tailored, and entitled to deference. These methodologies and the FHWA's analysis fully support FHWA's decision to construct the Mid-Currituck Bridge. Because Plaintiffs entirely fail show that FHWA's analysis was arbitrary and capricious, they cannot succeed on their claims. Therefore, the Court should grant the Federal Defendants' cross-motion for summary judgement and deny Plaintiffs' motion for summary judgment.

Respectfully submitted this 1st day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum was filed through the Court's CM/ECF system on April 1, 2021, which will electronically serve all registered counsel.

/s/ Elizabeth McGurk
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