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

Case No. 2:19–cv–000014–FL

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

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APA	Administrative Procedure Act
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ER	Existing Roads
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
ICE	Indirect and Cumulative Effects Technical Report
MCB	Mid-Currituck Bridge
NCDOT	North Carolina Department of Transportation
NEPA	National Environmental Policy Act
NOAA	National Oceanic and Atmospheric Administration
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

I. INTRODUCTION

In an effort to address increasing traffic congestion and associated problems related to only one bridge connecting the northern Outer Banks of North Carolina to the mainland, the Federal Highway Administration ("FHWA") and North Carolina Department of Transportation ("NCDOT") have developed an extensive record and have engaged with the public every step of the way. In so doing, the Agencies have gone above and beyond the requirements of the National Environmental Policy Act ("NEPA").

Plaintiffs' arguments to the contrary reflect a misunderstanding of the law and of the facts of this case as reflected in FHWA's administrative record. First, Plaintiffs fail to understand that a public notice and comment period is not required for Reevaluations and ignore evidence in the record noting that FHWA considered and responded to comments received on the Reevaluation. Second, Plaintiffs argument that supplementation of the Final Environmental Impact Statement ("FEIS") was required improperly seeks a sweeping rule that any new information requires a Supplemental Environmental Impact Statement ("SEIS") or its equivalent. Third, contrary to Plaintiffs' assertions, the record describes differences in potential development between a bridge and no bridge scenario prior to the Reevaluation, ensuring that the public had access to relevant information related to project impacts. Fourth, Plaintiffs' claims that valid alternatives were not evaluated are likewise demonstrably false. Finally, Plaintiffs' claims that alternatives were not fairly compared and analyzed are false and refuted by the record.

II. ARGUMENT

A. NEPA Does Not Require That the Reevaluation be Subject to a Notice and Comment Period

NEPA requires agencies to "assess and consider the environmental consequences of their proposed actions, and *where prescribed*, to invite and consider the views of the public at large." *New River Valley Greens v. U.S. Dep't of Transp.*, 161 F.3d 3, *2 (4th Cir. 1998) (emphasis added)

(unpublished). The public review requirements applicable in this case are the 1978 NEPA regulations. Public review is *prescribed* for draft EISs. 40 C.F.R. § 1503.1(a); 40 C.F.R. § 1502.9(a); 23 C.F.R. § 771.123(i) (2018). An agency may also request comments on a FEIS. 40 C.F.R. § 1503.1(b). And an agency must respond to timely comments made on the FEIS. 40 C.F.R § 1502.9(b). An agency may also solicit and must respond to timely public comments made on and SEIS. 40 C.F.R. § 1502.9(c)(4). But public review is not prescribed for an agency's decision as to whether an SEIS is required in the first place. 40 C.F.R. § 1502.9 (c)(1); 23 C.F.R. § 771.129; 23 (2018) C.F.R. § 771.111 (2018). Indeed, FHWA went above and beyond the requirements of NEPA by responding to comments provided on the draft Reevaluation, as nothing in the regulations requires them to do so. Plaintiffs themselves reviewed and commented on the Reevaluation. FHWA's response to those comments are included in the record. *See e.g.,* MCB69254-69337. Plaintiffs' claim that the Reevaluation was kept secret is therefore incorrect. As described in detail below, *infra*16-19, Plaintiffs' claims that the agency kept the public in the dark are equally false. The agency solicited and received robust public input during the scoping process (MCB35812), on the Draft Environmental Impact Statement ("DEIS") (Fed. Defs.' Br. 7-8), and on the FEIS (MCB35111; MCB69441; MCB69152-69251). Further, as discussed in detail below, the record makes clear that the impacts of the project were clearly described to the public. *Infra* 16-19.

B. Supplementation is Not Required

Plaintiffs suggest that the agency is required to perform a SEIS anytime there is new information. But that is not the standard. Rather, NEPA requires supplementation when there is *significant* new information. 40 C.F.R. § 1502.9 (c)(1); 23 C.F.R. § 771.130 (2018). Not all new information is significant. *See* Fed. Def.s' Br. at 24 (ECF No. 93). Information is not significant if it would not cause an agency to change course. *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1062 (D.C. Cir. 2017). Plaintiffs also repeatedly incorrectly state that the new information they

identify is self-evidently significant. As discussed in the Federal Defendant's Memo in support of its Cross Motion for Summary Judgment, and in further detail below, Plaintiffs must do more. S*ee generally* Fed. Defs.' Br. 23-38. Specifically, Plaintiffs must show that new information changes the landscape from what was previously considered. Fed. Defs.' Br. 31-32 (*citing*, among other things *Protect our Communities Found. v. LaCounte*, 939 F.3d 1029, 1041 (9th Cir. 2019) and *Stand Up for Cal! v. U.S. Dep't of the Interior*, 410 F. Supp. 3d 39, 57 (D.D.C. 2019)), *aff'd sub nom. Stand Up for Cal.! v. U.S. Dep't of the Interior*, 994 F.3d 616 (D.C. Cir. 2021). Further, the determination as to whether new information is significant is subject to agency deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360 376 (1989). In other words, it is the agency, who, after taking a hard look at new information determines whether the information rises to the level of significant. Fed. Defs.' Br 28-29. That is exactly what FHWA did here. *Id.* at 28-29; 30-31; and 33-36. It carefully evaluated new in information in its Reevaluation and determined that the project is still necessary and that the new information considered, was not significant. Fed. Defs.' Br. 23-38.

Plaintiffs ignore this standard and presume that any new information must be significant and subject to public scrutiny under NEPA. Pls.' Resp. Br. 5-6 (ECF No. 95). But NEPA has no such indiscriminate requirement. Indeed, if Plaintiffs were correct, then agencies would be unendingly preparing supplemental environmental analyses regardless of the import of the new information. Plaintiffs cite no precedent in support of such a rule. Rather they rely on precedent addressing whether the public had access to the correct or necessary information in the DEIS and FEIS. Pls.' Resp. Br. 3-5 (*citing Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 199 (4th Cir. 2005); *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603-05(4th Cir. 2012)). These cases are unhelpful here, where the agency has already issued a DEIS and FEIS for public review. Nor does *La. Wildlife Fed'n Inc.,* 761 F.2d 1044, 1051 (5th Cir. 1985) support Plaintiffs' position. There the Fifth Circuit held that supplementation decisions are subject to agency discretion and that

information is "significant" if it "presents a seriously different picture of the environmental impact of the proposed project from what was previously envisioned." *La. Wildlife Fed'n Inc.,* 761 F.2d at 1051. At bottom, Plaintiffs have not made the required showing that the FHWA's significance determination violated the Administrative Procedure Act ("APA") and therefore, they have failed to show that NEPA requires supplementation in this case.

1. FHWA Reasonably Determined that New Information Was Not Significant

Plaintiffs claim that new information related to four issues required supplementation: 1) updated traffic data; 2) updated sea level rise projections; 3) updated growth and development projections; and 4) new alternatives and emerging vacation patterns. Plaintiffs are wrong on all counts.

a) **Updated Traffic Data is Not Significant**

Plaintiffs first argue that updated traffic data is significant new information requiring a SEIS. Pls.' Resp. Br. 7-10. Plaintiffs assert without citation to case law that "the decision to prepare a SEIS does not turn on whether or not new data make the Agencies believe a different solution is needed." Pls.' Resp. Br. 7.[1] On the contrary, courts have upheld agency determinations that supplementation was not required when an agency has assessed new data and reasonably concluded that it would not change their conclusions with respect to the selected alternative. *See Friends of Cap. Crescent Trail,* 877 F.3d 1051, 1061(D.C. Cir. 2017); *Clean Air Carolina v. N. C. Dep't. of Transp*., No. 5:14-CV-863-D, 2015 WL 5307464 at *16 (E.D.N.C. Sept. 10, 2015), *aff'd sub nom Clean Air Carolina v.*

[1] Instead, Plaintiffs cite the general proposition from *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d at 443 that the new information must present a "seriously different picture" from what was previously evaluated and from *La Wildlife Fed'n*, 761 F.2d at 1051 that additional review is required when the new information "carries 'sufficient gravity,'" but fail to articulate how they contend that applies in this case beyond reasserting the degree to which they assert summer weekday traffic expected in the project area has decreased. Pls.' Resp. Br. 7.

N.C. Dep't of Transp., 651 F. App'x 225 (4th Cir. 2016). That is exactly what FHWA did here. Fed. Defs.' Br. 33-38.

Plaintiffs claim that the reduction in the level of traffic congestion from what was predicted in the FEIS is a "significant difference []" warranting supplementation under NEPA. Pls.' Resp. Br. 8. But as described more fully in Federal Defendant's Memo in Support of its Cross Motion for Summary Judgment, FHWA considered updated traffic modeling and reasonably determined that the project need of reducing traffic congestion still exists,[2] and that the preferred alternative still best meets this need. Defs.' Br. at 25-27 and 33-34. Plaintiffs' argument that the FHWA displayed "willful ignorance" in making this conclusion is unfounded. Pls.' Resp. Br. 8. Rather, this is the exact rationale employed by the D.C. Circuit in *Friends of Capital Crescent Trail*. 877 F.3d at 1060-1062. In *Friends of Capital Crescent Trail*, the transportation agency reviewed updated Metrorail ridership information and determined that even though ridership was projected to decrease, the proposed project footprint would not change, and importantly, the information would not alter the "selection of light rail over bus rapid transit or other alternatives." *Id*. at 1061. Finding that the agencies' decision not to supplement was reasonable, the D.C. Circuit held that the agencies reasonably concluded that reductions in ridership "would not change the project's preferred alternative" and that "[t]hese circumstances warrant deference by the court to [the agencies'] reasonable, fact-intensive, technical determination that [the] preparation of a SEIS was not required." *Id.* at 1062. So too here.

Plaintiffs' comparison to *Louisiana Wildlife,* Pls.' Resp. Br. 9, lacks merit. In *Louisiana Wildife*, unlike this case, the plaintiffs raised a substantial environmental issue related to a change in

[2] Plaintiffs point out that summer weekend traffic congestion will occur across fewer miles Pls.' Resp. Br. 8, but the Reevaluation makes clear travel times in the no-build alternative do not yield a proportionate reduction. In fact, summer travel time over the Wright Memorial Bridge is still projected to take 136 minutes under the constrained development scenario in the no action alternative, a difference of only 18 minutes from the FEIS. *Compare* MCB68851 *with* MCB34954.

the Corps' assumption that 40% of the forested areas within the project area would be cleared regardless of the Corps decision. *La. Wildlife Fed'n Inc.* 761 F.2d at 1051. The Fifth Circuit reasoned that if the Corps' assumptions were incorrect, then a substantial number of acres would not be cleared but for the project which would result in significant environmental impacts not considered in the final EIS. *Id*. Therefore, the court determined that "[a]lthough the Corps need not necessarily prepare a supplemental EIS, it must reconsider its assumption that these acres will be cleared regardless of the project." *Id*. This is simply not the case here, where the new traffic information Plaintiffs point to would not result in additional environmental impacts not already considered in the FEIS. *See generally* Fed. Defs.' Br. 34-35; MCB68812-13; MCB68953-55. Indeed, FHWA found that there would be fewer adverse community impacts along NC 12 (MCB68810), that many categories of natural resource impacts were also projected to be less (MCB69487), and that noise impacts would also decrease (McB68811). FHWA does not require a SEIS for reductions in environmental impacts. 23 C.F.R. § 771.130(b)(1) (2018).

Plaintiffs' arguments related to toll revenue are nothing more than a red herring. NEPA does not require detailed financial plans as part of a project's environmental analysis. Rather, an EIS must "indicate those considerations, including factors not related to environmental quality which are likely to be relevant and important to a decision." 40 C.F.R. § 1502.23. FHWA requires a Preliminary Plan of Finance be developed pursuant to Major Project Guidelines. MCB68807. Thus, FHWA evaluated costs for the preferred alternative and ER2. MCB68804. The record establishes that to date, funding for the bridge can be reasonably anticipated and sources of funding including, but not limited to, tolling have been identified. MCB68806-08; MCB68812; MCB69460-61. Further, FHWA clearly explained in the Reevaluation that a new detailed traffic and revenue forecast would consider new development and traffic growth trends in determining the toll revenue the bridge could generate. MCB68823. If new traffic and revenue forecasts determined that the toll revenue from the bridge would be less than predicted in the Reevaluation, the reduced toll funding could be made up in other

areas. MCB68808. Furthermore, if the revised traffic and revenue forecast ultimately shows that the toll revenue is so insufficient that a detailed financial plan for the project cannot be supported, project planning would cease. MCB069279. In other words, at the time the Reevaluation and Record of Decision ("ROD") were published FHWA reasonably determined that the State had sufficiently identified project funding. To date, there has been no change to indicate that toll revenue is no longer an available source of funding for the project. MCB68806-08.

Plaintiffs further claim without record support that the question of toll bridge funding was a central question in the FEIS and that therefore a change relevant to toll funding necessitates an SEIS. Pls.' Resp. Br. at 10.[3] Plaintiffs are incorrect. FHWA's rationale for selecting the preferred alternative in the FEIS is not limited to the economic benefits of the alternative. MCB35814. Rather, the agencies selected the preferred alternative not solely because of its perceived economic efficiency but also because it best met the project purpose and need of reducing travel time, and easing congestion while avoiding adverse community and environmental resources impacts associated with the ER2 alternative. MCB35896-99; MCB69458-60. This conclusion is wholly unaffected by the availability of toll revenue to partially fund the project.

For these reasons the cases cited by Plaintiffs can be distinguished. For example, the court in *Natural Resources Defense Council v. United States Forest Service*, reasoned that the inaccurate economic data in the record could have led to the selection of an alternative with greater environmental impacts in more environmentally sensitive areas. *Natural Resources Defense Council v. United States Forest Service*, 421 F.3d 797, 811 (9th Cir. 2005). In contrast, here Plaintiffs have not shown that the project funding projections identified in the Reevaluation are incorrect or that they could have resulted in the selection of an alternative with fewer environmental impacts. *Compare Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446–48 (4th Cir. 1996) (finding

[3] As described above, the Reevaluation did not identify a significant change with respect to project funding that would warrant and SEIS.

that "inflated" economic benefits may result in approval of a project that otherwise would not have been approved because of its adverse environmental effects).

b) New Sea Level Rise Projections Were Not Significant

Second, Plaintiffs argue that FHWA should have prepared an SEIS due to updated sea level rise projections. Pl's Resp. Br. 10-17. But this too misses the mark: the FEIS disclosed the risks related to sea level rise. MCB35981-35983; MCB34249-251 (Other Physical Features Technical Report's sea level rise discussion). Supplementation is not required when new data merely confirms concerns already articulated and considered in an FEIS even when the new data provides more specific detail. *See Protect Our Communities Foundation*, 939 F.3d at 1040-41. In the Reevaluation, FHWA looked at an updated N*orth Carolina Sea Level Rise Assessment Report* issued by the North Carolina Coastal Resources Commission prepared in 2016 to determine whether a supplemental EIS was needed. MCB68930; Fed. Def's Br. 18. The data showed that sea level rise was still a long-term concern for the project area. MCB68930-68931. Therefore, FHWA determined that the FEIS' findings related to sea level rise remain unchanged. MCB68931.

Contrary to Plaintiffs' suggestion (Pls.' Resp. Br. 13) FHWA did take a "hard look" at the implications of the 2016 N*orth Carolina Sea Level Rise Assessment Report's* updated sea level rise projections on the project. Fed. Defs.' Br. 18. Instead, it is Plaintiffs who misunderstand the significance of the updated projections by listing the change in projections and describing them as self-evidently significant. Pls.' Resp. Br. 13. As discussed in the Federal Defendant's Memo in support of it's Cross Motion for Summary Judgment, if the highest estimate in the report for sea level rise in 2045 were to continue over 50 years, sea level rise would be 17.7 inches below the 23.2 inches and 39.4 inches discussed in the FEIS. Fed. Defs.' Br. 18 (*citing* MCB69330); see *also* MCB35047-49. Thus, the 2016 N*orth Carolina Sea Level Rise Assessment Report's* updated sea level rise projections were accounted for in the FEIS. Additionally, after evaluating projected sea level rise data in both the FEIS and the Reevaluation, FHWA reasonably determined that the risk and

uncertainty associated with sea level rise would affect all alternatives evaluated. MCB35826 ("Under all sea level rise scenarios considered, the entire barrier island would be inundated at the Dare/Currituck County line, . . . making a Mid-Currituck Bridge the only way off the Currituck County Outer Banks"); MCB68930. Additionally, the agency found that updated sea level rise projections would not negate the need for the project. *Id. See also* MCB68844. Indeed, FHWA found that the bridge component of the preferred alternative would reduce the impact of accelerated sea level rise on travel by offering alternative evacuation routes. MCB68811; MCB68930; MCB69460; MCB69465. Therefore, to the extent the data does represent a change from what was considered in the FEIS, it is not significant because it would not alter FHWA's conclusion with respect to which alternative to select.[4]

Additionally, Plaintiffs now argue for the first time that FHWA should have considered extra-record National Oceanic and Atmospheric Administration ("NOAA") sea level rise data because, in Plaintiffs' view, it is better than the North Carolina data analyzed by FHWA in its Reevaluation. Pls.' Resp. Br. 15 n.4 and 16. Plaintiffs describe, without additional explanation, the two reports as being designed for completely different purposes. *Id*. Plaintiffs further describe the NOAA data as "significantly different in its scope, quality and purpose." *Id.* at 16.[5] But Plaintiffs fail to explain how the data are different or why NOAA data compiled at the *national* level and describing *global* and *regional* change is relevant especially when the agency relied on state data

[4] Plaintiffs' response that "*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 need" (Pls.' Resp. Br. 14) concedes FHWA's point that the timing and extent of sea level rise is uncertain. MCB68931.

[5] The *North Carolina Sea Level Assessment Report* and the 2016 update were prepared by the North Carolina Coastal Resources Commission's Panel on Coastal Hazards to develop sea level rise projections for a thirty year time frame. MCB34249; MCB78024. Data in the report comes from the Intergovernmental Panel on Climate Change and NOAA tide gauges along the North Carolina Coast. MCB78027. The report develops "a range of predictions at each of the long-term tide gauges along the North Carolina Coast []."*Id*. The NOAA report describes its purpose as updating global mean sea level scenarios and integrating global scenarios with regional factors, MCB78243.

compiled specifically for the state in which the project is located. Further, Plaintiffs cite no authority whatsoever for the proposition that the NOAA data carries more weight than North Carolina's sea level rise data for the purposes of evaluating sea level rise impacts of a North Carolina project simply because the data emanates from NOAA. *Id*. Indeed, they cannot. At best, Plaintiffs state without citation that the NOAA data is "the federal government's official projections of sea level rise," (Pls.' Resp. Br. 16) but Plaintiffs offer the Court no explanation of how, and in what context, NOAA or the federal government intended this data to be used. Indeed, NOAA cautions planners using the data. "The process of selecting a sea level scenario for a specific setting is not a straightforward task for planners and engineers, and there are only a few case studies regarding its application in the literature." MCB78278.

Importantly, the N*orth Carolina Sea Level Rise Assessment Report* considered in the Reevaluation was an update to an earlier North Carolina sea level rise assessment report considered without objection in the FEIS. *Compare* MCB34249-251 *with* MCB68930. Plaintiffs did not question the agencies' source of this sea level rise data in their comments on the FEIS. MCB69194-69242[6]. Instead, it was not until after the issuance of the ROD that Plaintiffs challenged FHWA's selected source of sea level rise data. *See e.g*. MCB78893-78916. To the extent Plaintiffs now argue that FHWA should have considered updated NOAA projections as opposed to the *North Carolina Sea Level Rise Assessment* data all along, that argument has been waived. *Protect our Communities Found.,* 939 F.3d at 1036. If, on the other hand, Plaintiffs are arguing that the North Carolina data was appropriate for consideration of sea level rise impacts in the FEIS, but that Federal data was suddenly required for the Reevaluation, Plaintiffs offer no explanation for that assertion beyond the fact that it is newer. Pls.' Resp. Br. 13. But as explained in the Federal Defendant's Memo in Support of its Cross Motion for Summary Judgment, slightly newer data is not always required and "in

[6] Plaintiffs did not even raise this in their comments on the Draft Reevaluation. MCB69368-69369.

matters involving complex predictions based on special expertise, a reviewing court must be at its most deferential" because "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *See* Fed. Def.s' Br. at 30-31 (citing *Ohio Valley Envtl. 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) and *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428-29 (2011).[7] This Court has made clear that the 2017 NOAA data is extra record evidence that will only be evaluated to determine whether the agency considered all relevant evidence pertaining to new information and changed circumstances since development of the FEIS. ECF No. 74 at 7. Plaintiffs have failed to convincingly articulate why data from a report issued one year later than the updated data considered is relevant and should have been considered. Indeed, as the NOAA report Plaintiffs cite to explains, "sea levels have not been rising uniformly across the globe []." MCB78254.

Plaintiffs' citation to *Hughes River Watershed Conservancy v. Glickman* is therefore unavailing. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 445 (4th Cir. 1996), Pls.' Br. at 14. In *Hughes*, the court found that the agency failed to take a hard look at new information when it failed to address the undisputed conclusions of expert analysis related to the environmental effects of the project, but relied instead on the unsubstantiated conclusions that two Corps' employees provided verbally. *Id*. Here, unlike *Hughes*, the sea level rise projections contained in the 2017 NOAA report, are just that, projections. *Compare* MCB078278 (2017 NOAA report describing "significant uncertainties" in data) *with Hughes* at 445. Additionally, unlike the case in *Hughes*, NOAA's conclusions are not conclusions about the impacts of the agency action on the environment, but estimates of possible environmental change in the project area made separate and

[7] While FHWA and NCDOT are not experts in sea level rise, they are entitled to rely on the expertise of the North Carolina sea level rise experts responsible for drafting the 2016 N*orth Carolina Sea Level Rise Assessment Report*. "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).

apart from the agency action at issue. MCB078278. Once again, Plaintiffs fail to offer any record support for their statement that multiple federal agencies endorsed the updated 2017 sea level rise data. Pls.' Resp. Br. at 17. More importantly, Plaintiffs fail to offer any explanation of the context within which these agencies encourage the use of their data. Indeed, NOAA cautions that the data may be "of limited value" for "long-term, climate-related decision-making." MCB78278. Because Plaintiffs offer no compelling evidence to support their assertion that the 2017 NOAA data carries more weight than the State data relied on by the agencies, Plaintiffs have therefore failed to demonstrate any reason why this Court should substitute Plaintiffs' preferred data for the North Carolina sea level rise data reasonably considered by FHWA.[8]

Further, Plaintiffs misconstrue the effect of the NOAA projected sea level rise on the project by suggesting that the project will result in a bridge that is inaccessible by 2050 using Plaintiffs' preferred NOAA data (Pls.' Resp. Br. at 11). But the 2017 NOAA sea level rise projections do not undermine the need for a toll bridge in the near term. Fed. Def.'s Br. 31 (*Comparing* MCB78267-68 with MCB68930-31 and finding that consistent with the FEIS, 2017 NOAA data shows that much of the project area will be inundated by 2100). Additionally, Plaintiffs interpret the NOAA data as showing 28.3 inches of sea level rise by 2050. MCB78911. Even if Plaintiffs are correct, these projections do not exceed the sea level rise contemplated in the FEIS, which considered the impacts of one meter or 39.4 inches of sea level rise on the preferred alternative. MCB34236; MCB35982; MCB35047-49. Therefore, the 2017 updated NOAA projections are not relevant data that the agency should have considered, let alone sufficient to require the agency to submit an SEIS because they do not present information that wasn't considered in the FEIS. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 190 (4th Cir. 1999) (Holding no SEIS is required if the new data does not

[8] As explained in the Federal Defendant's brief, an agency should be afforded deference in terms of what technical data it relies on. Fed Def.'s Br. 30-31. Plaintiffs' citation to a non-NEPA case, *Nat'l Mining Ass'n v. Sec'y of Lab.*, discussing whether an agency should get deference to its interpretation of a statute does not change this conclusion. 153 F.3d 1264, 1267 (11th Cir. 1988).

present "a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned []").

c) New Growth and Development Projections are Not Significant

With respect to updated growth and development projections, Plaintiffs once again claim that new information is significant simply because it is new. Pls.' Resp. Br. 18. As explained *supra* 2-3, this is not the NEPA standard. Further, as discussed in detail in Federal Defendant's Memo in Support of its Cross Motion for Summary Judgment, FHWA took a hard look at updated development trends and accounted for their impacts to the project need in its Reevaluation. Fed. Defs.' Br. 36 (citing MCB68838-86644).[9] After considering the potential impacts of new development projections, the agency reasonably determined that although projected development decreased, the need for the project still remained. *Id*. In other words, even though projected development slowed, the area was still developing to a degree that the purpose and need for the project remained. As Plaintiffs contend (Pls.' Resp. Br. 19), anticipated development trends may influence a variety of environmental concerns. But critically, development at lower rates than what was evaluated in the FEIS is expected to decrease the environmental impacts of the project, rendering supplementation unnecessary. Finally, to the extent Plaintiffs press that changes in expected growth patterns affect projected toll revenue to a degree that requires supplementation (Pls.' Resp. Br. 19), that too is incorrect. The preferred alternative was selected for multiple reasons beyond its ability to be partially funded with toll revenue and for that reason, changes in development that effected tolling would not change the selection of the preferred alternative. MCB68808-68812.

d) FHWA is Not Required to Supplement the EIS to Consider Plaintiffs' Newly Identified ER2 Alternative

[9] As Discussed in detail *infra* 17, FHWA's FEIS evaluated the induced development impacts of the project both with and without the Bridge.

As described in Federal Defendants' opening brief, FHWA was not required conduct an SEIS to evaluate Plaintiffs proffered alternative of ER2 with shifting rental times. Fed. Defs.' Br. 33; MCB045562-63 (describing Plaintiffs proffered alternative). Plaintiffs do not even attempt to refute this point, but rather insist without support that their newly created "improved ER2" alternative should have been considered. Pls.' Resp. Br. at 20. It need not. *See* Fed. Defs.' Br. 33; *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1155 (9th Cir. 2008) ("An agency is not required by NEPA to consider new alternatives that come to light after issuance of the EIS[.]"); *See also, Providence Rd. Cmty. Ass'n v. EPA*, 683 F.2d 80, 83 (4th Cir. 1982) ("there must be an end to the process somewhere. Otherwise, so long as there are 'unexplored and undiscussed alternatives that inventive minds can suggest,' there would never be a federal project.").

Even so, the Reevaluation looked at Plaintiffs' proffered alternative and reasonably determined that it was not viable. Fed. Defs.' Br. 35-36 (citing MCB68871-72 describing the composite alternative as unrealistic and resulting in unacceptable environmental impacts). While Plaintiffs may disagree with the agencies' characterization of their suggested alternative, (Pls.' Resp. Br. 20), FHWA took a hard look at the information Plaintiffs presented concerning ER2. Indeed, FHWA gave this information more attention than NEPA requires explaining that Plaintiffs' alternative which included shifting rental times was unlikely to be implementable. Fed. Defs.' Br. 35 (citing MCB68871-72). Once again, Plaintiffs misapply the ruling of *Hughes* to this case (Pls.' Resp. Br. 20), because the alternative Plaintiffs are asking be considered in an FEIS is not "reasonable." MCB68872. FHWA investigated whether there were changes in vacation rental behaviors in the project area by interviewing rental property management companies and found that there were not. MCB68871-72. Therefore, the agencies' decision that no further evaluation of Plaintiffs' proffered alternative in an SEIS was reasonable.

C. FHWA Objectively Analyzed and Disclosed the Indirect and Cumulative Effects of the Project

Plaintiffs' assertions that FHWA, failed to comply with NEPA by obscuring the true effects of the toll bridge and misled the public (Pls.' Resp. Br. 21) are false. FHWA identified and evaluated impacts resulting from the toll bridge as well as impacts expected to occur in the project area without bridge as required by NEPA. *See* Fed. Defs'. Br. 44-47.

1. **The Agencies' Use of Development Plans Was Proper and Was Not Misleading**

FHWA relied on county land use plans to inform expected development for each of the alternatives. MCB69102. The no-build analysis was based on land use plans, but the build-out of homes to the maximum build-out consistent with land use plans was reduced to account for the possible effect of congestion as a constraint on future development. MCB35699.[10] Contrary to Plaintiffs' assertion, these publically available land use development plans are incorporated into the record. MCB36082-83 (FEIS references); MCB35625-35641(2011 ICE Report). Using the land use development plans to inform expected development in each alternative, including the no-action alternative was acceptable in this instance for multiple reasons.

First, using development plans to inform the baseline was helpful to determine not only the level of development expected for a project area for each alternative but also to determine the existing or committed land use conditions in the project area. MCB35693-35708; MCB068824. In addition to development projections, the land use plans provided FHWA with essential data related to existing land uses in the project area which FHWA must assess to understand the potential environmental impacts of the alternatives being evaluated. *See e.g.*, MCB35901-05 (maps describing existing land use, existing developments and existing facilities in the project area); MCB35672 (discussion of new housing units on the Currituck County Outer Banks). It was reasonable for the

[10] Existing development trends were compared to local land use plans. MCB35699. Because the trends were found to be consistent with the plans, FHWA forecast maximum build out available land based on the land use plans. MCB35699; MCB68941. FHWA then described how much of the maximum build out would occur by 2040 with a toll bridge. MCB68941. Finally because future build out would be less without the toll bridge, FHWA reduced projected future build out for ER2 and the no-build alternative. MCB68941.

agency to take this existing data and use it as a starting point for understanding the project area especially since the agency disclosed that expected development would be less if the toll bridge was not built and made reductions to development projections of non-bridge alternatives as was done here. Fed. Def.s' Br. 45; MCB68941; *See e.g., N.C. All. for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F Supp. 2d 661,690 (M.D.N.C. 2001) (*citing Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 526-27 (9th Cir 1994)) , *as amended on denial of reh'g* (Dec. 20, 1994). This is exactly what the agency did. MCB33174-80. Plaintiffs' arguments to the contrary fail. Pls.' Resp. Br. 23. Plaintiffs suggest that unlike *N.C. alliance*, where the court acknowledged it can be reasonable to use future growth in the baseline, it is not acceptable to do so here because future growth was not accounted for by existing or committed land use. *Id*. Plaintiffs are wrong. As described in the record, the county has constructed roads and made other commitments to achieve full build out of their land use development plans. MCB068824; MCB35630-34; MCB35697.

Second, information describing the potential increase in development resulting from the toll bridge was clearly identified in multiple places in the record and available for public review and comment. MCB35709-35711; MCB35712-35753; MCB35716 (Chapter 6 of the 2011 ICE report assessing the relationship of reasonably foreseeable changes in land development patterns with the detailed study alternatives; the effects of changed development patterns as well as the potential for increased day visitors on the area's ecosystem; and an assessment of the cumulative effects of the detailed study alternatives, project induced changes, and other activities); MCB36012-36024 (FEIS cumulative effects analysis). Indeed, Tables in the ICE report identify the following as project induced changes: 1) increases in permanent residents on the Outer Banks; 2) increase in the number of day trips to the Outer Banks; 3) development location, rate or type in the road-accessible Outer Banks; 4) development location, rate, or type in the non-road-accessible Outer Banks; and 5) development location, rate, or type in Mainland Currituck County to change. MCB35710-35711. Additionally, the ICE report described the difference in potential development impacts resulting from

the project. MCB35682-35708 (2011 ICE report describing the effects of project induced growth on alternatives).

Third, FHWA's description of development associated with building a toll bridge was not misleading. Contrary to Plaintiff's assertions, (Pl.'s Resp. Br. 21), FHWA did not conclude that a toll bridge would not affect development on the Outer Banks. Instead the FEIS explained "the Preferred Alternative does not increase the demand for development but does accommodate the forecast demand for new development of 86 percent build-out in 2035." MCB35827. Additionally, the FEIS explained that traffic congestion associated with the no-build and ER2 alternatives could constrain future development beyond what communities in the project area have already accounted for. MCB35698-35704. Specifically, FHWA found that projected growth in the area is driven not by transportation, but by tourism, and the existence of developable land. MCB35697-98. Yet, the agencies explained in the very next paragraph that transportation improvements "still have an influence on development." *Id*. And the agencies noted that severe congestion could limit development in the project area. MCB35698.

Fourth, the effects of increased development associated with a toll bridge were analyzed and disclosed in the FEIS. With respect to portions of the Outer Banks within the project area accessible by NC 12, the FEIS found that development could be less than projected if the bridge were not built. MCB36008. The FEIS goes on to explain that based on 2035 traffic forecasts, bridge alternatives would result in 86% planned build out or 13,200 homes or hotel rooms while the no-built alternative would result in 70% planned build out or 10,800 homes our hotel rooms and the constrained ER2 alternative would result in 75% planned build out or 11,600 homes or hotel rooms. MCB36008-09. The FEIS further explains that less development in the ER2 and no action alternatives would be unlikely to cause a reduction in new paved roadways and associated cumulative environmental impacts because the likely reductions in development would occur in areas where roads already exist. MCB36009. Additionally, the FEIS explained that the order of expected development would change

depending on whether or not a bridge was constructed. *Id*. (finding that with new access to the northern portion of the outer banks, undeveloped area in Currituck County would be expected to develop faster than undeveloped lots in Dare County). However, as described in the FEIS, roadless areas of the Currituck county Outer Banks would not be expected to develop regardless of the alternative selected because the influence of travel time saved to the area would be offset by numerous factors including government policy constraints, and local land use restrictions. MCB36010-11.

Including the data from land use plans that include the project to inform existing and expected land use patterns in each alternative including the no-action alternative, does not violate NEPA. *See Laguna Greenbelt, Inc.*, 42 F.3d at 526-27. Rather, it is a problem only when the impacts of the project are not adequately disclosed. *Ohio Valley Envtl. Coal. Inc.*, 883 F. Supp. 2d at 643-644. As described *supra* 16-17, that is clearly not the case here. Plaintiffs are wrong that the "ultimate conclusion" about the effect of a toll bridge denied key information. Pl.'s Resp. Br. 24. The differences not only in projected development, but also in the timing and location of development were disclosed and evaluated in the FEIS making it possible to "accurately isolate and assess the environmental impacts of the proposed protect." *See Ohio Valley Envtl. Coal. Inc.*, 883 F. Supp. 2d at 643 (*quoting NC. Wildlife Fed'n* , 677 F.3d at 602). For this reason, as stated in Federal Defendant's brief, *N.C. Wildlife Fed'n* and *Friends of Black Bay* are clearly distinguishable from this case. Fed. Def.s' Br. 45-46.

The Reevaluation assessed all alternatives including the ER2 alternative using both the constrained and unconstrained development scenarios. MCB68842-45. Plaintiffs' unsupported claim to the contrary is false. Pl.'s Resp. Br. 28. The Reevaluation makes clear that even under a constrained development scenario MCB is still the preferred alternative. MCB68942. Plaintiffs' claim that the ROD does not support the contention that the final decision was made using the constrained scenario ignores that the ROD is a concise summary. 40 C.F.R. § 1505.2. Even so, the

ROD makes clear that the preferred alternative was selected because the selected alternative would substantially improve traffic flow, substantially improve travel time between the Currituck County mainland and the Currituck County Outer Banks, and substantially reduce evacuation times from the Outer Banks for those who use US 158 and 168 as an evacuation route. MCB69447; MCB69458. Many of the advantages of the preferred alternative exist even in the constrained development scenario. MCB68866-67; MCB68851.

D. FHWA Objectively Analyzed and Fairly Compared a Full Range of Reasonable Alternatives

Plaintiffs offer four challenges to the agency's alternatives analysis. First, they contend that the FHWA should have considered a shifting rental time alternative because it would have met the project's purpose by reducing traffic congestion. Second, they argue that the agency should have assessed the "smaller scale" composite alternative. Third, Plaintiffs assert that the agency should have evaluated the hurricane evacuation times of each alternative. Fourth, Plaintiffs contend that the agency should have compared how each alternative would be funded. None of these arguments have merit.

Plaintiffs' alternatives argument ignores the threshold principle that an agency need only explore feasible and reasonable alternatives. *See* 40 C.F.R. § 1502.14(a) (an EIS must "[r]igorously explore and objectively evaluate all *reasonable* [project] alternatives." "[A]n agencies discussion of alternatives must be 'bounded by some notion of feasibility.'" *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Vermont Yankee Nuclear Power v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519,551 (1978)). An agency' evaluation of alternatives is subject to substantial discretion and Plaintiffs have offered no compelling reason why the agencies elimination of alternatives as unreasonable should not be afforded such discretion here. *See North Carolina v. FAA*, 957 F.2d 1125, 1135 (4th Cir. 1992).

1. FHWA Reasonably Eliminated the Shifting Rental Time Alternative Because It was Not Feasible.

The shifting rental times alternative is infeasible because it would require business to make unprofitable choices that consumers don't want. MCB20798-20800. Put simply, the agency cannot compel vacationers to travel during the weekday. MCB68871-72; (eliminating shifting rental times because no government agency could compel check out times when the market favored weekend check-ins/checkouts). In other words, shifting rental times are unlikely to be implemented by anyone not just FHWA. NEPA does not require an agency to consider alternatives "that are unlikely to be implemented." *Muckleshoot*, 177 F.3d at 813.

Plaintiffs site *Muckleshoot* and *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 835 (1972) to suggest that FHWA should have considered the no-construction alternative of shifting rental times, even though FHWA couldn't compel alternative checkout times. Pls.' Resp. Br. at 29. But, in *Muckleshoot*, the district court found in favor of the agency because there was no evidence in the record to suggest that a critical market participant "would agree to plaintiffs' proposed alternative." *Id*. The Ninth Circuit reversed because it did find such evidence in the record. *Id*. Here the only record evidence regarding the supposed feasibility of shifting rental times was submitted by Plaintiffs in their comments on the Reevaluation. MCB69305-06. FHWA interviewed managers of Outer Banks rental property as part of its Reevaluation and confirmed that contrary to Plaintiffs' suggestion a shifting rental times alternative is still unfeasible because it did not align with consumer behavior. MCB68871-72.

Next Plaintiffs state without citation to case law that shifting rental times is a reasonable alternative simply because it was evaluated in scoping. Pls.' Resp. Br. 29. Plaintiffs' assertion reflects a serious misunderstanding of the NEPA scoping process. 40 C.F.R. § 1501.7(3). Scoping is an early step in the NEPA process that allows an agency to "identify and eliminate from detailed study the issues which are not significant." *Id.* The early exploration of alternatives during scoping

does not commit the agency to assess those alternatives later. If the standard of reasonableness was, as Plaintiffs suggest, consideration during scoping, no alternative could be dismissed from detailed consideration. Moreover, the record citations Plaintiffs cite are for shifting rental times from Friday to Sunday only – not from mid-week to mid-week as Plaintiffs suggest is required. Pls.' Resp. Br. 29-30.

Plaintiffs make an about face and acknowledge that FHWA's inability to implement the shifting rental alternative, was not the only reason FHWA eliminated it from detailed evaluation. Pls.' Resp. Br. 30-31. But now Plaintiffs pretend that the shifting rental times alternative was eliminated solely because it didn't effectively meet the project purpose and need. *Id*. Plaintiffs are wrong again. As described above, this alternative was eliminated from detailed consideration during the scoping process because it was not feasible and because it did not meet the purpose and need. *Supra* 20; Fed. Defs.' Br. 41-43. FHWA took a second look at this conclusion during the Reevaluation process and found that this alternative remains infeasible. *Supra* 14.

2. NEPA Does Not Require Consideration of a Composite Alternative.

Plaintiffs falsely claim that an alternatives analysis is automatically flawed if it does not contain a composite alternative. Pls.' Resp. Br. 31. Once again, Plaintiffs misapply the standard. As explained in Federal Defendant's opening brief, the situation looked at by the Tenth Circuit in *Davis* is distinct from this case. Fed. Def.'s Br. 41. More importantly, Plaintiffs misconstrue the overarching problem with respect to analyzing the composite alternative Plaintiffs suggest even without the Ferry alternative. Pls.' Resp. Br. 32 n. 11. The composite alternative Plaintiffs argue should have been considered is not unreasonable only because it includes the ferry alternative that the Agencies found to be unreasonable, but also the shifting rental times alternative as well. MCB68870-72. For this reason, it would not make sense, nor is it required of the Agencies, to evaluate an alternative that

included any of the alternatives deemed unreasonable.[11] What Plaintiffs fail to understand is that "an agencies discussion of alternatives must be 'bounded by some notion of feasibility.'" *Muckleshoot*, 177 F.3d at 814. *See also, Nat. Res. Def. Council, Inc.*, 458 F.2d at 837 (holding that NEPA "must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible. . ."). And that determination is afforded deference. *FAA*, 957 F.2d at 1135.

3. FHWA Fairly and Objectively Compared How Alternatives Would Affect Hurricane Evacuations

Plaintiffs falsely claim that FHWA was arbitrary and capricious because it did not compare alternatives fairly with respect to their ability to improve hurricane clearance times. Pls.' Resp. Br. 33. Not so. Hurricane evacuation information was discussed in the 2009 Alternative Screening Report. MCB09398; MCB9403; MCB9412. Hurricane evacuation information was presented in the 2035 Traffic Alternatives Report. MCB05544. The FEIS showed the hurricane evacuation times for ER2 and the preferred alternative were essentially the same in the 2035 design year. MCB34954 (Table 2-3). The Reevaluation found that hurricane evacuation times were essentially the same in 2040 under an unconstrained traffic forecast scenario; and only 5% different in 2040 in a constrained traffic forecast scenario. MCB68846. Plaintiffs' argument that FHWA did not fairly compare alternatives with respect to hurricane evacuation times essentially boils down to 1) a complaint that the FEIS did not evaluate the toll bridge with respect to a third outbound lane but presented it as though it did and 2) that it was misleading for FHWA to combine two bridge alternatives together in one table. Plaintiffs are wrong on both counts. First, the FEIS did evaluate the toll bridge with a third outbound lane. MCB034877; MCB34888 (Table S-1). Second, the differences between the two alternatives presented in the same table Plaintiffs describe as misleading are minor and therefore

[11] This also applies to FHWA's determination in the Reevaluation that the composite alternative was not a reasonable alternative. MCB68882.

would not be anticipated to affect the projected hurricane clearance times. MCB034928-29; MCB35090.

Further, Plaintiffs are incorrect that the FEIS, Reevaluation and ROD never mention whether a toll bridge would meet the purpose and need of improved hurricane clearance time. Pls.' Resp. Br. 34. The FEIS describes this at MCB35887-88; the Revaluation at MCB68851; and the ROD at MCB6951-52. Additionally, contrary to Plaintiffs' suggestion, (Pls.' Resp. Br. 34) no alternatives were rejected from detailed consideration solely because they would not provide reductions in hurricane clearance times. Fed. Defs.' Br. 6-7 (citing MCB35812; MCB35896; MCB35896). Plaintiffs argue that FHWA's decision to eliminate some alternatives re-considered in the Reevaluation "because they would not provide *any reduction* in hurricane clearance times" and suggest that they should have eliminated the toll bridge alternative for the same reason. Pls.' Resp. Br. 35 (emphasis added). Plaintiffs are incorrect that these alternatives were eliminated solely because they would not provide any reduction in hurricane clearance time. MCB34963-65. But even if they were, unlike those other alternatives, the toll bridge did provide a reduction in hurricane clearance times. MCB68868; MCB68569.

4. The Agencies Fairly and Objectively Compared How Alternatives Could be Funded and Financed.

Plaintiffs next claim that funding and financing for different alternatives was not objectively compared. Here, the record makes clear that financing was not the sole reason for selecting the preferred alternative. MCB68808-68812. Nor was an alternative rejected primarily due to cost. *Infra* 19. Nonetheless, FHWA did provide anticipated sources of funding for alternatives discussed in detail. MCB68806-08. Moreover, Plaintiffs' speculation that the existing roads alternative could receive funding comparable to the toll bridge (Pls.' Resp. Br. 36) is unlikely, given the fact that an existing roads alternative does not have the same level of local support as the toll bridge and that the

bridge has funding sources available to it that an existing roads alternative does not. MCB02143; MCB2156; MCB2373; MCB3449; MCB68807-08; MCB68973; MCB72863-64.

Further, Plaintiffs' arguments that sea level rise increases will decrease toll revenue does not mean the bridge cannot be funded. Sea level rise projections impacting the project area under any scenario are not anticipated to occur for decades. *Supra* 12. In the interim the bridge would be utilized and toll revenue would be collected. MCB35891-92. Plaintiffs seem to assume that toll revenue reductions will occur immediately, but that is unlikely to be the case. Furthermore, a reduction in bridge traffic does not necessarily mean, as Plaintiffs suggest, that toll revenue cannot pay for the bridge.

III. Conclusion

For the reasons articulated in this and the Federal Defendant's Memo in Support of its Cross Motion for Summary Judgment, FHWA and NCDOT are entitled to summary judgment because the record shows the FEIS and Reevaluation contained a thorough and objective analysis of project alternatives. The Agencies' methodologies were reasonable, suitably tailored, and entitled to deference. Moreover, because Plaintiffs have failed to show that the Agencies' analysis was arbitrary and capricious, they cannot succeed on their claims. Therefore, the Court should grant the Federal Defendants' cross motion for summary judgment and deny Plaintiff's motion for summary judgment.

Respectfully submitted this 28th day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum was filed through the Court's CM/ECF system on May 28, 2021, which will electronically serve all registered counsel.

/s/ Elizabeth McGurk
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