UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
NO. 2:19-cv-00014-FL

NORTH CAROLINA WILDLIFE FEDERATION and NO MID-CURRITUCK BRIDGE-CONCERNED CITIZENS AND VISITORS OPPOSED TO THE MID-CURRITUCK BRIDGE,	)
Plaintiffs,	)
v.	)
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as Secretary, NCDOT; FEDERAL HIGHWAY ADMINISTRATION; and EDWARD T. PARKER, in his official capacity as Assistant Division Administrator, FHWA,	)
Defendants.	)

STATE DEFENDANTS' REPLY IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT
(Fed. R. Civ. P. 56; Local Civil Rules 7.1 and 7.2)

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AR – Administrative Record

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

DSA – Detailed Study Alternative

EIS – Environmental Impact Statement

ER – Existing-Road Improvement

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

FHWA – Federal Highway Administration

GARVEE – Grant Anticipation Revenue Vehicle

ICE – Indirect and Cumulative Effects

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

MCB – Mid-Currituck Bridge

NCDOT – North Carolina Department of Transportation

NCTA – North Carolina Turnpike Authority

NEPA – National Environmental Policy Act

NOAA – National Oceanic and Atmospheric Administration

ROD – Record of Decision (identifies the Selected Alternative)

STI – Strategic Transportation Investments

STIP – State Transportation Improvement Program

TEAC – Turnpike-Environmental Agency Coordination

TIFIA – Transportation Infrastructure Finance and Innovation Act

VMT – Vehicle Miles Traveled

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

I. INTRODUCTION

The Agencies have rigorously studied the Mid-Currituck Bridge Project, giving in-depth evaluation to the purpose and need, baseline conditions, alternatives, and project impacts.

Because the Reevaluation did not present a "seriously different picture" of the project from the FEIS and did not present any new effects that had not already been considered in the FEIS, no supplemental EIS was required. Plaintiffs' argument is grounded on their belief that the Mid-Currituck Bridge is a bad decision. However, it is not the Court's role to determine what transportation project is better, rather, it is the Court's role to determine whether the Agency took a hard look at the environmental impacts and 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." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989); *Manufactured Hous. Inst. V. United States EPA*, 467 F.3d 391, 399 (4th Cir. 2006) The Agencies complied with NEPA and with FHWA regulations in preparing a Reevaluation of the FEIS and concluding that a Supplemental EIS was not required. Plaintiffs may disagree with the outcome, but Plaintiffs have failed to demonstrate that the Agencies actions were arbitrary and capricious or not in accordance with law and thus Defendants are entitled to summary judgement.

II. ARGUMENT

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

Plaintiffs' argument that the Agencies are required to complete a supplemental EIS is

premised on two incorrect assumptions: (i) that simply because there is new information, a supplementation is required and (ii) that NEPA and its implementing regulations require the same processes for a reevaluation of an EIS as they do for the initial analysis and development of the EIS.

To the first point, the Agencies are not required to supplement the FEIS each time new information comes to light. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989). New information, no matter how much or little there may be, leads to supplementation only if the new information presents a seriously different picture of the environmental impact of the proposed project from what was previously envisioned. *Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990); *see also Marsh*, 490 U.S. at 374 (a supplemental EIS must be prepared "if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered"); 23 C.F.R. § 771.130(a)[1] (supplementation required when there is new information or circumstances relevant to environmental concerns ***and*** this information's or circumstances' bearing on the proposed project or its impacts would result in significant environmental impacts not evaluated in the FEIS); 40 C.F.R. § 1502.9(d) (supplementation is required when there are significant new circumstances or information ***and*** these circumstances or information bear on the proposed action or its impacts). Here, the Agencies thoroughly analyzed updated and new information and rightly determined that the new information did not present a seriously different picture of the environmental impact of the proposed project from what was previously evaluated in the FEIS.

To the second point, Plaintiffs' argument makes the incorrect assumption that the

[1] As with State Defendants' primary brief, all citations to the Code of Federal Regulations are to the pre-September 2020 version.

revaluation process mirrors the initial analysis and development process. Pursuant to NEPA and its implementing regulations, there are numerous opportunities for public review, comment, and involvement both during the scoping process (40 C.F.R. § 1501.7) and relating to the draft EIS and final EIS (40 C.F.R. §§ 1502.19, 1503.1, 1506.6). Plaintiffs make no allegations that the Agencies failed to properly involve the public during this entire process, but now argue that the Agencies failed to properly involve the public in the reevaluation process. However, the reevaluation process is not subject to the same regulations as the scoping and drafting process. Reevaluations are simply a written evaluation of the FEIS to determine if it remains valid. 23 C.F.R. § 771.129. If the reevaluation determines that the FEIS is no longer valid and requires supplementation, the supplemental EIS is subject to the same process and format, excluding scoping, as the original EIS. 23 C.F.R. § 771.130. This includes providing a draft supplemental EIS, a final supplemental EIS, and opportunities to comment thereon. *Id.* Plaintiffs argue as if the reevaluation is subject to the same requirements as an EIS, when it simply is not.[2]

In summary, Plaintiffs' argument that the Agencies violated NEPA by failing to prepare a supplemental EIS fails in both law and fact. The Reevaluation shows that the Agencies took a hard look at new information, and reasonably determined that a Supplemental EIS was not required.

1. Updated Traffic Forecasts Do Not Present a "Seriously Different Picture".

Because the Reevaluation did not present a "seriously different picture" of the project from the FEIS and did not present any new effects beyond those already considered in the FEIS, no supplemental EIS was required. *See Hickory Neighborhood Def. League*, 893 F.2d at 63.

[2] Notably, even though Plaintiffs argue that the Agencies did not allow for public involvement in the reevaluation process, Plaintiffs and their counsel (i) requested and received a draft of the reevaluation and (ii) submitted comments thereon, to which the Agencies responded. MCB045382, 69252-372, 69513.

Plaintiffs are correct that the updated traffic forecasts are different than the original traffic forecasts. DE 95, p 7. However, updated traffic forecasts do not, in and of themselves, necessitate a supplemental EIS. These updated forecasts must present a seriously different picture of the project, not just a different picture of the traffic forecasts, to require a supplemental EIS, and these do not. *See Hickory Neighborhood Def. League*, 893 F.2d at 63.

In the Reevaluation, the Agencies did an extensive analysis of the updated 2040 traffic forecasts in the same manner that they analyzed the 2035 traffic forecasts in the FEIS. MCB038848-51, 68852, 68867-69. After concluding that the updated traffic forecasts do not affect the purpose and need of the project, the Reevaluation uses these updated forecasts in an analysis of how well the No-Build Alternative, ER2, and the Preferred Alternative would meet the purpose and need of the project and finds that, overall, the Preferred Alternative outperforms each of the others. MCB068838-47, 68852, 68867-69. This is the same conclusion reached in the FEIS.

Additionally, in their response brief Plaintiffs continue to demonstrate a lack of understanding of the multiple traffic forecasts which are done to predict toll revenue for projects like the Mid-Currituck Bridge and that the traffic forecasts used for NEPA purposes are not those used for financial analysis. DE 95, pp 9-11. As explained in State Defendants' primary brief, in doing a financial analysis, the Agencies use a "worst case scenario" traffic forecast / toll-generating scenario to ensure that, even under less-than-anticipated traffic volumes, the project will still be financially feasible. DE 91, p 22; MCB068823. For NEPA purposes, the Agencies use actual traffic forecasts because the NEPA analysis is considering the environmental impacts of the project and using less-than-anticipated traffic forecasts in conducting these analyses could result in skewed results that minimize the potential environmental impacts. *Id.*

The Preferred Alternative was chosen, in part, because of its unique potential financing opportunities based on the receipt of toll revenue. MCB069460-61. Updated traffic forecasts do not change the fact that the Preferred Alternative has these unique financing opportunities. NEPA does not require an in-depth financial analysis and simply because the NEPA documents do not lay out a precise funding plan for the Project does not mean that the Agencies have not done extensive financial analysis of the Project. This analysis is being done in a non-NEPA investment grade traffic and revenue forecast. MCB068827.

Plaintiffs ask this Court to vacate the ROD because of updated traffic forecasts. Updated traffic forecasts do not present a "seriously different picture" of the Project, they present a "different picture" of the traffic forecasts – but traffic forecasts are just one factor used to study the Project. The Reevaluation took the required "hard look" at these updated traffic forecasts, and how they affect the Project as a whole, and concluded exactly as the FEIS did, that the Preferred Alternative remains the alternative that best meets the purpose and need of the project.

2. The Agencies Properly Considered Sea Level Rise Projections.

In both the FEIS and the Reevaluation, the Agencies undertook a thorough analysis of projected sea level rise and its potential effects on the Project. MCB035047-48, 68930-31.

Plaintiffs claim that the data and projections on which the Agencies' relied were obsolete and thus the decision is, consequently, arbitrary and capricious. DE 89 pp 26. But the proper inquiry under NEPA is not whether newer data or differing projections exist; the proper inquiry is whether the Agencies took a hard look at the environmental impacts of the project. "NEPA does not establish a time frame for agency data collection and therefore, Plaintiff's claim that Defendants relied on stale data is not relevant to the Court's analysis of whether the agency took a hard look at the consequences of the implemented actions." *Western Watersheds Project v. Kenna*, 2011 U.S. Dist. LEXIS 135108, *21, 2011 WL 5855095 (D. Ariz. November 21, 2011),

aff'd 610 Fed. Appx. 604, 2015 U.S. App. LEXIS 7357 (9th Cir. 2015); *see also Northern Plains Res. Council, Inc. v. United States BLM*, 725 Fed. Appx. 527, 530, 2018 U.S. App. LEXIS 4883, *4, 2018 WL 1060564 (9th Cir. 2018) ("The age of data, without more, is not dispositive as to reliability.")

Sea level measurement data does not become obsolete with age, it remains useful for examining trends over time, even as data from subsequent years is collected. So Plaintiffs' issue is not with the data, it is with the future projections based on the data. Projections of the future are inherently uncertain, and fall within the realm on which experts may disagree, and "it is not this court's role under NEPA to referee expert disputes when the agency reasonably evaluates the relevant factors." *Clean Air Carolina v. N.C. DOT*, 2015 U.S. Dist. LEXIS 120634, *26-27, 2015 WL 5307464 (E.D.N.C. 2015). It was reasonable for the Agencies to rely on the State's official North Carolina Sea Level Rise Assessment Report which focused on sea level rise at the North Carolina coast.[3] "Agencies are entitled to select their own methodology as long as that methodology is reasonable. The reviewing court must give deference to an agency's decision." *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 289 (4th Cir. 1999).

NEPA's fundamental role is for agencies to consider the environmental consequences caused by major agency actions. *See* 42 U.S.C. §§ 4321, 4332(C); 40 C.F.R. 1500.1(c). Plaintiffs cite *National Audubon Society*, 422 F.3d 174, 194 (4th Cir. 2005), where the Navy failed to acknowledge that the project would likely cause environmental harm as indicated by relevant studies. Here by contrast, the Agencies considered sea level rise projections even though sea level rise is an external factor and not an environmental harm caused by the project. NEPA requires Agencies to study "the environmental impact of the proposed action." 42 U.S.C.

[3] The North Carolina Sea Level Rise Assessment Report is the State's official report commissioned by the North Carolina Department of Environmental Quality – Coastal Resources Commission pursuant to N.C. Session Law 2012-202.

§ 4332(C)(i). As in their primary brief, Plaintiffs' response brief focuses on the fact that Plaintiffs disagree with the Agencies as to whether it is wise to build the Bridge in light of projected sea level rise. DE 89, pp 26-29; DE 95, pp 11-18. Plaintiffs' disagreement does not demonstrate a failure to comply with NEPA.

Plaintiffs imply that the Agencies lacked essential information to make a decision and failed to disclose that. DE 95, p 12 (quoting *Sierra Club, Ill. Chapter v. U.S. Dep't of Transp.*, 962 F. Supp. 1037, 1043 (N.D. Ill. 1997). This is incorrect because the Agencies did discuss projections of sea level rise and did disclose possible implications. MCB035047-49, 68930-31. Furthermore, the very next paragraph of *Sierra Club* undercuts Plaintiffs' argument by stating that agencies are not required to use a specific forecast advocated by plaintiffs. *See Sierra Club*, 962 F. Supp. at 1043 ("NEPA, of course, does not require an agency to use the best scientific methodology available."); *see also Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) (This Court's role is ". . . simply to ensure that the procedure followed by the [the Agencies] resulted in a reasoned analysis of the evidence before it, and that the [the Agencies] made the evidence available to all concerned.").

At its core, Plaintiffs' argument focuses on the Agencies' reliance on the 2016 update to the North Carolina Sea Level Rise Assessment Report, which utilizes data from 2014. DE 95, p 13. Plaintiffs cite two 2017 reports which they believe the Agencies should have relied on instead. DE 89, p 27; DE 95, pp 14-16. One, the US Global Change Research Program Climate Science Special Report, relies on pre-2016 data, with some references dating back to 2007. MCB046723, 46727. The other, NOAA's 2017 Global and Regional Sea Level Rise Scenarios for the United States, relies on a significant amount of pre-2014 data. MCB078292-99. In other words, the publication date of the report does not necessarily equate to newer or more pertinent data. For example, prior to its 2017 publication, the US Global Change Research Program

Climate Science Special Report went through an 18-month long drafting process and notes that, for observed trends, the most up-to-date data included is from 2015, because 2016 data was not fully available. MCB046719-20, 46723. Furthermore, neither of those two 2017 reports are specific to the North Carolina coast, while the report used by the Agencies is. MCB046713, 78235. Plaintiffs offer no support for their assertion that the 2017 NOAA report carries more weight than the official 2016 North Carolina report. Regardless, "NEPA does not require that [the court] decide whether an [EIS] is based on the best scientific methodology available, nor does NEPA require [the court] to resolve disagreements among various scientists as to methodology." *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987), *quoting Friends of Endangered Species*, 760 F.2d at 986 (9th Cir. 1985); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 512 (D.C. Cir. 2010) ("Nothing in the law requires agencies to reevaluate their existing environmental analyses each time the original methodologies are surpassed by new developments.").

Additionally, Plaintiffs argue that the Agencies should not be given deference as to their "expertise" in the development and/or interpretation of sea level rise data. DE 95, pp 16-18. This argument has an obvious flaw – the Agencies do not claim to be experts in either the development and/or interpretation of sea level rise data and do not ask for deference in that area. In conducting their sea level rise analysis, the Agencies relied upon experts in that field, the North Carolina Coastal Resources Commission Science Panel and its 2016 report on sea level rise along the North Carolina coast. MCB068930-31. Again, this argument is based in Plaintiffs' disagreement with which experts the Agencies chose to rely upon, and that does not undermine the Agencies' NEPA analysis in any way. *See Marsh*, 490 U.S. at 378 ("When 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.")

As NOAA explains in its 2017 report,

> [s]ignificant uncertainties exist about the exact trajectory (and impacts) of future climate change, limiting the value of prediction-based frameworks for long-term, climate-related decision-making. . . . Coastal planners making critical decisions should weigh several factors, such as the type of decision to be made, expected future performance, planning horizon, and overall risk tolerance, including the criticality of the asset and/or the size and vulnerability of the exposed population. The process of selecting a sea level scenario for a specific setting is not a straightforward task for planners and engineers . . . .

MCB078278 (internal citations omitted). The inherent uncertainties of sea level rise projections present the scenario in which federal courts have declined to mandate use of a particular methodology. *See Oregon Envt'l Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987). The Agencies considered projections of sea level rise by experts in the field and applied those projections to their analysis of the transportation project – which is squarely within the transportation Agencies' area of expertise.

3. Updated Growth and Development Projections do not Necessitate a Supplemental EIS.

Updated growth and development data still confirmed the purpose and need of the project and did not present a seriously different picture of the project as a whole. Plaintiffs argue that the updated growth and development "should have been disclosed to the public in a Supplemental EIS." DE 95, pp 18-19. This argument ignores the fact that the updated growth and development data was disclosed to the public, just not in a supplemental EIS. The Reevaluation and its corresponding study report, both of which were made public in March 2019, discuss the updated growth and development data at length. MCB068823-27. Seemingly, what Plaintiffs actually take issue with is that NEPA does not provide for public comment on the Revaluation in the way it does for a supplemental EIS. However, as noted earlier, Plaintiffs and their counsel requested,

received, and commented on a draft version of the Reevaluation,[4] demonstrating that the Agencies went above and beyond the requirements of NEPA in ensuring full and complete public involvement. MCB045382, 69252-372, 69513. The Agencies accepted Plaintiff's comments on the draft Reevaluation and provided written responses to those comments, even though not required by regulation. This negates Plaintiffs' allegations of "closed-door" Agency action.

In the Reevaluation, the Agencies have taken the required hard look at the updated growth and development trends in the project area and concluded that they do not present a seriously different picture of the project, thereby not requiring a supplemental EIS. *See Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996); *Hickory Neighborhood Def. League*, 893 F.2d at 63.

4. Improved ER2 and Potential Minor Changes in Vacation Trends do not Necessitate a Supplemental EIS.

Neither Improved ER2 nor the potential for minor changes in vacation trends present a "seriously different picture" of the project and, consequently, do not require the Agencies to supplement the FEIS. *Hickory Neighborhood Def. League*, 893 F.2d at 63.

i. Improved ER2

As detailed in State Defendants' primary brief, four (4) years after the FEIS, Plaintiffs submitted their own proposed variation of alternative ER2 entitled "Improved ER2." DE 91, pp 25-27. The Agencies reviewed Plaintiffs' proposal and comments and responded appropriately. MCB069254-56, 69270, 69278-83, 69285-88, 69295-303, 69335. Improved ER2 suggests some potential changes to ER2, but retains the elements of ER2 that provide most of the traffic benefits. MCB045562-63. ER2 has been fully considered through the NEPA process. *See*

[4] The Agencies also provided responses to these comments. MCB045382, 69252-372, 69513.

generally MCB05752, 5978, 9370, 14693, 34865, 35584, 44531, 57449, 68784. Because it shares so many aspects with ER2, the Agencies did not re-start the entire study of alternatives simply because Plaintiffs submitted a variant of a previously studied alternative, and NEPA does not require the Agencies to do so. By considering a reasonable range of alternatives, and not every suggested potential variation of each alternative, the Agencies met their obligations under NEPA. 85 FR 43304, 43330; *see N.C. Wildlife Fed'n v. N.C. DOT*, 677 F.3d 596, 602 (4th Cir. 2012) (agencies have discretion to identify the range of "reasonable alternatives").

ii. Vacation Trends

Plaintiffs offer no support that the alleged "emerging" vacation trends they cite to are in any way different than previous, existing vacation trends. DE 89, p 31.

First, Plaintiffs point to printouts from various rental websites saying that Friday-to-Friday and Sunday-to-Sunday rentals are available instead of the traditional Saturday-to-Saturday weekly rentals. MCB072220-24. Plaintiffs do not provide any support that this is an "emerging" trend or in any way new or different from what was previously available in the project area's rental market. These printouts simply show that, as of the date that Plaintiffs checked these websites, Friday-to-Friday and Sunday-to-Sunday rentals were available. These printouts do not address if this is in any way different than what was available previously. In any event, the Agencies considered variations of weekly rentals and determined that it would make only minimal (1%) difference in traffic projections. MCB09413.

Second, Plaintiffs point to an August 2016 article by a local news outlet discussing that tourism and rentals during that specific summer, 2016, were, as of August, not following traditional patterns. MCB072225. One article in a local news outlet specific to one summer does not equate to an "emerging" trend.

Third, Plaintiffs point to two online articles, one written for a British website, that offer

the general advice to travelers that landlords may be willing to be flexible with rental check-in dates. MCB072229-31. Again, this in no way shows "emerging" trends in Currituck and Dare Counties.

In 2015-2017, the Agencies interviewed property management companies local to the project area. MCB068871. These interviews highlighted that rental trends were likely to continue as they had, particularly with rental check-ins being on the weekend. *Id.* Information obtained from those actually in the local rental market, as opposed to information found on the internet, is far more telling as to what the trends in the area are and this local information shows that trends are expected to remain the same. *Id.* This information does not present a seriously different picture of the project and does not require a supplemental EIS.

B. The Agencies used the Correct Baseline and both Disclosed and Thoroughly Analyzed the Indirect and Cumulative Effects of the Project.

Local land use plans and projections provide useful input for a project-level NEPA analysis. 23 C.F.R. 450 Appendix A. The Agencies have never hidden the fact that certain local land use plans anticipate construction of the Bridge, as evidenced by its inclusion in both the FEIS and the Reevaluation. MCB034981; 68810. While courts have found this problematic in certain situations, there are two unique elements of this Project that remove any concern:

(i) the existing and committed land uses based on these plans have already been imposed and while some plans may have anticipated the Bridge, the current land uses are obviously not contingent on construction of the Bridge; and

(ii) the Project, and its impacts, was analyzed under both constrained and unconstrained development scenarios.

First, the existing and committed land uses in the project area are not contingent upon the Bridge.

(i) The paved, NC 12 accessible areas of the Currituck County Outer Banks are either fully subdivided or future development is defined by planned unit development ("PUD"). MCB068824. In other words, the paved, NC 12 accessible areas are subject to existing and committed land uses that are not contingent upon the Bridge being built – this land is already subdivided and/or subject to a PUD without any caveat that the Bridge must be built. Streets and utilities are already installed in most of these subdivisions, most public facilities are already planned for or in place, and planned major commercial areas have developed, all without being contingent upon the Bridge being built. MCB068824. *See N.C. All. for Transp. Reform, Inc. v. United States DOT*, 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001) *discussing Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517 (9th Cir. 1994) (existing or committed land uses not contingent upon the project being built may be included in the baseline).

(ii) For the non-paved road accessible portions of the Currituck County Outer Banks, the existing local government policies and lot size restrictions, none of which are contingent upon the Bridge being built, are already established and dictate the anticipated future growth and development in the area. MCB035700-04.

(iii) For the Dare County town of Kitty Hawk, no notable development of vacant land is expected because much of it is designated as conservation area and/or subject to land use restrictions, none of which are contingent upon the Bridge being built. MCB035630. For Southern Shores, no additional subdivision of lots is expected and future development is expected to be through the development of remaining vacant single-family lots and the redevelopment of occupied lots. Nothing about the subdivision of these lots is contingent upon the Bridge being built.

MCB035630. For Duck, the town anticipates the development of already platted and zoned lots and tracts – again, platting and zoning that is already done and not contingent upon the Bridge being built. MCB035634.

Because these are already existing and committed land uses that are not dependent upon construction of the Bridge, the Agencies properly depended on them to determine the baseline for the project area. As discussed in the second point below, even though the project area is already regulated by existing land use plans, the Agencies further defined the baseline with analysis of "constrained" and "unconstrained" growth scenarios to show how the project may impact where and when planned growth will likely occur.

Plaintiffs cite to both *N.C. Wildlife Federation* and *Catawba Riverkeeper Foundation* to support their argument that the Agencies improperly relied on existing and committed land uses in determining the baseline. DE 95, pp 21-24. *N.C. Wildlife Fed'n v. N.C. DOT*, 677 F.3d 596 (4th Cir. 2012); *Catawba Riverkeeper Foundation v. N.C. DOT*, No. 5:15-CV-29-D, 2015 U.S. Dist. LEXIS 31429, 2015 WL 1179646 (E.D.N.C. Mar. 13, 2015), *vacated as moot by* 843 F.3d 583 (4th Cir. 2016). Both of these cases are distinguishable from this Project.

The *N.C. Wildlife Fed'n* case addresses the Monroe Connector project[5] – an approximately 20-mile toll road to be built on "new location." *N.C. Wildlife Fed'n v. N.C. DOT*, No. 5:10-CV-476-D, 2011 U.S. Dist. LEXIS 123085, at *6, *10 (E.D.N.C. Oct. 24, 2011). The baseline for the Monroe Connector project was developed by the local planning organization based on socioeconomic data and the regional travel demand model. *N.C. Wildlife Fed'n*, 677 F.3d at 599. Part of the data underlying the local planning organization's projections assumed the construction of the Monroe Connector in the roadway network, thereby incorporating some

[5] The Monroe Connector is also known as the Monroe Bypass and the Monroe Expressway.

'build' assumptions into the 'no build' baseline. *Id.* at 599-600. In *N.C. Wildlife Fed'n* the court did not directly address the build versus no-build assumptions, as it is vacated and remanded because of a transparency concern regarding public disclosure of the data. *Id.* at 605. So, as discussed in State Defendants' primary brief, this case does not go to the issue of what is properly included in a no-build baseline, it goes to the issue of transparency and public disclosure.

The Fourth Circuit revisited the Monroe Connector project in *Clean Air Carolina v. N.C. DOT*, 651 F. App'x 225 (4th Cir. 2016). After the *N.C. Wildlife Fed'n* decision, the defendant agencies rescinded the Monroe Connector record of decision and reinitiated the NEPA process. *Id.* at 226. In doing so, the defendant agencies conducted a new no-build analysis with data that excluded the existence of the toll road in the roadway network and concluded that these new projections were identical to their original projections, thereby confirming that any inclusion of the Monroe Connector in the no-build assumptions made no difference to the baseline. *Id.* at 227. Based on this conclusion, the defendant agencies issued a new record of decision confirming the decision to build a new roadway. *Id.* The conservation group plaintiffs again filed suit and were unsuccessful in their attempts to stop the project, which opened to traffic in November 2018. *Id.* at 228.

There is a key difference between the Mid-Currituck Bridge project and the Monroe Connector project: the entire Monroe Connector project area was not already developed by existing and committed land uses which established known growth and development trends – these future land uses had to be projected and, logically, it was problematic if those projections included construction of the connector. *See, e.g.*, *Clean Air Carolina v. N.C. DOT*, No. 5:14-CV-863-D, 2015 U.S. Dist. LEXIS 120634, at **9-10 (E.D.N.C. Sep. 10, 2015). Here, regardless of

the existence of the Bridge, the land uses and growth and development trends in the project area are known.

Plaintiffs' reliance on *Catawba Riverkeeper Foundation*, is equally misplaced. First, the District Court's decision was vacated by the Fourth Circuit as moot, thus it holds no precedential value. *Catawba Riverkeeper Foundation v. N.C. DOT*, 843 F.3d 583 (4th Cir. 2016). It is also unpersuasive because *Catawba Riverkeeper* involves the proposed construction of a 22-mile toll road in Gaston and Mecklenburg Counties commonly called the "Garden Parkway" and, from a socioeconomic data/projection making standpoint, presents a similar situation to what was considered for the Monroe Connector. *Catawba Riverkeeper Found. v. N.C. DOT*, No. 5:15-CV-29-D, 2015 U.S. Dist. LEXIS 31429, at **2-3, 18 (E.D.N.C. Mar. 13, 2015). So just as the Mid-Currituck project is distinguishable from the Monroe Connector because of the existence of committed land uses and known growth and development trends, the Mid-Currituck Bridge project is equally distinguishable from the Garden Parkway project for the same reasons.

Plaintiffs claim that the Agencies' analysis cannot rely on local land use plans because they are not part of the record. DE 95 p. 21 fn. 7. Plaintiffs' claim fails because an EIS "may rely upon external materials provided that the materials are reasonably available, that statements in the Final Statement are understandable without undue cross-reference, and that incorporation by reference meets a general standard of reasonableness." *Oregon Envtl. Council*, 817 F.2d at 496 (9th Cir. 1987); *see also* 40 C.F.R. 1502.21. The local land use plans are readily available to the public on the counties' and towns' websites.[6]

[6] Land use plans for: Currituck County, https://co.currituck.nc.us/planning-zoning/land-use-plan/; Dare County, https://www.darenc.com/departments/planning/land-use-plan; Duck, https://www.townofduck.com/lup/; Kitty Hawk, https://www.kittyhawknc.gov/departments-and-services/planning-and-inspections/cama/; Southern Shores, https://www.southernshores-nc.gov/wp-content/uploads/2012/07/8-30-12CertifiedAdoptedLandUsePlan.pdf

Second, as addressed in detail in State Defendants' primary brief, both the FEIS and the Reevaluation consider both constrained and unconstrained growth scenarios. DE 91, pp 19-50. The "constrained growth" analysis considered a scenario where traffic congestion increased up to the level of being a barrier to development because traffic congestion caused such an inconvenience to vacation renters that development stops due to lack of demand for vacation rentals. On the other hand, the "unconstrained growth" analysis considered a scenario where growth continued as expected under the existing land use plans even if traffic congestion causes inconveniences. So, even though the Agencies believe that the unconstrained growth scenario is the proper baseline for the Project because "[t]he best starting point for planning a new transportation project is to ask, based on land use plans and development trends, what level of development needs to be served and how well will the various alternatives serve that development," they still considered a constrained growth analysis for comparative purposes and to ensure the most complete analysis possible. MCB044557, 69102.

The fact that when certain local land use plans were initially developed, they anticipated construction of the Bridge is not itself determinative as to what is the appropriate no-build baseline for the Project. Lots have already been subdivided, and PUD agreements already entered into. The Agencies must start with the actual land uses – i.e. the existing and committed uses that are currently in place and are not contingent upon whether the Bridge is built – to analyze future growth and development and associated impacts. And that is exactly what the Agencies did.

1. No-Build Baseline Allowed for Complete Analysis of Environmental Impacts.

As detailed above and in State Defendants' primary brief, the Agencies relied on both land use plans and actual current land uses in creating the no-build baseline scenario. DE 91, pp 42-49. While Plaintiffs want to focus solely on the fact that some of the local land use plans

anticipate construction of the Bridge, they ignore the reality that even without a bridge, these land use plans have already been put into place. Because this represents the current, and future, growth and development in the project area, it is the proper baseline for the Project and the proper baseline to begin measuring impacts. *See Laguna*, 42 F.3d at 525-26. (EIS properly relied on data relating to current and expected growth, including existing and committed land uses); *N.C. All. for Transp. Reform, Inc. v. United States DOT*, 151 F. Supp. 2d at 689-90.

2. No-Build Baseline Allowed for Complete Analysis of Alternatives.

As with the analysis of environmental impacts, the no-build baseline scenario used by the Agencies was the correct baseline to use for the analysis of alternatives as well. The Agencies properly considered that the baseline must account for the fact that the project area is already largely developed or primed for development and that future development is slated to happen whether or not a bridge is built. [7]

To bolster their faulty argument that the Agencies used the wrong baseline to compare alternatives, Plaintiffs argue that the Agencies considered constrained versus unconstrained growth only in the Reevaluation. DE 95, p 27. That is incorrect. While the FEIS discusses unconstrained growth, it also addresses constrained growth in the indirect and cumulative effects analysis. MCB035074-77, 35081-87.

Similarly, Plaintiffs argue that both the FEIS and Reevaluation should have analyzed alternatives using constrained growth, implying that neither looks at ER2 in this light. DE 95, p 27. However, both the FEIS and the Reevaluation do exactly what Plaintiffs imply they do not

[7] "[A]ssuming full build-out of planned and expected development is appropriate in the Southern Shores and Duck areas because they are already 90 percent built-out. In addition, in Currituck County, developable land is fully subdivided or future development is defined by Planned Unit Development. In the NC-12 accessible area, streets and utilities are installed in almost all subdivisions, most public facilities are planned or in place, and planned major commercial areas have developed." MCB 068824.

and consider ER2 in both unconstrained and constrained growth scenarios. MCB035074-77 (FEIS), 68847-69 (Reevaluation).

The Agencies chose the proper baseline for the alternatives analysis because it is the baseline that represents the status quo, i.e., it represents the current state of land use, growth, and development. *See Defs. of Wildlife v. N.C. DOT*, 971 F. Supp. 2d 510, 527 (E.D.N.C. 2013), *aff'd in part, rev'd in part, remanded on other grounds by Defs. of Wildlife v. N.C. DOT*, 762 F.3d 374 (4th Cir. 2014). By using the baseline, the Agencies complied with NEPA and ensured a full and complete analysis of alternatives.

C. The Agencies Properly Analyzed and Compared a Full Range of Reasonable Alternatives.

Pursuant to NEPA, the Agencies are required to evaluate reasonable alternatives and a no-build alternative. 40 C.F.R. § 1502.14(a), (d). Alternatives that do not accomplish the purpose and need of the action are deemed unreasonable and require only a brief explanation for their rejection. *Webster v. United States Dep't of Agric.*, 685 F.3d 411, 427 (4th Cir. 2012). No analysis of environmental consequences is required for alternatives that the Agencies have, in good faith, rejected as too remote, speculative, impractical, or ineffective. *Id.*

1. Staggering Rental Times Was, and Remains, an Unreasonable Alternative.

In their primary brief, State Defendants discuss at length why the "staggering rental times" alternative was eliminated from further consideration and incorporate that argument herein. DE 91, pp 28-30. Plaintiffs argue that merely because the Agencies mentioned staggering rental times as a conceptual option that it is within the "realm of reason", citing to the 2009 Alternatives Screening Report for support. DE 95, p 29. Foremost, something being within the "realm of reason" does not mean that it is reasonable for implementation. The Alternatives Screening Report is done early in the NEPA process for the purpose of screening which potential alternatives reasonably meet the purpose and need of the project and merit detailed study. It

includes a number of alternatives that were eliminated from further review for various reasons. *See generally* MCB09370. The Alternatives Screening Report does just as it says, it screens out unreasonable alternatives and identifies reasonable alternatives for further detailed study.

Contrary to Plaintiffs' argument, staggering rental times was not eliminated solely because it is beyond the Agencies' authority and/or control, but for the basic reason that staggering rental times does not meet the purpose and need of the Project. MCB09411-13. Because of this fundamental shortcoming alone, the Agencies properly eliminated staggering rental times from further detailed study. *Webster*, 685 F.3d at 427.

2. The Agencies Considered Combinations of Alternatives.

NEPA requires that the Agencies examine "all alternatives that 'appear reasonable and appropriate for study at the time' of drafting the EIS, as well as 'significant alternatives' suggested by other agencies or the public *during the comment period*." *Roosevelt Campobello Int'l Park Com. v. United States EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (emphasis added).

As previously noted in State Defendants' primary brief, in the same comments that suggested Improved ER2, Plaintiffs and their counsel suggested further review of various combinations of alternatives. MCB069306-09. While the Agencies were not required to consider or respond to these untimely comments, they did. *Roosevelt Campobello*, 684 F.2d at 1047. First, Plaintiffs suggested considering the ferry alternative in combination with others. MCB069301. Despite having already done this in the 2009 Alternatives Screening Report, the Agencies did it again in the Reevaluation and reached the same conclusion – any ferry alternative, no matter what combination, is unreasonable. MCB09416-23; 68873-82. Second, in conjunction with Improved ER2 Plaintiffs suggested roundabouts, consolidation of driveways and local street intersections, multi-use paths, and using law enforcement officers to direct traffic – and the Agencies explained why each of these will contribute or not contribute to reducing future

congestion in the project area. MCB068882; 69295-99. Third, Plaintiffs suggested some sort of different composite alternative be considered. MCB068882, 69306-09. To address this, the Agencies explained why some of Plaintiffs suggestions were not feasible in the project area (or in at least one instance, bike and pedestrian facilities, already exists) and then the Agencies considered yet another combination of alternatives in the Reevaluation, finding that this new combination was also unreasonable. MCB068871, 68882, 69306-09.

Plaintiffs take specific issue with the fact that the Agencies did not consider ferry alternatives in combination with shifting rental times, transportation system management, or mass transit components. DE 95, p 32. This argument ignores the fact that, because of its high costs and environmental impacts, a ferry alternative itself is not feasible and combining a ferry with any other alternative does not change this. MCB09419-21, 69302-03. Plaintiffs also argue that, if ferries are not feasible, then the Agencies should have considered combinations of alternatives without a ferry. DE 95, p 32. Again, the Agencies did this beginning in the Alternatives Screening Report when they considered various combinations of alternatives that do not involve a ferry but do involve either improving the existing roads (the ER alternatives) or building a bridge (the MCB alternatives). MCB09396-9411.

Throughout the NEPA process, the Agencies analyzed alternatives and combinations of alternatives, eliminating those that were not reasonable and being transparent with the public about the process and reasoning behind why these decisions were made. This is what NEPA requires and this is what the Agencies did.

3. The Agencies Compared Alternatives on Many Criteria, including Hurricane Evacuation Benefits.

Throughout the NEPA process, the Agencies clearly presented the hurricane evacuation information for each alternative and, as required, presented it in a comparative form for ease of

understanding. 40 C.F.R. § 1502.14; MCB09398, 9403, 9412 (Alternatives Screening Report analysis of hurricane evacuation benefits); MCB05535 (2035 Traffic Alternatives report); MCB034953-55 (FEIS); MCB068831-32, 68847-51 (Reevaluation).

For the two bridge detailed study alternatives, MCB2 and MCB4, two hurricane evacuation options were considered – adding a third outbound lane to US 158 or reversing the existing center lane.[8] MCB034877; 34911-29. The Preferred Alternative identified in the FEIS is comprised of (i) MCB4/C1 with Option A; (ii) reversing the center turn lane of US 158 between the bridge's interchange with US 158 and NC 168/US 158 intersection for hurricane evacuation purposes; and (iii) some small design refinements to help avoid and minimize impacts. MCB034928-29. Plaintiffs argue that combining MCB4 and the Preferred Alternative for FEIS Table 2-3 is misleading because the Preferred Alternative is not exactly the same as MCB4. DE 95, pp 33-34. The Preferred Alternative is not exactly the same as MCB4 because it contains slight refinements, but the refinements were minor enough that the traffic benefits were the same. MCB034928-29. It is nonsensical that NEPA would require the Agencies to do individual hurricane evacuation studies on each possible slightly refined scenario of every detailed study alternative. For example, one of the refinements in the Preferred Alternative (and the refinement pointed out by Plaintiffs in their brief as being the reason that Table 2-3 is "misleading") is that MCB4 has approximately four miles of widening on NC 12 while the Preferred Alternative reduces that to approximately 2.1 miles of widening concentrated in the most congested areas. DE 95, pp 33-34; MCB034928, 34954. The Agencies did not do an entirely different hurricane evacuation analysis to account for this 1.9-mile reduction because the effect is miniscule when applied to the wider picture of hurricane evacuation benefits.

[8] Plaintiffs are incorrect when they state that the Bridge was never analyzed with a third outbound lane for hurricane evacuation. DE 95, p 34.

Plaintiffs argue that the FEIS does not adequately disclose and evaluate the hurricane evacuation benefits of the detailed study alternatives while simultaneously citing to the language of the FEIS that both discloses and evaluates this information.[9] DE 95, pp 33-34; MCB034953-55. This in and of itself shows the weakness of Plaintiffs' argument. Beginning with the 2009 Alternatives Screening Report, each of the detailed study alternatives have been consistently evaluated for their ability to meet each of the purposes and needs of the project, including reducing hurricane evacuation times. MCB09398, 9403, 9412; 5535; 34953-55; 68831-32, 68847-51.

4. The Agencies Thoroughly Analyzed How Alternatives Could be Funded and Financed.

Two facts play primary roles in why the Existing Roads alternative cannot be adequately funded but the Bridge can: (i) the Existing Roads alternative does not have as much local support as the Bridge and (ii) because it will generate toll revenue, the Bridge has more financing options than the Existing Roads alternative. MCB02143, 2156, 2373, 3449, 68807-08, 68973, 72863-64.

The Agencies fairly compared funding options for the Preferred Alternative and the Existing Roads alternative. The project did not score high enough to qualify for any statewide or regional level funding under the Strategic Mobility Formula. MCB69269. At the Division level, scoring is based half on data and half on "Local input", defined as the rankings identified by NCDOT's Division Engineers, and the relevant Rural Planning Organization ("RPO"). N.C.G.S. § 136-189.11(d)(3)(a). The RPO favors construction of a bridge, MCB0349-50, 68973, 72863; as do the Currituck County Commissioners, MCB02143; the Town of Southern Shores, MCB02156, 67411; the Town of Duck, MCB02257, 67410; the Town of Nags Head, MCB02373; and the Town of Kill Devil Hills, MCB72864. Nonetheless, the Agencies gave the

[9] Plaintiffs also argue that the ROD does not discuss the Bridge's ability to reduce hurricane evacuation times. DE 95, p 35. This is not true. MCB068751, 68762-63, 68766.

Existing Roads alternative the benefit of the doubt by assuming it would receive the same state funding as the Preferred Alternative, even though it almost certainly would not because local input strongly favors the Preferred Alternative.

Despite Plaintiffs' argument, the Agencies' consideration of multiple funding arrangements and use of separate traffic forecasts shows just how in-depth the Agencies' financial analysis is. First, the Agencies have considered a "wide range of estimated costs and financing options" because different financing options have different costs (i.e., debt service) and the Agencies are exploring varied options to find the optimal financing plan. *See. e.g.*, MCB068808, 75499, 75512-13. While Plaintiffs want this to be problematic, it is akin to a homebuyer researching various mortgage options and is a concrete demonstration of the Agencies' commitment to a full financial analysis. Second, as discussed in detail above, use of two traffic forecasts, one for environmental impacts and one for toll revenue projections, is necessary. Plaintiffs argue that the Agencies have "distanced themselves" from the reduced traffic forecasts and their impact on toll revenue when, in fact, the opposite is true. DE 95, p 37. The Agencies are preparing an investment grade traffic and revenue study, based on these reduced traffic forecasts, to thoroughly analyze the "worst case [financial] scenario" of toll revenue projections and how that will affect Project financing.[10] MCB068823. Again, this shows the Agencies' dedication to an in-depth financial analysis.

In short, after a full and complete analysis, the Agencies determined that, despite costing more than some alternatives, the Bridge best meets the purpose and need of the project while minimizing environmental impacts and also has the most viable funding and financing opportunities.

[10] Seemingly, Plaintiffs' issues with the financial analysis regarding the Project lie with NEPA itself. The investment grade traffic and revenue study is not part of the NEPA process and, therefore, not subject to Plaintiffs' review and comment.

III. CONCLUSION

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

Respectfully submitted this the 27th day of May, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 27th day of May, 2021, I electronically filed the foregoing STATE DEFENDANTS' REPLY IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to, and pursuant to Local Civil Rule 5.1(e) shall constitute service upon, the following:

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