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

No. 2:19-cv-00014-FL

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

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Plaintiffs North Carolina Wildlife Federation and No Mid-Currituck Bridge-Concerned Citizens and Visitors Opposed to The Mid-Currituck Bridge ("Conservation Groups") submit this response and reply in support of their motion for summary judgment and in opposition to Defendants' motions for summary judgment.

I. INTRODUCTION

NEPA is a democratic decisionmaking tool. *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012). Central to NEPA since its inception has been a requirement to disclose information to the public so the statute can help guide decisionmaking in the wider world. NEPA promotes its goals "by specifying formal procedures the agency must follow before taking action" and by requiring the agency "to disseminate widely its findings on the environmental impacts of its actions," thereby ensuring "that the public and government agencies will be able to analyze and comment on the action's environmental implications." *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 184 (4th Cir. 2005) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

In keeping with this intent, NEPA establishes that "[i]t is the continuing policy of the Federal Government" to cooperate with "concerned public and private organizations" to maintain environmental quality. 42 U.S.C. § 4331(a). Accordingly, "public scrutiny [is] essential to implementing NEPA," and "federal agencies shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. §§ 1500.1(b), 1500.2(d) (1978).

In defending their review of the Mid-Currituck Bridge, Defendants would turn NEPA away from this long-established tool of democracy and into a meaningless paper exercise. Defendants make clear that a significant amount of new analysis, deliberation, and investigation occurred during the seven-year period between the last public facing document—the Final Environmental Impact Statement ("EIS")—and the Record of Decision ("ROD"). The administrative record, moreover,

makes plain just how much nearly every aspect of the project changed during this period. And yet, it is undisputed that the public was given no access to this changed information until *after* the decision to build the Toll Bridge was made. Allowing this poor process to stand would turn NEPA on its head.

Defendants' briefs illustrate the substantive problem and the legal error with this approach. Defendants explain, for example, how they allegedly looked at a variety of sea level rise data between 2012 and 2019. Dkt. 91 at 24–25; Dkt. 93 at 29. Defendants note that they embarked on an entirely new way of analyzing traffic forecasts during this time period. Dkt. 91 at 19–20; Dkt. 93 at 25. They discuss their new findings about project alternatives. Dkt. 91 at 22–23; Dkt. 93 at 35. And Defendants admit that hurricane evacuation expectations have changed considerably. Dkt. 91 at 35–36; Dkt. 93 at 26. But despite acknowledging the enormous amount of new information and analysis—based on the dramatically different external circumstances that emerged during this time frame—Defendants did not provide any of this information, analysis, or updated data to the public for review and scrutiny. Making it public for the first time after the Record of Decision was published means —obviously—it came too late to actually influence the decision. *See Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010). The purpose of NEPA is for the government to "look before it leaps"—not after. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 106 (D.D.C. 2017).

The Agencies' closed-door behavior violated NEPA. NEPA is not an internal paper exercise; it is a public disclosure statute. 40 C.F.R. § 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."). And NEPA does not exist to justify decisions after they have been made. *Id.* § 1502.2(g). The Agencies cannot comply with NEPA by conducting an internal investigation to justify their previously held position. The new information that is significant to the project should have been made public to allow for informed, responsive decisionmaking.

A key passage from State Defendants' brief illustrates the error. Responding to the Conservation Groups' claim that the Agencies failed to disclose up-to-date sea level rise data, State Defendants assert:

> Essentially, Plaintiffs argue that the Project is unwise in light of sea level rise predictions. *Plaintiffs are entitled to this opinion, but Plaintiffs' opinion is not a determining factor under NEPA*. *See Robertson*, 490 U.S. at 351 (NEPA prohibits uniformed, rather than unwise, agency action.)

Dkt. 91 at 25(emphasis added). The passage illuminates Defendants' misunderstanding of NEPA. As the *Robertson* court noted, NEPA prohibits *uninformed* agency action. *See* 490 U.S. at 351. NEPA required the Agencies to follow the correct process, and to disclosure of relevant information to the public and all relevant decisionmakers. *See Robertson*, 490 U.S. at 349. Thus, the Conservation Groups were not only "entitled to [an] opinion," they were entitled to an informed one and they were entitled to share it with decisionmakers before a choice was made.

Rather than understanding the import of NEPA's procedural disclosure requirements, Defendants instead attempt to illegally turn NEPA into a substantive statute. In the passage above and throughout their briefs, Defendants put all their emphasis on who is right and who is wrong about the decision to build the Toll Bridge. They explain away their failure to share significant new information with the public by noting repeatedly that the new information would not have changed their minds. *See, e.g.*, Dkt. 91 at 16, 19, 22, 25; Dkt. 93 at 19, 26-27, 29-30, 31. But the Agencies miss the point. Decisionmaking about a project of this magnitude does not just involve the Agencies. Multiple levels of government and many stakeholders are involved; without the benefit of input from all relevant stakeholders, the Agencies did not, and *could* not, produce an informed decision. The assertion that none of the required input would have changed the Agencies' minds is irrelevant; NEPA squarely prohibits such uniformed justifications. *See Nat'l Audubon Soc'y*, 422 F.3d at 199.

The same problem of uninformed decisionmaking can be found in the Agencies' earlier Final EIS analysis. As the Conservation Groups have set out in detail, the Agencies used a baseline that

included construction of the Toll Bridge to forecast impacts and compare alternatives, including the no-action alternative. *See* Dkt. 89 at 42–44; *see also infra* Section II. This approach deprived the public of information about the Toll Bridge's true environmental impact on the Outer Banks, because all of that impact was already assumed in the baseline condition, and as a result, the Agencies did not analyze it or disclose it. This fatal flaw in the analysis has been squarely rejected multiple times by courts in this Circuit as an "obvious and fundamental blunder." *See Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012) (citing *N.C. Wildlife Fed'n*, 677 F.3d at 603). Likewise, the Agencies erred when they failed to accurately and transparently review a full range of reasonable alternatives. The Agencies place all their weight on trying to show how the Toll Bridge and only the Toll Bridge can solve the problems in the area, and in doing so make critical omissions and errors in analysis. Rather than grapple with these flaws, the Agencies attempt to explain them away, forgetting, once again, that their role under NEPA is to inform the public, and thereby improve decisionmaking—not to justify a preordained decision.

The Fourth Circuit has repeatedly stressed the action-forcing purpose of NEPA that is accomplished via public disclosure. In *N.C. Wildlife Federation*, the Fourth Circuit noted "that NEPA procedures emphasize clarity and transparency of process over particular substantive outcomes," that NEPA is "a democratic decisionmaking tool …" and that "[w]hen relevant information is not available during the [impact statement] process and is not available to the public for comment[,] ... the [impact statement] process cannot serve its larger informational role, and the public is deprived of [its] opportunity to play a role in the decisionmaking process.'" 677 F.3d at 603–05 (internal quotations omitted) (alteration in original).

Likewise, in *National Audubon Society*, 422 F.3d at 199, the Fourth Circuit noted that "NEPA of course prohibits agencies from preparing an EIS simply to justify [ ] decisions already made," and that "where an agency has merely engaged in post hoc rationalization, there will be evidence of this in its failure to comprehensively investigate the environmental impact of its actions

and acknowledge their consequences." (internal citations and quotations omitted).!

The Agencies' actions here fly in the face of this precedent. The Agencies failed to comply with the informational role of NEPA. Instead they focused the Reevaluation process only on justifying the decision they had already made in 2012, and what minimal inquiry they did undertake took place behind closed doors. The evidence for these legal errors, as the Fourth Circuit instructs, can be found in the Agencies' failure to fully investigate relevant issues and acknowledge consequences to the public. Instead, the Reevaluation is littered with attempts to "spin" data and facts in the light most favorable to the Toll Bridge—for example, by obscuring the better hurricane relief afforded by the Existing Roads alternative and conflating sea level rise projections for 2100 with those for half a century earlier.

For these same reasons, the Agencies' pleas for deference must fail. Where Federal Defendants respond over and over that the failure to present information to the public was warranted because the agency knows best, they necessarily concede the Conservation Groups' point that there was in fact new information that should have been disclosed. *See, e.g.*, Dkt. 93 at 28; 30; 44. NEPA requires the Agencies to gather and analyze such data and then present it to the public. That way there can be an informed democratic discussion about whether, for example, it still makes good public policy sense to spend more than half a billion dollars on a bridge where growth is slowing and forecasts of future traffic are significantly less than previously expected.

The issue is not whether the Agencies were right to pick the Toll Bridge. The issue is whether they accurately and sufficiently disclosed relevant information—which they did not.

Defendants' analysis in the Final EIS was arbitrary, capricious, and—by 2019—significantly outdated. Defendants' efforts, over seven years, to look at new information behind closed doors did not satisfy NEPA's mandate. The consequential result was a choice made without consideration of relevant factors and public input. This Court must vacate the ROD and remand the matter to the Agencies to prepare a Supplemental EIS that considers all the significant information the public

needs to determine the best transportation solution for this barrier island: up-to-date forecasts of how sea levels are expected to rise and land formations expected to shift; up-to-date projections of how much traffic is expected in the future, how much development is expected to occur, and where it will be; up-to-date projections of costs for the Toll Bridge and viable alternatives; and an up-to-date analysis of how the project can be funded and financed.

II. ARGUMENT

A. The Agencies Violated NEPA Because They Failed to Prepare a Supplemental EIS.

A supplemental EIS is a key part of the NEPA process. It ensures that when circumstances change, the federal government will continue to assess the implications of its proposals and share this information with the public to guide informed decisionmaking.

The Agencies do not deny that in the seven years between publication of the 2012 Final EIS and 2019 ROD, reams of new information came to light regarding the future of the project area and the need for transportation solutions. Dkt. 91 at 18; Dkt. 93 at 25. Yet the Agencies continue to protest that they need only consider this information behind closed doors. *See, e.g.*, Dkt. 91 at 20–21, 23, 25; Dkt. 93 at 25, 29.

In their opening brief, the Conservation Groups demonstrated that the new information shows "a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned." *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d 437, 443 (4th Cir. 1996) (emphasis in original) (equating "significant" with "seriously different picture"); *see also* 40 C.F.R. § 1502.9(c)(ii); *La. Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1051 (5th Cir. 1985) (new information is significant if it "raise[s] new concerns of sufficient gravity").

Unlike the cases cited by the Agencies, *see, e.g.*, Dkt. 91 at 27, this is not a situation where plaintiffs are coming in at the last minute, requesting that every tiny new study or dataset require a full re-start of the NEPA process. *See, e.g.*, *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 379–80 (1989) (holding a Supplemental EIS was not necessary to address two specific documents brought

before the agency after the lawsuit had been filed). Instead, here, the Agencies were fully aware of new information—including updated traffic forecasts, development trends, sea level rise data, and funding and financing options. The Agencies took more than four years to look at all the information. The problem, as noted above, is that they misunderstood their role. Rather than working to ensure the public and all relevant decisionmakers at each level of government were provided with any new information that was significant, instead the Agencies spent this time period attempting to justify their pre-determined desire to construct the Toll Bridge. The Agencies violated NEPA.

1. The Agencies Failed to Prepare a Supplemental EIS in Light of Unconsidered Impacts From Updated Traffic Patterns.

Apparently misguided about NEPA's purpose, the Agencies attempt to dismiss the significance of dramatically different, new traffic forecast data by irrelevantly re-asserting their view that the Toll Bridge is still the best solution for the project area. But the decision to prepare a Supplemental EIS does not turn on whether or not new data make the Agencies believe a different solution is needed. Dkt. 91 at 19–23; Dkt. 93 at 33–38. Rather, NEPA requires a Supplemental EIS when new information creates a "seriously different picture" than previously considered, *Hughes*, 81 F.3d at 443, and carries "sufficient gravity" that additional review and disclosure is required. *La. Wildlife Fed'n*, 761 F.2d at 1051. The new traffic forecasts are substantially different. *See, e.g.*, Dkt. 89 at 23 (explaining that summer weekday traffic expected in the project area has decreased by 47%). And the new forecasts affect not only the performance of alternatives, but also the financial viability of the proposed Toll Bridge. The significance of the new information demands preparation of a Supplemental EIS.

In an attempt to evade their NEPA obligations, the Agencies make two meritless arguments regarding the updated traffic forecasts. First, the Agencies state that because the new forecasts still show some level of congestion, supplementation is not needed. Dkt. 91 at 22–23; Dkt. 93 at 25–26.

Second, the Agencies conclude that the updated traffic forecasts are insignificant and merely depict the same picture presented in the Final EIS. Dkt. 91 at 19; Dkt. 93 at 25. But each of these conclusions displays willful ignorance toward what the data actually show.

There is no dispute that the traffic expected on project area roads in the future has dramatically decreased. Expected summer traffic by 2040 on the proposed Toll Bridge has fallen from the 14,500 vehicles anticipated in the Final EIS to just 8,600 vehicles. AR-68826. Traffic volume in the surrounding project area has seen a similar reduction. There is now 47% less traffic expected in the project area by 2040 than was anticipated in the Final EIS. *Id.* And where the Final EIS determined that summer weekend congestion would occur across 43.5 miles of road under the No-Build Alternative, the Reevaluation now concludes that under the most likely estimates,[1] congestion will only be seen on 8.3 miles—an 81% decrease. AR-34954; 68851.

The Agencies attempt to obscure these significant differences by making the irrelevant point that there will still be some traffic congestion and thus a need for some type of transportation improvements. Dkt. 93 at 25–26; Dkt. 91 at 20. But the fact that *some* solution may still be needed, in light of new information, does not obviate the need for a Supplemental EIS—if anything, it further necessitates supplemental analysis. The entire point of NEPA is to guide decisionmaking. When the public last reviewed this project, the expected traffic congestion was so severe that to many, the $600 million Toll Bridge looked like a viable option and a reasonable expenditure of resources. The situation has now changed, and has changed significantly. Although NEPA does not mandate any particular substantive outcome, it does require the public to be equipped with relevant information. *See Robertson*, 490 U.S. at 351. The Agencies' decision not to prepare a Supplemental EIS in light of this significant new information was therefore arbitrary and capricious.

[1] In the Reevaluation, Agencies conclude that "the constrained development estimates *most closely represent what is considered likely to occur*." AR-68837; 68866 (emphasis added).

The Agencies' second argument—which attempts to dismiss the dramatically different forecasts of future traffic as insignificant—fares no better. Dkt. 91 at 18–19, 22–23; Dkt. 93 at 25. The argument rings hollow particularly when compared to how much the Agencies had stressed the expected severe traffic congestion in the past. *See, e.g.*, AR-34907–09; 34953–54; 34963. Indeed, the idea that traffic forecasts could change so completely and yet not be significant enough to require disclosure would suggest that they need not have been prepared in the first place.

The fact is, the new forecasts create a seriously different picture of the project in a number of ways:

First, under the new most likely estimates, the Toll Bridge, ER2, and the No-Build Alternative all provide (in the Agencies' own words) "essentially the same" congestion reduction. AR-68866. Accordingly, under the most likely conditions, the supposed benefits previously associated with the Toll Bridge are no longer present. AR-68866. The new traffic numbers "lower[] the travel time savings associated with using the Mid-Currituck toll bridge, which results in some trips no longer shifting from existing thoroughfare system to the Mid-Currituck Bridge." AR-68827. This new information undermines the justification the Agencies gave in the Final EIS, where they stated they were selecting the Toll Bridge largely because it would best reduce traffic congestion. AR-34909. New information that affects the performance of the Toll Bridge and other alternatives in reducing traffic is of "sufficient gravity" to merit a new NEPA analysis. *See La. Wildlife Fed'n*, 761 F.2d at 1051.

Second, because the new forecasts show less traffic, they also show that the Toll Bridge will generate less toll revenue. Dkt. 89 at 23–24. The Agencies fail to respond to this relevant fact in any coherent way. While Defendants admit that they have not even attempted to review how the financial feasibility of the Toll Bridge has changed, Dkt. 91 at 22; Dkt. 93 at 27, elsewhere Defendants nonetheless assert—without any support whatsoever—that "there ha[s] been no change in the financial feasibility of the project." Dkt. 93 at 27; *see also* Dkt. 91 at 22.

Not only do the Agencies contradict themselves, but the Federal Defendants' brief seems to misunderstand the financing for the project entirely. The Federal Defendants' brief points to sections of the EIS which list financing mechanisms for the Toll Bridge in an attempt to make the point that if toll revenue is less than expected there are other ways to fund the project. But the vast majority of the instruments Federal Defendants cite to are loans that must eventually be paid off *with toll revenue*. *See* Dkt. 93 at 27 (citing AR-68808). The reference thus serves only to underscore the Conservation Groups' argument that the financial viability of the project will be severely impeded if less traffic brings less toll revenue.

State Defendants, meanwhile, assert that there is no way to know how significant the reduction in toll revenue will be, because they *have not yet done the analysis*. Dkt. 91 at 24. This is no answer at all. Where, as here, the Agencies publicly justified their selection of the Toll Bridge over other alternatives due, at least in part, to its ability to generate toll revenue, the Agencies cannot now just throw up their hands when new information emerges which shows the revenue generating potential of the Toll Bridge will be significantly lower.

How the Toll Bridge would be funded was a central question in the Final EIS, and the significant change is relevant information which should have been presented for scrutiny in a Supplemental EIS. *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 812 (9th Cir. 2005) (presenting updated and accurate financial information as it relates to the project is "necessary to ensure a well-informed and reasoned decision, both of which are procedural requirements under NEPA"); *see also Hughes*, 81 F.3d at 446 (NEPA requires that "relevant information regarding proposed projects," including the economic justifications and financial viability of a proposed project be made available to public and decisionmakers); *Tongass Conservation Soc'y v. Cole*, No. 1:09-CV-00003 JWS, 2009 WL 10704137, at *6 (D. Alaska Dec. 7, 2009) (unpublished) (holding that because the agency undertook an economic analysis in the Final EIS and because it used the

economic analysis to select one alternative over another, changes to the economic projections required the preparation of a Supplemental EIS).

On this count, then, the Agencies violate both prongs of the test set out in *Hughes*, 81 F.3d at 443. They failed to take a "hard look" at the new information and failed to present the significant new information in a Supplemental EIS. The Agencies violated NEPA.

2. The Agencies Failed to Prepare a Supplemental EIS in Light of Updated Sea Level Rise Projections.

The Toll Bridge would connect to a dynamic barrier island system, which already experiences impacts from erosion, storm surge, and other flooding events. How the geology and geography of the area will change over the lifetime of the Toll Bridge is essential knowledge for any decisionmakers considering whether to invest resources into the project. Yet the Agencies fail entirely to explain why they did not analyze and consider updated projections of sea level rise and present them in a Supplemental EIS.

In a series of confused explanations, the Agencies attempt to obscure the fact that at the time the ROD was published, widespread publicly available data showed the Toll Bridge and surrounding project area would be inundated and subject to repeat flooding within the first 25 years of its life. AR-78910. Recent data show that by 2050, the base of the Toll Bridge is expected to be inundated or extremely vulnerable to flooding and both US 158 and NC 12 will be inundated resulting in an inaccessible "bridge to nowhere." AR-78913; 75591. These new projections of sea level rise not only affect access to the Toll Bridge, but also reduce expected development, as currently available land will either be permanently or routinely flooded. AR-78915. All this information was readily available to the Agencies. Yet rather than analyze and disclose it in a Supplemental EIS they simply ignored it. This deprived the public and other decisionmakers the opportunity to engage in the reasoned, informed, and democratic decisionmaking process NEPA requires.

The Agencies attempt to justify their decision not to prepare a Supplemental EIS by stating that they "are aware of the risks and uncertainty regarding sea level rise," Dkt. 91 at 25; *see also* Dkt. 93 at 31, but merely acknowledging the risk in a legal brief is not enough to satisfy NEPA's hard look requirement, particularly now that science (which the Agencies ignored) has advanced to a point where accelerated sea level rise projections are widely available and relatively certain. *See Nat'l Audubon Soc'y*, 422 F.3d at 194 ("An agency's hard look should include neither researching in a cursory manner nor sweeping negative evidence under the rug."); *Sierra Club, Ill. Chapter v. U.S. Dep't of Transp.*, 962 F. Supp 1037, 1043 (N.D. Ill. 1997) ("[W]hen there is incomplete or unavailable information . . . and that information is essential to make a reasoned choice among alternatives, NEPA requires an agency to make clear in the final impact statement that the study was not undertaken and that there are reasons the study was not undertaken."). Here again, the Agencies misunderstand the purpose of the NEPA process. It is not sufficient that *they* grasp climate-related risks (although they miss even this low mark); NEPA requires those risks to be disclosed to the public.

a. Updated sea level rise projections show the project area will experience more sea level rise in the first 25 years than the Final EIS assumed it would experience in its lifetime.

In an attempt to justify their failure to prepare a Supplemental EIS, the Agencies point to sea level rise findings from the Final EIS, claiming that those findings, which relied on decades old data, "remain[] unchanged." Dkt. 91 at 25; Dkt. 93 at 29. This is simply false. Contrary to the Agencies' assertions, new data—available to the Transportation Agencies for more than two years before their decision was made—show the project area will experience devastating levels of sea level rise *50 years sooner* than was anticipated in the Final EIS. *Compare* AR-35047–48 *with* AR-78910; *see also* Dkt. 89 at 26–29 (explaining that the project area is now expected to experience 28.3 inches of sea level rise by 2050, and 81.1 inches of sea level rise by 2100).

The Agencies did not take a hard look at this new data to determine whether it yielded impacts not considered in the Final EIS. In fact, the Reevaluation does not mention the most up to date sea level rise data at all. *See* AR-68930–31. The failure to even recognize this information, despite it being readily available, renders the analysis arbitrary and capricious. *Town of Winthrop v. FAA*, 535 F.3d 1, 7 (1st Cir. 2008) ("It would undermine NEPA's policies if agencies in the interim were allowed to ignore material new information or circumstances which could change the environmental analysis contained in the original EIS."); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2011) ("Reliance on data that is too stale to carry the weight assigned to it may be arbitrary and capricious," and does not constitute a hard look for NEPA purposes). Furthermore, even where the Agencies did actually reference some slightly newer but still less timely [2] sea level rise information in the Reevaluation, they failed to take the requisite "hard look" at that information. The data mentioned in the Reevaluation show a significant increase in expected sea level rise, from 6.7 inches in 2035 to 10.6 inches in 2040. AR-68931, 35049. Yet the Agencies failed to analyze what the new data would mean for the Toll Bridge. Having failed to take a hard look, the Agencies subsequently failed to provide the public with the information. *See Hughes*, 81 F.3d at 445.

The Agencies attempt to justify their legal violation by arguing that the new sea level rise data offers nothing new beyond what was included in the Final EIS because the Final EIS considered impacts associated with 23.2 inches of sea level rise. Dkt. 93 at 31; *see also* Dkt. 91 at 25. This explanation can only be characterized as absurd. The Final EIS concluded that the project area would see 23.2 inches of sea level rise *by 2100*, but because the Toll Bridge would be replaced before then, it would never actually experience 23.2 inches of sea level rise. AR-35048. New data,

[2] The Reevaluation only tersely mentions the 2016 North Carolina Sea Level Rise Assessment Report, a document that itself relies on sea level rise data from 2014. AR-68930. The new data is not modeled or analyzed in relation to the project area.

however, show the Toll Bridge will likely experience that amount of sea level rise a full fifty years earlier—*before 2050*—well within the lifetime of the bridge. AR-78910. Experiencing permanent inundation 50 years sooner than originally expected is not merely a "confirmed concern" already addressed in the Final EIS, as the Agencies suggest. Dkt. 93 at 31. It is significant—indeed critical—new information that demands disclosure in a Supplemental EIS.

With a final clutch at straws, Federal Defendants present the most irrational argument of all, claiming that regardless of how soon or how badly the project area would be inundated by sea level rise, traffic projections show the Toll Bridge is still needed today. Dkt. 93 at 31. To state the obvious, however, if the Toll Bridge *will not be accessible* because of higher sea levels and associated storm surge, it does not matter how much traffic congestion there is to drive the need. A bridge that cannot be accessed cannot alleviate traffic. And indeed, because the Agencies never factored rising sea levels into their analysis of future traffic, neither they, nor the public can know what traffic will actually look like in the future as the barrier island roads become increasingly inundated with sand and water. *See* AR-68930–31.

b. The Agencies were required to consider NOAA's 2017 updated sea level rise data, which was publicly available for over two years before the Agencies made their decision.

Having disregarded the information they did consider as irrelevant, the Agencies next argue that they were under no obligation to consider the most comprehensive and up-to-date sea level rise projections released by the National Oceanic and Atmospheric Administration ("NOAA"). Dkt. 91 at 25 n.21; Dkt. 93 at 30.[3] This argument also fails. The 2017 NOAA data is the federal

[3] In making this assertion, the Agencies openly admit that they did not even cursorily consider the NOAA's 2017 sea level rise data. This is exactly Conservation Groups' point. The Agencies did not consider the new information, and they were required to do so. *See Hughes*, 81 F.3d at 445 (concluding that because the agency ignored expert information on the project's impact to zebra mussels it failed to take a hard look in violation of NEPA).

government's official approach to analyzing sea level rise,[4] and the Agencies had access to it during the reevaluation process[5] and for more than two years before they published the ROD. This easily accessible, relevant, up-to-date information that pertains to such a key issue of Outer Banks transportation should have been considered. *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (holding that reliance "on stale scientific evidence" violates NEPA, and concluding that the EIS must be reexamined); *N.C. All. for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 695 (M.D.N.C. 2001) (holding that use of a 4-year-old air quality model rather than a newer more accurate model violated NEPA).

State Defendants cite *Marsh*, 490 U.S. at 379, as justification for not considering the 2017 NOAA data, but it does not assist them. Dkt. 91 at 25. Unlike here, where the record makes clear that the Agencies did not even glance at the relevant data, in *Marsh*, the agency evaluated the new information and made a reasoned decision for why it did not merit the preparation of another Supplemental EIS. 490 U.S. at 379.

Federal Defendants' reliance on *Village of Bensenville v. FAA* fails for the same reason. Dkt. 93 at 32. In *Village of Bensenville*, the court held that the agency was entitled to deference when it chose to use 2002, rather than 2003, airline traffic data to assess the utility of a new airport runway plan. 457 F.3d 52, 72 (D.C. Cir. 2006). But again, contrary to what the Agencies did here, the FAA had actually reviewed the 2003 data and given a reasonable explanation for why the new information did not create meaningful difference in the results on airline traffic. *Id.* at 425. Moreover, in *Village*

[4] State Defendants attempt to diminish the argument to whether agencies should look at data from 2016 or 2017, *see* Dkt. 91 at 25 n.21, but this ignores the fact that the 2017 NOAA data and the 2016 North Carolina report are of completely different calibers and were designed for completely different purposes. The 2017 NOAA data is the federal government's official modelling and thus carries more weight than that relied upon by the Agencies.

[5] This data became widely available in January 2017. AR-78378. At that time, the Agencies were still preparing the early versions of the draft Reevaluation, AR-47910; 49464, which was finalized in March 2019.

of Bensenville, the 2003 data was merely an update—produced by the same agency and using the same methods—to the 2002 data. Here, NOAA's 2017 sea level rise data is significantly different in its scope, quality, and purpose. It is the federal government's official projections of sea level rise, not merely an update to the North Carolina 2016 data.

Given the significance of the NOAA 2017 data and given the fact that the Agencies had the information before them for two years prior to issuing the ROD, the decision to ignore the 2017 NOAA data is arbitrary and capricious and in violation of NEPA.

Perhaps sensing the difficulty of their position, Federal Defendants resort to contending, in essence, that projections of future sea level rise are unimportant because "a need for the project exists *now*." Dkt. 93 at 39 (emphasis added). Not only does this ignore the critical risk sea level rise presents to the project's ability to achieve its purpose, *see* p. 15, *supra*; it is also the very type of "head-in-the-sand" thinking NEPA sought to prevent by requiring agencies to consider "reasonably foreseeable" future effects. *See Am. Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 931 (D.C. Cir. 2017); *350 Montana v. Bernhardt*, 443 F. Supp. 3d 1185, 1191 (D. Mont. 2020). And to the extent Federal Defendants offer up any new attempt at explaining away the error in their brief, it is not only incoherent, but an illegal post hoc rationalization. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigating positions are not entitled to deference when they are merely appellate counsel's *post hoc* rationalizations for agency action, advanced for the first time in the reviewing court.") (internal quotations omitted); *N.C. Wildlife Fed'n*., 677 F.3d at 604 (explaining that an agency cannot cure "missteps" in a NEPA analysis with post hoc rationalizations).

c. The Agencies are not owed deference on ignoring sea level rise data.

Contrary to the Agencies' argument, the decisions regarding sea level rise are not a matter of "special expertise" to which the Court should defer. Dkt. 93 at 30. As a primary matter, courts have been clear that "[d]eference…does not mean dormancy," and even where a court is deferential it

must nonetheless scrutinize an agency's analysis to check it is reasonable. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991); *see also Nat'l Audubon Soc'y*, 422 F.3d at 185 (holding deference "does not turn judicial review into a rubber stamp").

Moreover, unlike the cases cited by the Agencies, here the issue of sea level rise is not one where the two transportation agencies have any specialized expertise. *Cf. Friends of Capital Crescent v. Federal Transit Admin.*, 877 F.3d 1051, 1059 (D.C. Cir. 2017) (deferring to the Federal Transit Administration on its interpretation of metro-rail rider trend data because it is an area that the agency has expertise in); *Ohio Valley Env't. Coal., Inc., v. U.S. Army Corps of Eng'rs*, 883 F. Supp. 2d 627, 636 (S.D.W.Va. 2012), *aff'd*, 716 F.3d 119 (4th Cir. 2013) ("*OVEC*") (deferring to the Army Corps of Engineers because the use of stream creation as a mitigation measure was within the agency's expertise); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428–29 (2011) (deferring to the Environmental Protection Agency in its decision to regulate carbon dioxide emissions because, as the Clean Air Act denotes, it is the expert agency on air emissions). The same is not true here, where the transportation agencies claim deference is owed to their application of climate data, but do not have special expertise in development or interpretation of that data. *See Nat'l Mining Ass'n v. Sec'y of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998) ("[W]e need not defer to issues beyond the agency's expertise.").

In fact, by relying on outdated climate data, the *transportation* agencies ignored the advice of *scientific* agencies that *do* have climate expertise. NOAA, the United State Geological Survey, and the Environmental Protection Agency all contributed to and endorsed the updated 2017 sea level rise data. Those agencies all have expertise in climate science, unlike the transportation agencies. The Agencies here deserve no deference for ignoring the expertise of these other agencies.

And finally, to the extent the Agencies' plea for deference is that they used their expertise to determine that the Toll Bridge was, in their opinion, still worth building, they miss the point of NEPA. *See, e.g.*, Dkt. 93 at 28; 30. As noted above in the introduction, NEPA is a procedural statute

that requires agencies to follow a set of procedures and disclosure requirements. Arguing that the Agencies know best, and that the Conservation Groups' "opinion" on such matters cannot command ultimate outcomes, misses the point. NEPA demands disclosure, and here a Supplemental EIS would have allowed review of significant information by all parties so that informed decisionmaking could proceed.

3. The Agencies Failed to Prepare a Supplemental EIS in Light of Significantly Different Updated Growth and Development Projections.

The Agencies admit that development trends have slowed in the project area. Dkt. 91 at 23; Dkt. 93 at 26. But rather than engage with the new trends and acknowledge the consequent impacts of that slowed growth in a Supplemental EIS, the Agencies make the bizarre argument that their deficient analysis of *traffic forecasts*, discussed above, was sufficient justification not to present significant new information about *growth patterns* to the public. Dkt. 91 at 23–24; Dkt. 93 at 26.

The Agencies are wrong. Their own numbers show that new housing units are being built at a rate nearly half what the Final EIS predicted. AR-75283. Furthermore, permanent population growth, tourism trends, and visitation rates have all substantially declined in the years since the Agencies' last NEPA review. Dkt. 89 at 25; AR-68825. The assumption that the area would continue to grow at a high rate was central to the analysis presented to the public in the Final EIS (and, as discussed further below, resulted in an arbitrary and capricious analysis that failed to properly account for induced growth. *See* Section II). The fact that these growth patterns have slowed so dramatically was significant information that should have been presented to the public in a Supplemental EIS.

The Agencies attempt to hide behind the fact that updated development projections were factored into the updated traffic forecasts (which they also failed to provide to the public). Dkt. 91 at 23, 24; Dkt. 93 at 26. But this justification gets them nowhere. While development patterns certainly affect traffic forecasts, and are likely one reason the projected traffic is now so much lower,

they affect many other important aspects of the Toll Bridge project too. Anticipated development trends, with and without the Toll Bridge, influence a variety of environmental concerns including water quality, habitat destruction, noise levels, and wetland loss, as well as underlying project conditions, such as tourism rates and toll revenue. *See, e.g.*, AR-32130; 32203–04; 32263–66; 35086. The significant changes to the expected growth patterns in the project area should have been disclosed to the public in a Supplemental EIS.

4. The Agencies Failed to Prepare a Supplemental EIS Considering New Alternatives and Emerging Vacation Patterns.

Prior to the Agencies' decision, the Conservation Groups provided the Agencies with an "Improved ER2" alternative. AR-45418; 45562.[6] The Conservation Groups also provided the Agencies with evidence that vacation trends were shifting and that the Agencies should reevaluate whether their conclusions about each alternatives' performance was still accurate. The Agencies did not take a hard look at either "Improved ER2" or changing vacation patterns. Consequently, their decision not to prepare a Supplemental EIS in light of the new information was arbitrary and capricious.

The Agencies concede that traffic and development projections have changed since the release of the Final EIS. Dkt. 91 at 20. In recognition of these changes, the Conservation Groups provided the Agencies with Improved ER2. Improved ER2 was designed with the reduced traffic forecasts and declined development projections in mind, *see* AR-45549, and it combines road expansion techniques with other transportation solutions to best address the *new* traffic and development demands. Given the fact that so many of the Agencies' assumptions have changed

[6] The Agencies attempt to skew the comment submitted by Conservation Groups as "untimely," but this is distracting and irrelevant. After 2012, the public was not given an opportunity to comment on any of the Agencies' actions. Furthermore, between the years of 2012 and 2017 (when the new alternative was provided to the Agencies), there was nothing happening on the Toll Bridge's proposal, so the Conservation Groups did not have reason to comment. The Conservation Groups submitted comments when they found out about rapidly evolving circumstances surrounding the Toll Bridge. This is timely for NEPA supplemental comment purposes.

since the last time the public was able to review the analysis—including traffic demand, development predictions, financial feasibility, and vacation patterns—the Agencies should have considered an alternative designed to specifically function in the updated landscape.

The Agencies dismissed the recommendation of Improved ER2, concluding that Improved ER2 is merely a variation of ER2. Dkt. 91 at 26. This conclusion demonstrates the Agencies' failure to take a hard look at Improved ER2, which is comprised of substantially different factors and yields substantially different benefits. *See* AR-45562–63. The Agencies contend it was sufficient that they responded to comments on the Conservation Groups' submission of Improved ER2 and that the Reevaluation considered some "variations" to ER2. Dkt. 91 at 26–27. But this argument, once again, misses the point. The Reevaluation was a private document, not subject to public disclosure and public comment. When new information weighing on the NEPA analysis showed a "seriously different picture," the public should have been given the opportunity to assess the performance of all reasonable alternatives—including Improved ER2—that were before the Agencies. *See Hughes*, 81 F.3d at 443. Failing to consider Improved ER2 in a Supplemental EIS in light of changed traffic and development forecasts was arbitrary and capricious.

Finally, the Agencies did not respond to the Conservation Groups' argument that they should have considered evolving vacation habits that make other alternatives more viable. Plaintiffs showed that companies like VRBO and Airbnb provide opportunity for visitors to travel during the week, which mean that changed vacation habits are more than a "remote and speculative possibilit[y]." *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978); Dkt. 89 at 31. The Agencies based much of their analysis, and the exclusion of other alternatives, on the assumption that vacationers will not arrive and depart in the middle of the week. *See infra* Section III(1). New travel patterns suggest that this assumption is now inaccurate, and vacationers are now much more likely and much more capable of travelling mid-week. Accordingly, these emerging

vacation patterns present significant new information that should have been discussed in a Supplemental EIS.

B. The Agencies Violated NEPA by Failing to Objectively Analyze and Disclose the Indirect and Cumulative Effects of Constructing a New Toll Bridge to the Outer Banks.

The Agencies' failure to prepare a Supplemental EIS compounded errors which were already present in their Final EIS analysis. Perhaps most egregiously, the Agencies misled the public and failed to comply with NEPA by unlawfully including the Toll Bridge in the baseline for their analysis of the project—thus obscuring the true effects of the Toll Bridge.

For obvious reasons, in a NEPA analysis, project alternatives must be compared to a "No Build" alternative that represents what would happen if the agencies *did not build the project*. "Without [accurate baseline] data, an agency cannot carefully consider information about significant environment impacts . . . resulting in an arbitrary and capricious decision." *N.C. Wildlife Fed'n.*, 677 F.3d at 603 (citation omitted) (alteration in original). But here, the Agencies used development plans that include construction of the Toll Bridge as their baseline. Unsurprisingly, this led them to conclude that the Toll Bridge would have "no reasonably foreseeable change in the overall type and density of development" on the Outer Banks, since they treated the Toll Bridge's increased development as part of the baseline. Even though the Agencies' own information indicated that far more development on the Outer Banks will occur if the Toll Bridge is constructed compared to the No-Build scenario, AR-35074–75, the Agencies insisted it would not. AR-35704; 35706 (stating "no reasonably foreseeable change in the location, rate, or type of development . . . compared to the No-Build Alternative").

For their baseline, the Agencies used local land use plans—which are not part of the administrative record[7]—claiming that "[t]hese plans are, logically, the status quo because they are the

[7] Because the land use plans the Agencies rely on are not part of the record they cannot justify the Agencies' approach here. As Federal Defendants previously argued to this court, "the focal point for

current state of anticipated growth and development in the project area." Dkt. 91 at 43; Dkt. 93 at 44–45. But these local land use plans are not a baseline, because they all anticipate construction of the Toll Bridge: "*a Mid-Currituck Bridge . . . [is] included in the land use plans of the affected jurisdictions*." AR-34981 (emphasis added); AR-68810 (the "area [Coastal Area Management Act] land use plans . . . *include a Mid-Currituck Bridge*." (emphasis added)). By using these plans as their baseline, the Agencies included construction of the Toll Bridge in what was supposed to be the no action scenario, against which they were to evaluate the effects and efficacy of different project alternatives. The Fourth Circuit has rejected this approach as a "material misapprehension of the baseline conditions" and an "obvious and fundamental blunder." *Friends of Back Bay*, 681 F.3d at 588 (citing *N.C. Wildlife Fed'n*, 677 F.3d at 603).

In fact, the same agency behind the NEPA analysis the Fourth Circuit already rejected —the N.C. Turnpike Authority—prepared the Mid-Currituck Bridge analysis during the same period. A third highway project, also analyzed by this same agency during the same time, suffered from a similar flaw. This Court rejected the analysis for that highway project, citing the same fundamental baseline error, in *Catawba Riverkeeper Found. v. N.C. Dep't of Transp.*, No. 5:15-CV-29-D, 2015 WL 1179646 (E.D.N.C. Mar. 13, 2015). The opinion was later vacated as moot when the highway project was abandoned. *Catawba Riverkeeper Found. v. N.C. Dep't of Transp.*, 843 F.3d 583 (4th Cir. 2016). The NEPA reviews for all three projects were prepared concurrently and all contain the same fundamental flaw in their baseline analysis.

Despite being on notice[8] that courts in this Circuit have repeatedly struck down the same fundamental error—including construction of a preferred alternative as part of the baseline for

judicial review should be the administrative record." Dkt. 72 at 20 (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

[8] After the Fourth Circuit issued its opinion in *N.C. Wildlife Federation*, the Conservation Groups brought the fact that the same error was contained in the analysis for the Mid-Currituck Bridge to the Agencies' attention. AR-69507–08. The error was never fixed, however.

evaluating the project—the Agencies contend that their analysis is compatible with the case law. Their arguments are without merit.

State Defendants claim that under *N.C. Alliance for Transportation Reform*, 151 F. Supp. 2d 661, it would be acceptable to use future growth as part of the baseline if the area were "accounted for by either existing or committed land uses," Dkt. 91 at 45. First, there are no such existing commitments here. The Agencies do not even try to claim the land use plans represent "*existing* or *committed* land uses." Instead, they admit these land use plans cover "the *anticipated* and *expected* growth and development in the area." Dkt. 91 at 46 (emphases added). There are no commitments, let alone existing land uses, that would make this development part of the baseline.

Second, State Defendants omit a key component of the Middle District's statement: to be included in the baseline, there must be "existing or committed land uses *not contingent on construction of the corridor*." *N.C. All. for Transp. Reform*, 151 F. Supp. 2d at 690 (emphasis added). As the Agencies' own analysis states, without the Toll Bridge the full amount of development contemplated by the land use plans would not occur. AR-69103; 35074. In other words, the development anticipated in these land use plans *is* contingent on construction of the transportation corridor, in this case the Toll Bridge. Under these circumstances, there is no basis for including the Toll Bridge's full development in the baseline as the Agencies did here. The Agencies have committed exactly the same error rejected by the Middle District in *N.C. Alliance for Transportation Reform. Id.* at 690.

The Agencies' attempt to distinguish *N.C. Wildlife Federation* fares no better. They claim the only problem in that case was a lack of transparency about the fatal flaw of including the proposed project in the baseline. Dkt. 91 at 46; Dkt. 93 at 45–46. But the Fourth Circuit subsequently explained that in *N.C. Wildlife Federation*, these same Agencies "erroneously adopted the assumption that the road would be built in estimating the consequences resulting from no action being taken," and described this error as an "obvious and fundamental blunder." *Friends of Back*

Bay, 681 F.3d at 588. As the Fourth Circuit stated in *N.C. Wildlife Federation*, "courts not infrequently find NEPA violations when an agency miscalculates the 'no build' baseline or when the baseline assumes the existence of a proposed project." 677 F.3d at 603. That is exactly what the Agencies did here.

Regardless, the Agencies also failed to be transparent here, just as in *N.C. Wildlife Federation*; this serves as another fatal flaw that provides additional grounds for invalidating their NEPA analysis. The Agencies misled the public by persistently presenting the development and traffic effects of the Toll Bridge as baseline conditions, without explaining that these effects depended upon construction of the Toll Bridge. *See* Dkt. 89 at 43; *see also* AR-68941; 69103; 35074. They obscured their unlawful approach by basing it on land use plans that are not included in the administrative record. And worst of all, they used their faulty baseline to conclude that the Toll Bridge would not affect development on the Outer Banks. All of these problems are serious violations of NEPA's required transparency, as well as of the requirement to evaluate alternatives and effects against a "No-Build" baseline. Tellingly, State Defendants do not even disclose to the Court that the Toll Bridge is included in the land use plans on which they relied.

Federal Defendants suggest that because the NEPA documents contained underlying information that revealed their sleight-of-hand, this somehow exonerates them. Dkt. 93 at 46 (citing *OVEC*, 883 F. Supp. 2d at 627). But their cited case is inapposite because there, the Corps' "ultimate conclusions . . . took into consideration" water quality issues in the affected stream. *OVEC*, 883 F. Supp. 2d at 644. Here, by contrast, the Agencies' "ultimate conclusion" about the effects of the Toll Bridge denied the key information: they told the public the Toll Bridge would not result in increased development on the Outer Banks when their own information—once untangled and reanalyzed in a useable form, *see* Dkt. 89 at 49 & n.15–16—showed it would. The fact that there is evidence of this fundamental blunder is no excuse. The Agencies refused to disclose the true effects of the Toll Bridge on the Outer Banks, so this required component of NEPA is simply missing.

And indeed, the *OVEC* decision explained that exactly the baseline error the Agencies committed here is unacceptable: "The basis for rejecting the EIS [in *N.C. Wildlife Fed'n*] was that the data used for calculating the 'no build' baseline inaccurately assumed that the proposed project would in fact be built. This fundamental misapprehension of the baseline conditions made it, 'impossible to accurately isolate and assess the environmental impacts of the [proposed project].'" *OVEC*, 883 F. Supp. 2d at 643 (quoting *N.C. Wildlife Fed'n*, 677 F.3d at 602). This fatal flaw in the analysis violates NEPA and the APA.

1. The Flawed Baseline Rendered the Agencies' Analysis of Environmental Impacts Arbitrary and Capricious.

By relying on land use plans that include the Toll Bridge, the Agencies created a baseline that is fundamentally different from the No-Build scenario that should represent the baseline. Instead, they made the Toll Bridge scenario of maximum development on the Outer Banks the baseline, and treated the No-Build scenario as if it were a project alternative with its own "effects"—namely a fictional "constraint" on the development that would otherwise occur with the Toll Bridge. *See, e.g.*, AR-68824; 68941. That approach left the actual effects of increased development unanalyzed and undisclosed.

The Agencies try to argue they did use a proper baseline to evaluate the project's effects. Dkt. 91 at 45. This is incorrect. Again, they cite sections of the Final EIS that obliquely acknowledge that full development on the Outer Banks would occur with the Toll Bridge but not the No-Build or Existing Roads alternatives—but they did not use this information to analyze the Toll Bridge's effects. AR- 35074. The Toll Bridge would cause 2,500 additional homes or hotel rooms and 830 additional acres on the Outer Banks to be developed, mainly in the northern roadless area, compared with the No-Build alternative. *See* Dkt. 89 at 49 & n.15–16 (explaining how this information was extracted from the Final EIS). Yet the Agencies insisted throughout the NEPA process that the Toll Bridge would cause *no additional development* on the Outer Banks. AR-32244;

35074–75; 35077–78. The Agencies refused to acknowledge or evaluate these effects of the Toll Bridge.

The Conservation Groups pointed out in their opening brief that the Agencies told the public in their response to comments that "[t]he potential impact of fewer lots being developed with the No-Build Alternative and ER2 is addressed in Section 3.6.2.3 of the FEIS" (Dkt. 89 at 47, citing AR-69103), but that section contains no evaluation of the increased development impacts that would happen with the Toll Bridge and not with the other alternatives. AR-35083–84. State Defendants now admit that Section 3.6.2.3 does not contain the analysis. Dkt. 91 at 49. Instead, they point to other locations, all of which likewise fail to evaluate the environmental effects of these thousands of new housing units and hundreds of acres of new construction. For example, the Indirect and Cumulative Effects Technical Report, just like the Final EIS and other documents, misleadingly and incorrectly states that "[t]here is no reasonably foreseeable induced development on the Outer Banks." AR-32244. Likewise, the report finds the Toll Bridge "would not notably contribute to cumulative impacts." AR-32258. Nothing is different in the 2012 update to this report: the Agencies once again insisted there would be "no reasonably foreseeable induced development on the Outer Banks" from the Toll Bridge. AR-46094. Finally, State Defendants cite to the Final EIS's "Indirect Effects" section (Dkt. 91 at 49 (citing AR-35081)), but there too the Agencies did not recognize any development effects of the Toll Bridge on the Outer Banks.

In reality, of course, the only acceptable No-Build scenario should represent the baseline, and extra development that would occur with the Toll Bridge should then be considered as an effect of construction. Yet the Agencies refused to do so. This is not a matter of "semantics," as Federal Defendants assert in attempting to distract from their flawed approach. Dkt. 93 at 44. It is a fundamental error that the Agencies used to deny the public and other decisionmakers the required analysis of the Toll Bridge's effects.

2. The Flawed Baseline Rendered the Agencies' Analysis of Alternatives Arbitrary and Capricious.

By including the Toll Bridge and its increased Outer Banks development in their baseline, the Agencies "fail[ed] to provide a reasonable basis for comparison of the[] alternatives." *N.C. Alliance for Transp. Reform*, 151 F. Supp. 2d at 690 (rejecting agency analysis that claimed proposed project would merely accommodate growth that would occur anyway).

The fundamental flaw in their baseline prevented a reasonable comparison of how each alternative would address traffic. As the Agencies stated in the Indirect and Cumulative Effects Technical Report, "[t]he 2035 traffic forecasts used in assessing project need and the benefits of the detailed study alternatives assessed in the DEIS and FEIS *assume full build-out of the NC 12-accessible area.*" AR-32225 (emphasis added). This assumption was unreasonable because as the Agencies admitted, their own analysis found much less development would occur with the No-Build and Existing Roads alternatives. AR-35074–75. By using the greater traffic forecasts of the Toll Bridge to evaluate the Existing Roads and other alternatives, the Agencies impermissibly skewed the analysis. *See* Dkt. 89 at 48–49.

The Agencies try to compensate for this defect by pointing to the Reevaluation, where they included "constrained" as well as "unconstrained" development scenarios. Dkt. 91 at 20; Dkt. 93 at 11. But the Reevaluation was not a public document, and there was no opportunity for the public to assess and comment on it. Because the Agencies eschewed a Supplemental EIS, their decision must be supported by the Final EIS. But that analysis was biased by assuming the full-build out associated only with the Toll Bridge.

Moreover, the Existing Roads alternative should have been assessed only using the traffic that the Agencies found would actually occur with that alternative, not the greater traffic demands associated with the Toll Bridge. As the Agencies stated in the Reevaluation, "the constrained development estimates most closely represent what is considered likely to occur." AR-68837. Yet

without justification the Agencies used the "unconstrained" traffic levels in their Reevaluation to assess the Existing Roads alternative. This was arbitrary and capricious.

Finally, State Defendants claim their final decision was made using the "constrained" traffic scenario, Dkt. 91 at 49, but the ROD does not support this claim. The ROD notes that both constrained and unconstrained traffic scenarios were developed in the Reevaluation, AR-68757–58, but does not state what assumptions were used for comparing the Existing Roads alternative to the Toll Bridge for the Agencies' final decision. Moreover, State Defendants acknowledge in their brief that the "unconstrained" baseline was the one "used by the Agencies." Dkt. 91 at 49. And in any event, most of the Toll Bridge's purported traffic advantages only appear under the faulty "unconstrained" scenario; the Agencies' own estimates show that under constrained traffic conditions, the Existing Roads alternative performs comparably to the Toll Bridge and outperforms it for US 158 in Dare County and NC 12 in Currituck County on congested summer weekends. AR-68856.

C. The Agencies Violated NEPA by Failing to Objectively Analyze and Fairly Compare a Full Range of Reasonable Alternatives.

The alternatives analysis is "the heart" of the NEPA process, 40 C.F.R. § 1502.14, and yet here the Agencies employed a myopic, bridge-centered vision in analyzing alternatives. Instead of carefully and thoughtfully reviewing a reasonable range of alternatives, the Agencies summarily eliminated several feasible alternatives without appropriate comparison and review. And in reviewing the remaining alternatives selected for detailed review, the Agencies still failed to objectively present and compare alternatives.

The Agencies misdirect,[9] claiming they are not required to dream up and examine far-flung alternatives, Dkt. 91 at 27, Dkt. 93 at 38–39, rather than face their deficient and irrational treatment

[9] Even worse, State Defendants misleadingly recite the definition of "reasonable alternatives" under the September 2020 CEQ NEPA regulations—even though Defendants concede that those regulations do not govern the Agencies' decisions here, which predate those revisions. Dkt. 91 at 27 & n.23. This is

of the reasonable alternatives before them as established by Conservation Groups' claims. Dkt. 89 at 31–42; *see* 40 C.F.R. § 1502.14. And then, Defendants repeatedly turn to the new information in their Reevaluation in an attempt to address Conservation Groups' claims—further reinforcing the significance and relevance of the information contained in the Reevaluation that should have been publicly disclosed and reviewed in a Supplemental EIS. The Agencies' alternatives analysis violated NEPA in at least four different ways, as detailed below.

1. The Agencies Arbitrarily Eliminated the Reasonable Alternative of Staggering Rental Check-In Times.

Defendants' main defense to their poor treatment of the staggering rental times alternative—without citation to a single case—is that they did not need to consider staggering rental times because it was beyond their jurisdiction. Dkt. 91 at 28, Dkt. 93 at 7, 41. This is wrong as a matter of law.

An agency violates NEPA if it "failed to consider an alternative that was more consistent with its basic policy objectives than the alternatives that were the subject of final consideration," *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999). The requirement to consider reasonable alternatives extends to "reasonable alternatives not within the jurisdiction of the lead agency." *Id.* at 814 (quoting 40 C.F.R. § 1502.14(c)); *see also Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 835 (1972) (establishing that NEPA requires consideration of reasonable alternatives outside of an agency's jurisdiction).[10]

The Agencies' argument is unsupported by the law—and the Agencies' own recognition of this possible alternative, cursory as it was, belies that it is *not* outside of the realm of reason contemplated by NEPA. AR-9411–9413. Additionally, in the Final EIS, the Agencies acknowledge

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particularly surprising given North Carolina is a plaintiff in a lawsuit challenging the legality of the Trump regulations.

[10] Contrary to Federal Defendants' claim, Dkt. 93 at 42, the NRDC Court nowhere limited this holding about alternatives beyond an agency's jurisdiction to a certain scope or size of action; that an agency must broaden the range of evaluated alternatives commensurate with the scale of the project or problem is simply another requirement of NEPA.

the possibility of vacation trends naturally "adapting" to different rental property changeover days in response to congestion and market demands—further demonstrating the feasibility of such an alternative. AR-35075 ("Adaptation could be as simple as vacation rentals varying the "changeover" times to a larger window from Friday to Sunday, vacationers in future years having an increased tolerance for congestion, or season-long residents avoiding travel during peak hours."); AR-35081 (noting that realtors might offer more weekday rental starts if the Toll Bridge were not built).

As the Conservation Groups explained and Defendants do not dispute, reducing traffic congestion in the project area is one of the primary purposes articulated by the Agencies as to why the project is needed. The stated purpose and need has largely concentrated on reducing congestion during summer weekends, as the only times when the roadway network would in fact suffer from extreme congestion. *See, e.g.*, AR-34907–08 (explaining needs for project in relation to summer weekend congestion). Not coincidentally, summer weekends suffer from the greatest congestion levels as tens of thousands of tourists travel to and from rental properties, with 70% of rental properties turning over occupancy on Saturdays. Dkt. 89 at 32 (citing AR-9411–12). The remainder of rental properties change over on Sunday (25%) and Friday (5%). AR-9411.

The Agencies' limited attempt at considering shifting rental changeover days in the Final EIS only looked at spreading those changeover days *over the same three days they already happen*, and only over the weekend days that are already the worst days of the week from a traffic congestion perspective. The Agencies never explained why or how they chose to limit consideration of this alternative in such an arbitrary and capricious manner. The Agencies essentially defined this alternative to limit its effectiveness as much as possible.

Despite this fundamental design flaw, the limited alternative showed substantial promise, with a 28% reduction in the worst summer weekend congestion (Poor LOS F). AR-9412. Instead of acknowledging this gain based on a very narrow shift in rental changeover times, the Agencies

zeroed in on the 1% gain of the reduction in *annual* congestion at lesser congestion levels (LOS E or F). AR-9412–13.

State Defendants then redirect to the Reevaluation—in an apparent bid to cure the Agencies' earlier arbitrary limitation of shifting rental days to Friday, Saturday, and Sunday—with an updated analysis considering the traffic congestion reductions if rental times were spread evenly across all seven days of the week. Dkt. 91 at 30. That the Defendants lean into the Reevaluation's expanded version of this alternative serves as yet another example of new, changed information that should have been disclosed in a Supplemental EIS. Regardless, the Agencies again myopically look only to the alternative's 1.7% reduction in annual congested VMT (which amounts to 600,000 congested VMT) compared with the No-Build alternative—while not noting the parallel percentage reduction attributable to other alternatives for comparison purposes. AR-68870–71. In fact, the Toll Bridge performed *worse* on this same metric of annual congested VMT, showing an *increase* of 1,200,000 annual congested VMT. AR-68851. In other words, Defendants dismiss the shifting rental times alternative because of a supposedly small benefit under this single metric—annual congested VMT—while the Toll Bridge actually would perform worse than the No-Build under this same measure. For the worst congestion on summer weekends, the two alternatives performed *the same*. AR-68871, AR-68851 (compare "Miles of Road with Traffic Demand 30 Percent or Above Road Capacity").

The Agencies' Reevaluation again fails to objectively compare and contrast shifting rental times alternative and instead further obscures the merit of this alternative.

2. The Agencies Failed to Consider a Combination of Alternatives.

The Agencies' Final EIS and supporting documents never considered a combination of smaller scale transportation improvements, in violation of NEPA. The Agencies attempt to address this flaw by claiming they did finally consider a combination alternative in the Reevaluation, but this is too little too late—particularly when the Agencies assert that there was no significant new information in the Reevaluation.

Contrary to State Defendants' assertions, *see* Dkt. 91 at 31, the court in *Davis v. Mineta* did not premise its ruling about FHWA's failure to consider combined transportation improvements on the fact that the agencies' NEPA review only included two alternatives. 302 F.3d 1104 (10th Cir. 2002). Instead, the court looked specifically at the agencies' rejection of the combination alternative and declared that dismissal as "one of the most egregious shortfalls of the EA." *Id.* at 1121–22. And while Federal Defendants try to recast this as a decision made under a different statute's standard, Dkt. 93 at 41–42, the *Davis* court's repeated reference to the EA (environmental assessment) and to whether an alternative was "unreasonable" based on being "remote, speculative, impractical or ineffective" belies any such assertion. *Id.* at 1122. And the *Davis* court did not consider a combination alternative as unreasonable.

State Defendants overstate and mislead about alternatives considered in the Final EIS and Alternatives Screening Report, pointing to the ferry alternatives as a supposed combination of alternatives. Dkt. 91 at 30–31. But none of the ferry alternatives considered in the Alternatives Screening Report included shifting rental times, transportation system management, or mass transit components—instead, each ferry alternative incorporated components of one of the existing roads alternatives or one of the bridge alternatives. AR-9416 ("The non-ferry components of F1 and F2 are the same as ER1 and ER2 . . . . F3 and F4 are the ferry plus improvements to US 158 . . . creating a ferry equivalent to MCB3 and MCB4 respectively.").[11]

While the Reevaluation did include a cursory combination, or "composite" alternative—which resulted in a collective travel benefit greater than any one of its constituent parts, as State Defendants acknowledge, Dkt. 91 at 31—the Agencies still designed this combination alternative so as to limit its effectiveness by omitting the individually most beneficial smaller-scale alternative of

[11] To the extent the Agencies determined that "any alternative with a ferry, no matter what other alternatives it may be combined with, was not reasonable," Dkt. 91 at 31, the Agencies then irrationally did not consider a combination without the common, offending component: ferries.

transportation system management or "TSM" solution. AR-68871. The Reevaluation determined transportation system management strategies would reduce annual congested VMT by 3.8 percent on its own, but then did not include this in the combination alternative without any explanation beyond a note to a table. AR-68872; 68871.[12]

The Agencies dismissed this new combination alternative due to its alleged minimal travel benefits and costs, but never disclosed a price tag for the alternative nor enumerated the alleged environmental costs so that the alternative could be fairly compared to the Toll Bridge and its respective costs. *See* AR-68882. The failure to objectively study and disclose the efficacy of smaller scale alternatives was arbitrary and capricious. The existence of such "viable but unexamined alternative[s] renders an environmental impact statement inadequate." *Muckleshoot Indian Tribe*, 177 F.3d at 814 (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)).

3. The Agencies Failed to Objectively Compare how Alternatives Would Affect Hurricane Evacuations.

The Agencies cannot escape that the Final EIS, Reevaluation, and even the ROD obscured the ability of the preferred Toll Bridge alternative to meet the project's hurricane evacuation purpose, while the Agencies simultaneously leaned into this purpose as justification for rejecting other alternatives. Such inconsistent reliance on a project purpose for evaluating alternatives is arbitrary and capricious, in violation of NEPA. 42 U.S.C. § 4332(C).

The Final EIS did not evaluate the Toll Bridge with a third outbound lane, contrary to State Defendants' post hoc rationalization. Dkt. 91. at 33. State Defendants cite a misleading table that does not present such an alternative—instead, it contains a column where the travel benefits of a different alternative, MCB4, and the Toll Bridge are disclosed together as a single number. A

[12] The Agencies dismissed this individual alternative because of its "small potential benefit"—even though transportation system management solutions outperformed the Toll Bridge alternative on this same metric. AR-68872.

footnote to the table acknowledges that the travel benefits for the Toll Bridge would actually be less than for MCB4 because of differences between the two alternatives (other than the third outbound lane). AR-34954. State Defendants incorrectly suggest this table shows how the Toll Bridge would perform with a third outbound lane—essentially, a new alternative not analyzed anywhere else in the Final EIS. Dkt. 91 at 33. And in fact, the text accompanying and preceding the table similarly misleadingly suggests the Toll Bridge had been analyzed with a third outbound lane, stating such an addition "would offer the greatest reductions in hurricane evacuation clearance times *with any alternative* . . . ." AR-34953. But the Toll Bridge was never envisioned or analyzed as having such an outbound lane. AR-34946; 34954. Lumping together distinct alternatives for travel benefits analysis purposes fails to present the alternatives in a comparative format, in violation of NEPA.

The Agencies miss the point that the Final EIS obscured this information about relative hurricane evacuation benefits, while simultaneously rejecting other alternatives that performed better in meeting this offered project purpose. Indeed, the Agencies tellingly did not include any discussion of how the Toll Bridge would meet this project purpose in the Final EIS. *See* Dkt. 89 at 35–36. State Defendants attempt to defend this omission, and the oblique reference to hurricane evacuation methods in the context of project costs, by claiming that section of the Final EIS only addressed impacts "that differentiate the Preferred Alternative from other DSAs." Dkt. 91 at 35. But that is exactly the point: the *five hour* difference in evacuation times—one of the three identified purposes for the project—between the Toll Bridge and other alternatives is a substantial differentiation between the alternatives, which the Agencies should have clearly disclosed and fairly evaluated.[13] And at the same time that the Agencies did not evaluate the Toll Bridge against this purpose, the

[13] The new projections in the Reevaluation continue to show that the Existing Roads alternative would outperform the Toll Bridge by a difference of 1.6 to 2.1 hours, where a two-hour difference "could translate into roughly 9,000 additional evacuees being able to reach a point of safety." AR-68869.

Agencies expressly rejected other alternatives allegedly because they "would not provide any reduction in hurricane clearance times." AR-9413–22.

State Defendants admit that ER2 outperforms the Toll Bridge under the hurricane evacuation purpose, and then retreat to the ROD in an attempt to justify their selection. But even if the ROD did make sense of this decision (which it does not), the ROD could not cure the Agencies' failure to disclose an objective comparison of alternatives in the environmental impact statement subject to public scrutiny. Regardless, State Defendants' reliance on the ROD's reasoning only underscores the Agencies' arbitrary and capricious treatment of alternatives against the hurricane evacuation purpose. Dkt. 91 at 36. Much like the discussion in the Final EIS and Reevaluation, the ROD never mentions the Toll Bridge's ability to reduce hurricane evacuation times. AR-68762–65.

4. The Agencies Failed to Objectively Compare how Alternatives Could be Funded and Financed.

As the Agencies admit, the Final EIS compared alternatives under a now-obsolete cost and financing landscape, which predated an overhaul of the state's transportation funding laws. Dkt. 91. at 38. The new funding structure rendered the Final EIS's financing discussions and consequent decisions invalid—and represents yet another significant change that should have spurred the Agencies to complete a publicly disclosed and reviewed supplemental EIS.

Instead, the Agencies cut corners and use unreasonable assumptions in an attempt to ensure their Reevaluation reached the same paradoxical financing conclusions as the Final EIS: that only the Bridge, despite being substantially more costly than the Existing Roads alternative and other alternatives, could be funded and built.

But Defendants never actually assessed how much state funding the Existing Roads (or other) alternatives would receive under the 2013 Strategic Transportation Investments law. 2013 N.C. Sess. Laws 183 § 1.1(a). Instead, the Agencies' central claim is that they compared alternatives in the Reevaluation by assuming the Existing Roads alternative would score the same and receive the same

funding as the Bridge under the state's new transportation funding scheme. Dkt. 91 at 39–40. Defendants misunderstand how the data-driven transportation prioritization process works.

The Strategic Transportation Investments law, and its "mobility formula," set-up a tiered, step-wise approach to prioritization and funding of new transportation projects based on several different metrics, including benefit cost, congestion, and multimodal considerations. N.C. Gen. Stat. § 136-189.11(d)(1). Projects are submitted with a "cost to NCDOT" that is used for scoring and awarding funds. AR-70168; *see also* AR-45398–45404.

Large highway projects deemed to be of statewide significance are first scored and awarded funds at the statewide level based entirely on quantitative criteria. N.C. Gen. Stat. § 136-189.11(d)(1). If a project fails to outcompete other projects at this stage, it then is assessed against other projects based on a mix of qualitative and quantitative criteria at the regional level and eventually the divisional level. *Id.* § 136-189.11(d)(2)-(3). The Bridge was submitted as a statewide project, but scored so poorly under the quantitative criteria that it failed to qualify for Statewide or Regional funding. AR-70168; 45400.

The Agencies never assessed the Existing Roads alternative under this process, and thus *cannot know what funds would be available for this alternative.* Under this set-up, the Existing Roads alternative would have been submitted with a different "cost to NCDOT"—and would have been scored according to its unique characteristics, and could have been awarded funds at the Statewide or Regional levels, unlike the Bridge. By assuming that the Existing Roads alternative would receive the exact same amount of state funding as the Bridge, the Agencies wrongly assume not only that the Existing Roads alternative would have scored the same as the Bridge; they also assume an arbitrary "cap" on the amount of state funds it could receive. Other road projects frequently receive more than $192 million in state funding.

At the same time the Agencies assume funding limits for the Existing Roads Alternative, they inconsistently assume availability of unguaranteed funds to cover the costs of the Bridge. *See* AR-

68807-08 (detailing multiple assumptions made in preliminary plan of finance for the Bridge); Dkt. 91. at 41 (discussing different potential financing models). In arguing that their plans do not show a shortfall of funds, State Defendants miss the point that they have inconsistently used a wide range of estimated costs and financing options with regard to the Bridge in order to find a financing model that they could assume would cover its costs, while never extending the Existing Roads alternative the same treatment. The Agencies were inconsistent in their disclosure of costs and financing for the Bridge, and inconsistent in their treatment of alternatives according to financing options.

Finally, the Agencies disregard the impact of other significant changes on their toll-dependent financing model for the Toll Bridge. The Agencies try to irrationally distance themselves from the reduced traffic forecasts and the likely effects on the financing of the Toll Bridge by claiming that a different future study, outside of the NEPA process, will explore the effects of reduced toll revenue. First, this reinforces the inconsistent treatment of alternatives according to financing viability by advancing an unsupported assumption—that there will be sufficient toll revenue based on an as-yet-to-be-completed study—while rejecting other alternatives for failing to have guaranteed financing available now. Indeed, that the Agencies promise to terminate the project if the traffic and revenue forecast shows toll revenue is insufficient underscores the importance of this analysis. Dkt. 91 at 22, AR-69279. Second, this bifurcation of traffic forecasts for environmental purposes versus financing purposes is irrational given that environmental effects analyzed in the NEPA process will likely impact the use of the Toll Bridge and consequent toll revenue. As Conservation Groups established—and the Agencies do not dispute—sea level rise projections show the Toll Bridge is likely to be inaccessible from the mainland, AR-75592, and that much of Currituck County's coastline will be flooded, AR-75591–92, *see also supra* Section I(2). If people cannot use the Toll Bridge, or if people cannot live on or visit certain areas in Currituck County due to sea level rise and flooding, toll revenues will be dramatically reduced. Defendants' only response to this is that NEPA does not prohibit unwise decisionmaking, Dkt. 91 at 41, again

missing the point that they are *ignoring this information and its impact on toll revenues*, and not only engaging in an unwise financial decision but an unfair and inconsistent treatment of alternatives based on the alleged financial viability of alternatives.

III. CONCLUSION

For all the foregoing reasons, the Court should grant Conservation Groups' Motion for Summary Judgment and deny Defendants' Motions for Summary Judgment. Further, the Court should declare the ROD arbitrary and capricious and not in accordance with law, vacate the ROD, and enjoin the Agencies from taking any further actions to proceed with the construction of the Toll Bridge until they have complied with NEPA.

Respectfully submitted this 30th day of April, 2021.

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CERTIFICATE OF SERVICE

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

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This the 30th day of April 2021.

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