

No. 22-1103

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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NORTH CAROLINA WILDLIFE FEDERATION, et al.,

*Plaintiffs-Appellants*

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, et al.,

*Defendants-Appellees,*

On Appeal from the United States District Court  
for the Eastern District of North Carolina  
No. 2:19-cv-14-FL

**PLAINTIFFS-APPELLANTS' OPENING BRIEF**

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**FED. R. APP. P. 26 & L.R. 26.1 DISCLOSURE STATEMENT**

Plaintiffs-Appellants North Carolina Wildlife Federation and No Mid-Currituck Bridge-Concerned Citizens and Visitors Opposed to The Mid-Currituck Bridge have no parent corporations and no publicly held corporations that own 10% or more of their stock, or have direct financial interests in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement. Plaintiffs-Appellants do not have any disclosures.

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## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The National Environmental Policy Act (“NEPA”) is a democratic decisionmaking tool. *N.C. Wildlife Fed’n v. N.C. Dep’t of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012). NEPA ensures that decisions made by the federal government that affect the environment are informed and thoughtful. NEPA accomplishes this purpose via two mechanisms:

First, “by specifying formal procedures [federal agencies] must follow before taking action,” NEPA ensures agencies consider the true impacts of their actions, as well as less damaging alternatives. *Nat’l Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 184 (4th Cir. 2005) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

Second, NEPA directs agencies “to disseminate widely [their] findings on the environmental impacts of [federal] actions,” thereby ensuring “the public and government agencies will be able to analyze and comment on the action’s environmental implications.” *Id.*

These twin responsibilities do not mandate particular outcomes, but are intended to be “action-forcing.” *Robertson*, 490 U.S. at 349. In other words, the drafters of NEPA believed if government took time to consider the impacts of its action and had to disclose those impacts to the public and receive input, it would arrive at better results. *Id.* Because NEPA is all about making good decisions, its



mandate endures throughout the decision-making process and ends only when a final decision has been made and executed. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

A thorough and transparent NEPA review is particularly important for costly, environmentally damaging, and controversial projects like the Mid-Currituck Bridge at issue in this case—a proposed nearly five-mile-long toll bridge that would connect to the Northern point of North Carolina’s Outer Banks across a tranquil Sound, known for its diverse waterfowl habitat. The Toll Bridge, with an almost \$600 million price tag, is so costly that it can only be built if cars are charged hefty tolls to use it. The Toll Bridge would provide new access to a fragile barrier island, that is already beginning to feel the impact of sea level rise, and for over 50 years concerns have been raised that the additional access will make traffic congestion worse and exacerbate environmental impacts from extra traffic and development.

Rather than take a careful look at these issues and keep the public informed, as NEPA requires, Defendants-Appellees N.C. Department of Transportation and Federal Highway Administration (“FHWA”) (collectively “Agencies”) failed to be thorough or transparent throughout the decisionmaking process. The Agencies published their last public review over a decade ago, in 2012. The review was riddled with flaws, including reliance on overly-rosy projections of traffic and

growth, outdated sea level rise data, and an incomplete analysis of alternatives.

What is more, in this old review, the Agencies relied on models that assumed the *project would be constructed*, creating an erroneous baseline scenario associated

with increased traffic and development only the Toll Bridge could accommodate.

This false picture of future growth and traffic overstated the need for the Toll

Bridge and made alternative options look less feasible. The invalid approach also

hid the fact that the Toll Bridge would induce growth and traffic, and thus be

responsible for numerous environmental consequences.

After this shoddy analysis was completed, the Toll Bridge lost popularity

and funding and the project was abandoned for several years. When enthusiasm

for the Toll Bridge revived, the Agencies had the opportunity to fulfill their

statutory duty under NEPA and perform an up-to-date supplemental review of

impacts and alternatives and share their findings with the public in a Supplemental

Environmental Impact Statement (“EIS”). But they did not. Instead, the Agencies

performed an internal private review and made a final decision to construct the

Toll Bridge behind closed doors.

In the time between the last public review of the Toll Bridge in 2012 and the

Agencies’ ultimate decision to build it in 2019, the identified benefits of the project

diminished significantly. Forecasts of future traffic and growth decreased. Sea

level rise projections increased. The cost of the Toll Bridge went up, its efficacy in

alleviating traffic went down, and less harmful alternative solutions, like upgrades to the existing road system, became both cheaper and better situated to accomplish the articulated aims. None of this was disclosed to the public.

The Agencies' NEPA analysis was thus both illegally outdated and based on compromised data. In upholding it, the district court disregarded the fundamental purposes of NEPA.

First, the court misapplied the requirements for NEPA supplementation. The court did not deny that significant changes occurred between the last public review of the Toll Bridge and the ultimate decision to build it. Rather, the court held, in a significant departure from the law of this Circuit, that agencies have no responsibility to consider significantly changed circumstances that relate to the analysis of alternatives.

Second, the court brushed off the Agencies' use of baseline data that assumed construction of the Toll Bridge, obscured the impact the Bridge would have on the Outer Banks, and overstated its utility. Here again, the court disregarded the law of this Circuit, which has repeatedly rejected this error in NEPA analyses.

To accept the district court's ruling would be to negate NEPA's role as a democratic decisionmaking tool. This Court should reject the district court's analysis, make clear that NEPA requires sound, up-to-date, public analysis to

fulfill its purpose, and remand this case with instructions to vacate the Record of Decision.

### **STATEMENT OF JURISDICTION**

This is an appeal from a final judgment granting and denying cross-motions for summary judgment that disposed of all claims. Plaintiffs-Appellants, the North Carolina Wildlife Federation and No Mid-Currituck Bridge-Concerned Citizens and Visitors Opposed to the Mid-Currituck Bridge (collectively, the “Conservation Groups”) are organizations with members who live, work, and recreate in the vicinity of the proposed Toll Bridge. These members will be harmed by the construction and associated indirect effects of the Toll Bridge if it is constructed. Dkts. 89-1; 89-2; 89-3; 89-4; 89-5.

The district court had jurisdiction over this action under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–06. On December 13, 2021, the district court entered its order denying the Conservation Groups’ summary judgment motion and granting the Agencies’ summary judgment motions. Dkts. 98, 99.<sup>1</sup> The Conservation Groups timely noticed this appeal on January 31, 2022. Dkt. 100. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

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<sup>1</sup> Citations containing “Dkt.” refer to the ECF number of the case document filed with the district court. The pages correspond to the page of the document submitted to the court, not the ECF page number.

## STATEMENT OF THE ISSUES

- I. Whether the district court erred when it concluded the Agencies were not required to prepare a Supplemental EIS to disclose significant new information on the impacts of and alternatives to the proposed Toll Bridge, and specifically:
  - a. Whether the district court erred in concluding that there is no legal requirement to prepare a Supplemental EIS when significant changes occur which affect the comparison of alternative solutions; and
  - b. Whether the district court erred when it concluded that significant new information related to traffic, development, and sea level rise did not require preparation of a Supplemental EIS.
- II. Whether the district court erred when it concluded the Agencies did not violate NEPA and the APA when they misrepresented the growth-inducing impact of the Toll Bridge in the project area by including this growth in their baseline.

## STATEMENT OF THE CASE

### I. Statement of Facts

Nearly half a century ago, the Agencies began plans to construct the Mid-Currituck Bridge: a proposed \$600 million toll bridge across the Currituck Sound

to a fragile barrier island in the Northern Outer Banks of North Carolina.

AR-74489. The most recent version of the project consists of

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

AR-68751. The Toll Bridge would operate as an additional way to access the northern Outer Banks barrier island.

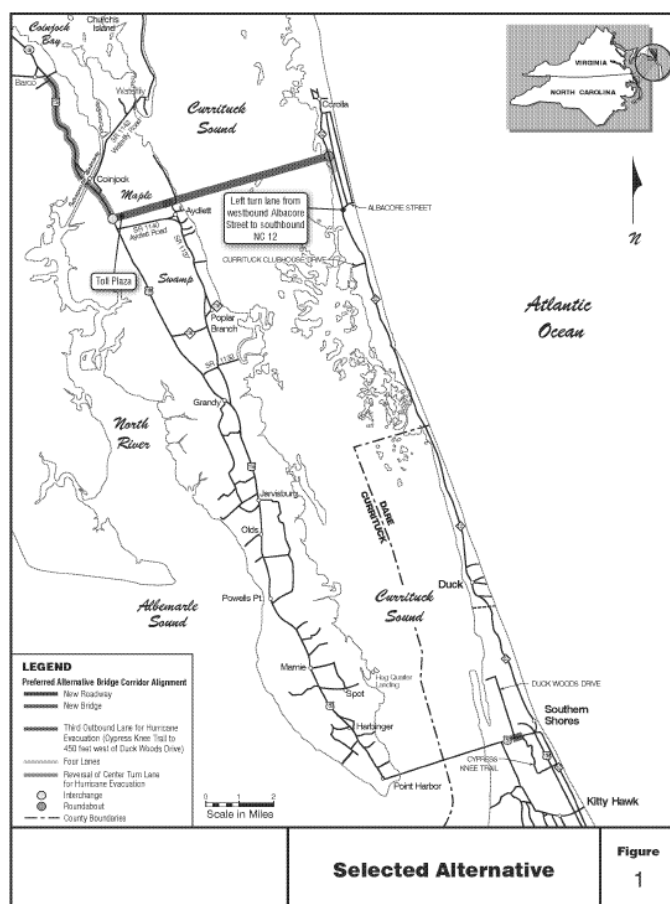


Figure 1: 2019 Selected Project Design. AR-68752.

### **A. The Agencies' Outdated and Flawed NEPA Review**

The Agencies began the NEPA process for the Toll Bridge in 1995. AR-35093; 74562. After a series of mis-starts, the Agencies began the NEPA review at issue in this litigation with a Draft EIS published in March 2010, followed by a Final EIS in January 2012. AR-35093. These were the only two documents the public were able to review and provide input on before the Agencies made the decision to construct the Toll Bridge in 2019.

The Final EIS described the purpose and need behind the project as:

- [t]o substantially improve traffic flow on the project area's thoroughfares (US 158 and NC 12);
- [t]o substantially reduce travel time for persons traveling between the Currituck County mainland and the Currituck County Outer Banks; and
- [t]o reduce substantially evacuation times from the Outer Banks for residents and visitors who use US 158 and NC 168 as an evacuation route.

AR-34874; 34907. The purpose and need statement was accompanied by traffic projections which anticipated by 2035 summer traffic would exceed capacity of the existing road system and traffic would be congested between 11 and 18 hours on a summer weekend day. AR-34907–08. Hurricane evacuation was anticipated to reach 36 hours. AR-34909.

Against this stated purpose and need, the Agencies considered seven “alternatives” in detail, five of which were versions of the Toll Bridge. AR-34911. The only non-Bridge action alternative studied in detail was Existing Roads 2

(“ER2” or “Existing Roads alternative”), which involved upgrades to the existing highway system. AR-34910; 34914. The Existing Roads alternative involved widening US 158 and NC 12, adding a third outbound evacuation lane on US 158, the Wright Memorial Bridge and the Knapp Bridge, and constructing a new interchange where US 158 and NC 12 meet. AR-34914. The Agencies determined the Existing Roads alternative would be the least expensive option and would meet the purpose and need of the project. AR-34955–56.

Despite the efficacy of the Existing Roads alternative, the Final EIS identified a Toll Bridge alternative as the Agencies’ preferred course of action. AR-34928. This Toll Bridge was expected to cost \$600 million, \$100 million more than the Existing Roads alternative. AR-34881–82. Nevertheless, the Agencies selected it because of its asserted superior ability to improve traffic flow, AR-34963; 9397–98; 9400–10, accommodate expected development, AR-34893, and generate toll revenue, *see* AR-34958; 9406. The Agencies anticipated the Toll Bridge would generate approximately \$21 million in toll revenue annually for the first ten years and up to \$34 million annually by 2065. AR-34957. The Agencies planned to finance the Toll Bridge with State funds (\$35 million per year) earmarked in law to fill the “gap” between the toll revenue and the full project cost. AR-34958.



### 1. The Final EIS' Biased Alternatives and Impacts Analysis

The Agencies relied on future forecasts of anticipated development and traffic to disclose the relative merit of different alternative solutions. *See, e.g.*, AR-34953–54. The Agencies generated different forecasts of growth to illustrate what supposedly would happen if each alternative was built, as well as a “No-Build” baseline scenario. AR-34954; 9396–97; 9400–10. However, each of these forecasts was based on data which assumed the Toll Bridge would be built. *See* AR-35074.

To create the traffic forecasts, the Agencies relied on 2001 traffic conditions as well as land use forecasts that estimated conditions expected for 2006. AR-5427–28. The land use forecasts were based in part on land use plans prepared for Currituck County, Kitty Hawk, Southern Shores, and Duck, AR-35075, all of which assumed the Toll Bridge would be constructed. *See, e.g.*, AR-34980–81 (“A bridge is . . . included in the land use plans of the affected jurisdictions.”).<sup>2</sup> Because the land use forecasts assumed construction of the Toll Bridge, the Agencies’ underlying conditions in the Final EIS likewise assumed the projected

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<sup>2</sup> The land-use plans themselves were not included in the Administrative Record by the Agencies. *See* Dkts. 20-1 at 4–56; 66-1 at 4–13; 72-7 at 4.

increase in development and traffic associated with the Toll Bridge's construction. AR-35074.

The Final EIS stated the traffic forecasts used for all alternatives assumed “full build-out” of development—a condition which was only expected if the Toll Bridge was constructed. AR-35074–75. The Agencies defined “full build-out” as 86 percent of available lots in the area being developed, for a total of 13,200 new housing units. AR-35074. If the Toll Bridge was not constructed, and no action was taken (the “No-Build” alternative), the Agencies anticipated significantly fewer units would be constructed.<sup>3</sup>

Yet the Agencies used traffic forecasts that assumed the Toll Bridge would be built, and “full build out” would occur, for all alternatives, even their “No-Build” baseline. AR-35074. In other words, the Agencies assumed a level of development associated only with the Toll Bridge would occur regardless of which alternative (including the “No-Build” option) was chosen.

The Final EIS and subsequent documents thus presented the topsy-turvy position that the Toll Bridge would not in fact induce development beyond the baseline condition, but rather that the non-Bridge alternatives would “constrain” development. AR-35074–75. As a result, the Agencies did not evaluate the

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<sup>3</sup> The Agencies found that if no action was taken there would be 2,400 fewer housing units. AR-35074–75.

greater development impacts on the Outer Banks (including 2,400 more housing units) attributable to the Toll Bridge and did not disclose how this increase in development would affect the natural resources of the area. AR-35081–87.

On the contrary, the Agencies repeatedly told the public no additional development on the Outer Banks would occur. For example, the Final EIS stated:

[f]or the NC 12-accessible Outer Banks, *there would be no reasonably foreseeable change in the overall type and density of development with implementation of the detailed study alternatives, including the Preferred Alternative*, compared to the No-Build Alternative. Negligible or no increase in the demand for houses and businesses throughout the Outer Banks resort area would be foreseeable over the No-Build Alternative.

AR-35074 (emphasis added); *see also* AR-35076 (reaching same conclusion for development in the roadless area); 32244. The Agencies reached these conclusions because they assumed growth from the Toll Bridge would occur as part of the No-Build baseline.

Indeed, other documents make clear that constructing the Toll Bridge “could greatly facilitate the continued growth within the area.” AR-70210; *see also* AR-70325. Yet nowhere did the Agencies assess the impacts of the thousands of additional housing units and hundreds of acres of additional development on the Outer Banks that would occur if the Toll Bridge were built.

The flawed analysis also blinded the Agencies to the efficacy of different alternative solutions. Because the Agencies assumed the full level of development

associated with the Toll Bridge for all alternatives, they also assumed the full level of traffic associated with that level of growth into their analysis. AR-35074. As a result, the Agencies asserted that the Existing Roads alternative would result in traffic congestion along 5.9 miles on summer weekdays and 39 miles on summer weekends. AR-34954. The Agencies relied on these distorted traffic projections to reject the Existing Roads and other alternatives and instead select the Toll Bridge. *See, e.g.*, AR-9406; 34953–54.

## **2. The Final EIS' Outdated Analysis of Sea Level Rise**

The Final EIS included a brief discussion of sea level rise, all premised on data from a 2008 ICF International Report—a document premised on climate data from the mid-1990s to the early 2000s. *See* AR-35047; 78009; 78010–22.<sup>4</sup> The Agencies briefly considered how sea level rise would impact the Toll Bridge by 2035, which they stated was the design year of the Toll Bridge. Based on the old data from the 2008 Report, the Agencies concluded under a “worst-case sea level rise scenario” the area would experience a 6.7-inch rise in sea level by 2035.

AR-35049. The Agencies admitted this level of sea level rise would result in some inundation of roads in the project area, AR-32338, but nonetheless concluded this

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<sup>4</sup> The Agencies' 2011 Other Physical Features Technical Report, which also discusses sea level rise relied on the same obsolete data. *See* AR-32347–48.

level of sea level rise would not have any meaningful impact on the viability of the project. AR-32351; 35048.

The Agencies also determined that by 2100, the area could experience sea level rise of 23.2 inches. AR-35048. The Agencies largely dismissed these projections, noting that the Toll Bridge would need to be replaced before that time. *Id.* Nevertheless, they went on to observe that the anticipated breach of NC 12 by the Dare-Currituck County line by this time would render the highway impassable, and thus the Toll Bridge “would be a useful asset” in getting people on and off the barrier island. *Id.* This eventuality was not an identified purpose of the Toll Bridge, however, and was not described, let alone studied, in any detail.

Finally, the Agencies looked at how the structure of the Toll Bridge would be affected by one meter of sea level rise but did not extend this analysis to how nearby roads and development would be affected. *Id.* No analysis was performed to determine how traffic and need for the Toll Bridge would change once areas became inundated.

The Conservation Groups and others submitted substantial comments outlining deficiencies in the Draft and Final EIS. *See, e.g.*, AR-16891–913; 36509–83; 69505–12; *see also* AR-69051; 69096.

## **B. Project Delay and Financial Developments**

Typically, a Final EIS would be swiftly followed by a Record of Decision (“ROD”) finalizing the decision to pursue a selected action. That did not happen here, and instead the project stalled once again. In 2013, significant changes were made to North Carolina’s transportation funding system, and the \$35 million annual earmark funding for the Toll Bridge was eliminated. *See* Strategic Transportation Investments Act, N.C. Gen. Stat. § 136-189 (2016). A new scoring process for transportation funding was set in place, making the analysis of how to fund and finance different options in the Final EIS obsolete. *See id.* The Toll Bridge scored poorly under the new system and was, once again, placed on hold. *See* AR-70168.

Five years later, in 2018, the Toll Bridge idea was again revived. Because the previous earmarked funding had been removed, a consultant prepared a new draft finance plan. This plan anticipated the Toll Bridge would need to generate toll funding through at least 2073 to pay for itself, even when combined with other sources of government funding. AR-75487.

### C. The Agencies' Internal Reevaluation

Because a ROD was not issued within three years of publication of the Final EIS, FHWA was statutorily required to reevaluate the Final EIS. 23 C.F.R. § 771.129(b); AR-68757. This was not a public process.

Because there had been so many significant changes since publication of the Final EIS, the Conservation Groups submitted a letter to the Agencies requesting they prepare a Supplemental EIS so the public could scrutinize the analysis of the Toll Bridge and alternative solutions based on up-to-date information, and give feedback based on the new information. AR-45382–442.

The Agencies declined to do so, and in March 2019, more than seven years after the Final EIS was published, and without any interim opportunity for public input or scrutiny, the Agencies released their ultimate ROD announcing they would construct the Toll Bridge. AR-68747. The ROD was accompanied by the Agencies' internal Final Reevaluation Report and Study (the "Reevaluation") and nineteen separate technical study reports, none of which were made public prior to the Agencies' final decision. *See* AR-68784.

The Reevaluation and accompanying reports further demonstrated that there had been significant changes to the impact, viability, and financial feasibility of the Toll Bridge since the last public evaluation in 2012. For example, the expected cost of the Toll Bridge had risen from an estimated \$502.4–\$594.1 million to as

much as \$605.4 million. *Compare* AR-34882 with AR-68806. At the same time, the cost of the Existing Road alternative decreased from an estimated \$416–\$523.4 million to as low as \$277.9 million. *Compare* AR-34881 with AR-68806. Other changes to traffic forecasts, growth patterns, and sea level rise created a significant new picture of the transportation needs that had existed on the Outer Banks in 2007, when study of the Toll Bridge for the Final EIS began.

### **3. Significantly Changed Traffic Forecasts**

In the internal Reevaluation, the Agencies acknowledged forecasts of future traffic had decreased on *all* the roads in the project area. For example, the Final EIS had predicted that by 2035, there would be 45,400 average annual vehicle trips between US 158 and the site of the Toll Bridge. AR-68826. But under the Reevaluation's forecasts, that number dropped to 26,100 vehicle trips by 2040 (a more than 40 percent decrease). *Id.* Similarly, forecasts of anticipated traffic on the Wright Memorial Bridge if the Toll Bridge were not constructed dropped from a projected 48,700 vehicle trips in the Final EIS to just 30,600 vehicle trips in the Reevaluation. *Id.* Even expected traffic on the proposed Toll Bridge decreased from 12,600 average vehicle trips in the Final EIS to 7,700 vehicle trips in the Reevaluation. *Id.* Tables 1 and 2 below demonstrate the stark differences.



Representative Links	Average Annual Daily Traffic (number of vehicles)					
	2006	2015	No-Build/ER2		Preferred Alternative	
			2035 Previous Forecast	2040 Updated Forecast	2035 Previous Forecast	2040 Updated Forecast
US 158 Barco to Mid-Currituck Bridge	21,300	17,400	45,400	26,100	45,400	26,100
US 158 Wright Memorial Bridge	24,600	21,000	48,700	30,600	37,400	23,100
NC 12 Duck	19,500	16,000	29,000	27,000	21,700	19,500
NC 12 Albacore Street to Mid-Currituck Bridge	14,100	12,100 <sup>1</sup>	20,100	17,700 <sup>1</sup>	21,700	17,400 <sup>1</sup>
Mid-Currituck Bridge	NA	NA	NA	NA	12,600	7,700

*Table 1: Comparison of Average Annual Daily Traffic. AR-68826.*

Representative Links	Summer Weekday Traffic (number of vehicles per day)					
	2006	2015	No-Build/ER2		Preferred Alternative	
			2035 Previous Forecast	2040 Updated Forecast	2035 Previous Forecast	2040 Updated Forecast
US 158 Barco to Mid-Currituck Bridge	27,000	19,600	54,300	29,300	54,300	29,300
US 158 Wright Memorial Bridge	29,500	23,600	58,900	34,400	46,000	26,000
NC 12 Duck	24,000	18,000	36,500	30,300	27,900	21,900
NC 12 Albacore Street to Mid-Currituck Bridge	17,000	13,600 <sup>1</sup>	25,300	19,900 <sup>1</sup>	26,800	19,500 <sup>1</sup>
Mid-Currituck Bridge	NA	NA	NA	NA	14,500	8,600

*Table 2: Comparison of Summer Weekday Traffic. AR-68826.*

Based on these new forecasts, and in contrast to the dire projections of gridlock in the Final EIS, the Reevaluation found that “2040 traffic demand generally will not exceed NC 12 capacity in Currituck County,” even if the Toll Bridge is not built. AR-68843; *see also* AR-68841 (“[T]ravel demand over capacity now only occurs on the summer weekend on 2.8 miles of road.”).

Because of the overall decrease in congestion, the Reevaluation noted that updated projections “lower[] the travel time savings associated with using the Mid-Currituck toll bridge, which results in some trips no longer shifting from the existing thoroughfare system to the Mid-Currituck Bridge.” AR-68827. The Reevaluation did not, however, evaluate how this diminution in Toll Bridge trips would affect projected toll revenue. *Id.*

#### **4. Significantly Reduced Development Forecasts**

The Reevaluation also found that development and growth patterns had slowed since the Final EIS was published. AR-68825. The Reevaluation stated that permanent population growth trends had slowed to less than 1 percent per year, a drop from 3 percent presented in the Final EIS. *Id.* Gross occupancy tax receipts that indicate tourism trends showed an annual increase of only 3.7 percent, down from 9.0 percent annually from 1994 to 2000 and 7.2 percent annually from 2001 to 2006. *Id.* Further, the overall annual increase in housing units fell to 0.82 percent per year from 2007 to 2014 compared to a rate of 1.41 percent per year from 2001 to 2007. AR-75283.

#### **5. Significantly Changed Sea Level Rise Forecasts**

The Reevaluation restated the Final EIS’ terse sea level rise conclusions, which were based on decades-old data. The Agencies also acknowledged publication of the 2016 North Carolina Sea Level Rise Assessment (a report that

itself relied on data from 2014), but did not take steps to apply the report's findings to the project area. AR-68930–31. And while the 2016 report predicted significantly more sea level rise than was addressed in the Final EIS (for example, sea levels were anticipated to rise by 10.6 inches by 2040 compared to the 6.7 inches predicted in the Final EIS), AR-68930, the Agencies cited the report as demonstrating that conclusions in the Final EIS were “unchanged.” AR-68931.

Other new developments regarding sea level rise were ignored by the Agencies entirely. For example, in 2017, the U.S. Global Change Research Program, comprised of thirteen federal agencies, issued Volume 1 of the Fourth National Climate Assessment, (“Fourth Assessment”), *see* AR-46713, which predicted that global average sea levels are expected to rise by “at least several inches in the next 15 years and by 1-4 feet by 2100,” AR-46728.

Likewise, the National Oceanic and Atmospheric Administration (“NOAA”) released a Technical Report supporting the Fourth Assessment that, at the time, provided the most recent and comprehensive data regarding sea level rise along the Outer Banks of North Carolina. *See* AR-78236. Updated projections in the NOAA Technical Report indicated that the year 2100 “high” sea level rise scenario analyzed in the Final EIS (23.3 inches), *see* AR-35047–48, is now a “low” projection, AR-78910 (compiling data from 2017 NOAA Technical Report); 78267–68. These newer projections show that the Toll Bridge is expected to see

28.3 inches of sea level rise by 2050 and 81.1 inches by 2100. AR-78910; 78267–68; 78454. None of this was analyzed or disclosed by the Agencies.

## **6. The Conservation Groups’ Supplemental EIS Request**

In sum, in their internal Reevaluation, the Agencies acknowledged some significant changes—such as traffic and growth forecasts, and cost projections—and entirely disregarded others, like the latest sea level rise data. All of these changes were brought to the Agencies’ attention by the Conservation Groups, who requested they be analyzed and published in a Supplemental EIS. AR-45382–442. In response, the Agencies simply asserted that “no new significant issues or impacts” had arisen and the conclusions and analysis in the Final EIS “remain[] valid” and declined to publish any additional public-facing NEPA review. AR-68783.

Shortly after the ROD was published, the Conservation Groups sent the Agencies another letter asking them to prepare a Supplemental EIS to allow for public scrutiny and input prior to moving forward with the Toll Bridge. AR-78893–925. The Agencies did not respond.

## **II. Procedural Background**

On April 23, 2019, the Conservation Groups filed suit in the United States District Court for the Eastern District of North Carolina under NEPA, 42 U.S.C. §§ 4321–4347, and the APA, 5 U.S.C. §§ 701–06, challenging the Agencies’

NEPA analysis, ROD, and decision to not prepare a Supplemental EIS for the proposed Toll Bridge. Dkt. 1. After the Agencies filed the administrative record pursuant to the court's case management order, Dkt. 18, the Conservation Groups moved to complete and supplement the record, Dkt. 46, which was granted in part on August 26, 2020, Dkt. 74. All parties moved for summary judgment. Dkts. 88, 90, 92. On December 13, 2021, the district court denied the Conservation Groups' motion for summary judgment and granted the Agencies' motions for summary judgment. Dkts. 98, 99. The Conservation Groups timely noticed this appeal on January 31, 2022. Dkt. 100.

### **III. Statutory Background**

NEPA is the nation's keystone environmental law, designed to serve as "a democratic decisionmaking tool" by ensuring careful decisionmaking and requiring rational consideration and disclosure of a full range of alternatives and the environmental impact of each. *N.C. Wildlife Fed'n*, 677 F.3d at 603 (quoting *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 n.24 (9th Cir. 2010)); *see also* 42 U.S.C. § 4332(2)(C).

NEPA promotes its purpose in two ways. First, NEPA ensures that a federal agency will carefully consider the effects of its actions on the environment by specifying formal procedures the agency must follow before taking action. Second, NEPA requires an agency to disseminate widely its findings on the environmental impacts of its actions.

*Nat'l Audubon Soc'y*, 422 F.3d at 184 (internal citation omitted).

For major federal actions significantly affecting the quality of the human environment, NEPA requires that federal agencies prepare an EIS. 42 U.S.C. § 4332(2)(C). Under the regulations applicable to this project, an EIS must identify the direct, indirect, and cumulative impacts of the proposed action and consider alternative actions and their impacts. 40 C.F.R. §§ 1502.14, 1502.16, 1508.7, 1508.8 (1978).<sup>5</sup> These impacts and alternatives must be evaluated against a baseline “No-Action” alternative. *Id.* § 1502.14(d) (1978).

After preparation of a Draft EIS that is subject to public review and comment, the agency will release a Final EIS that responds to comments and updates any needed changes to the analysis, *id.* § 1502.9(b) (1978), and a ROD that represents the culmination of the agency’s NEPA decisionmaking process, *id.* § 1505.2 (1978). Because circumstances can change over time, NEPA requires an agency to prepare a Supplemental EIS when “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.* § 1502.9(c)(1)(ii) (1978). If a project changes or new information presents a “seriously different picture of the environmental impact of the proposed project,” then a Supplemental EIS is

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<sup>5</sup> The NEPA documents for the Toll Bridge were prepared using the 1978 NEPA regulations in place when the ROD was published in 2019. The parties agree the claims at issue are based on those regulations and not the new regulations promulgated in 2020. *See* Dkts. 89 at 18 n.6; 91 at 27 n.23; 93 at 2 n.2.

required. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996) (quoting *Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990)).

In keeping with this requirement, FHWA regulations require an internal reevaluation if three years have passed since the publication of a Final EIS to determine if a Supplemental EIS is needed. 23 C.F.R. § 771.129(b). The reevaluation process does not replace the agency's duty to prepare a Supplemental EIS and instead is only used to make "the initial determination about whether a change or new information meets the threshold of 'significance' or 'uncertainty' needed to require further environmental documentation. . . ." *Piedmont Env't. Council v. U.S. Dep't of Transp.*, 159 F. Supp. 2d 260, 270–71 (W.D. Va. 2001), *aff'd in part, remanded in part on other grounds*, 58 F. App'x 20 (4th Cir. 2003).

### STANDARD OF REVIEW

This Court's review of the district court's grant of summary judgment is *de novo*. *Hodges v. Abraham*, 300 F.3d 432, 445 (4th Cir. 2002).

NEPA cases are reviewed pursuant to the APA. *See Ohio Valley Env't. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 189 (4th Cir. 2009). As such, the court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). An agency decision is arbitrary and

capricious if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

While the standard of review is narrow, the court must be careful to not “reduce judicial review to a ‘rubber-stamp’ of agency action.” *Aracoma Coal Co.*, 556 F.3d at 192. Instead, the court must “engage in a searching and careful inquiry of the record,” *id.* (internal quotations omitted), to determine if the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” *State Farm*, 463 U.S. at 43 (internal quotations omitted).

This Court employs a two-step inquiry to review whether a decision not to prepare a Supplemental EIS was lawful. *Hughes*, 81 F.3d at 443. “First, the court must determine whether the agency took a hard look at the proffered new information. Second, if the agency did take a hard look, the court must determine whether the agency’s decision not to prepare a supplemental EIS was arbitrary or capricious.” *Id.* “Close calls should be resolved in favor of preparing a SEIS.” *Senville v. Peters*, 327 F. Supp. 2d 335, 356 (D. Vt. 2004) (citing *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997)).



## ARGUMENT

### **I. The Agencies Violated NEPA Because They Failed to Prepare a Supplemental EIS.**

The requirement to prepare a Supplemental EIS when circumstances change is central to NEPA's role in guaranteeing informed decisionmaking.

Because NEPA is a democratic decisionmaking tool, the decision whether to prepare a Supplemental EIS “turns on the value of the new information to the still pending decisionmaking process.” *Marsh*, 490 U.S. at 374. If the new information weighs upon the selection of one alternative over another, it is “nothing short of ‘significant,’” and requires a Supplemental EIS. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 561 (9th Cir. 2006).

NEPA requires that an EIS “contain high-quality information and accurate scientific analysis.” *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (citing 40 C.F.R. § 1500.1(b)). Thus, an agency cannot simply put on “blinders” after a Final EIS has been produced. *Marsh*, 490 U.S. at 371. Instead, an agency must “prepare supplements” to its analyses when there “are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.* at 372–73 (quoting 40 C.F.R. § 1502.9(c)(1)). Thus, just as when conducting a NEPA review in the first instance, a Supplemental EIS is needed when there are significant changes to the assessment of impacts and alternative options. *Id.* at 374 (“[T]he decision whether

to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance.”).

The Supplemental EIS ensures that NEPA fulfills its role in providing for “broad dissemination” of relevant environmental information and guaranteeing that the public can react to the effects of a proposed action at a meaningful time, affording a chance for the public to play a role in the decisionmaking process. *Id.* at 371. In keeping with ongoing NEPA obligations, FHWA’s own NEPA regulations require it to conduct an internal reevaluation if a ROD is not issued within three years of the Final EIS. 23 C.F.R. § 771.129(b). The reevaluation is not public, however, and does not substitute for a Supplemental EIS. *See Piedmont Env’t. Council*, 159 F. Supp. 2d at 270–71.

**A. A Supplemental EIS Is Required Where Significant New Information Is Relevant to the Still-Pending Decisionmaking Process.**

The district court wrongly narrowed the circumstances where a Supplemental EIS is required, stating that “none of plaintiffs’ asserted bases of new information relate to ‘environmental concerns’ as caused by the proposed action.” Dkt. 98 at 41 (emphasis in original). Instead, the court noted that “Plaintiffs’ argument regarding a supplemental environmental impact statement focuses primarily on how these changes impact the need and feasibility of the

project . . . rather than changes in how the project impacts the environment.” *Id.* at 42.

In construing the Supplemental EIS requirement in this way, the district court made an error of law. This distinction between environmental impacts *caused by* the project, as opposed to information relevant to the NEPA analysis as a whole, is found nowhere in the NEPA statute or implementing regulations. *E.g.*, 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.9(c) (1978). Nor has it been interpreted as such in case law.

On the contrary, the Supreme Court has been clear that an agency *must* prepare a Supplemental EIS when there “are significant new circumstances or information relevant to environmental concerns and *bearing on the proposed action* or its impacts.” *Marsh*, 490 U.S. at 372 (quoting 40 C.F.R. § 1502.9(c)(1)) (emphasis added). A Supplemental EIS may be “necessary to satisfy [NEPA]’s ‘action-forcing’ purpose,” and the key consideration is “the value of the new information to the still pending decisionmaking process.” *Id.* at 374.

Other courts have reinforced this requirement and, like the Supreme Court, have made clear that it is not limited to instances where the expected environmental impact of a proposed action changes. Rather, “[t]he overarching question is whether an EIS’ deficiencies are significant enough to undermine informed public comment and informed decisionmaking,” such that a

Supplemental EIS was required. *Mayo v. Reynolds*, 875 F.3d 11, 20 (D.C. Cir. 2017) (quoting *Sierra Club v. Fed. Energy Reg. Comm'n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017)).

Because NEPA is an action-forcing statute that requires the federal government to consider and disclose the impact of a variety of alternative solutions, it is axiomatic that new information which relates to the “need and feasibility of the project,” Dkt. 98 at 42, as well as alternative solutions, must be disclosed in a Supplemental EIS when they are significant enough to “undermine informed public comment and informed decisionmaking.” *Mayo*, 875 F.3d at 20 (quoting *Sierra Club*, 867 F.3d at 1368).

Courts have also been clear that the new information itself “need not be strictly environmental.” *Nat. Res. Def. Council v. Lujan*, 768 F. Supp. 870, 886 (D.D.C. 1991) (quoting *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987), *abrogated on other grounds by Marsh v. Or. Nat. Res. Council*, 490 U.S. 360 (1989)). Rather, “the test is whether the new information so alters the project’s character that a new ‘hard-look’ at the environmental consequences is necessary.” *Id.* at 886–87 (quoting *Froehlke*, 816 F.2d at 209–10). As such, information “that does not seriously change the environmental picture, but that nevertheless affects, or could affect, the decisionmaking process, is subject to the procedural requirements of NEPA.” *Id.* at 887 (quoting *Froehlke*, 816 F.2d at

209–10). For example, in *Natural Resources Defense Council v. Lujan*, the court held that a Supplemental EIS was required because a new report on oil reserves in a wildlife refuge significantly changed the framework within which the agency made decisions regarding management of the refuge. *Id.* at 886–89.

The district court did not cite to any cases that limit the Supplemental EIS requirement to exclude analysis required for informed decisionmaking, one of the core purposes of NEPA. And the cases the district court did cite do not support this novel distinction. On the contrary, *Friends of Capital Crescent Trail v. Federal Transit Administration* states expressly that “the need for supplementation ‘turns on the value of the new information to the still pending decisionmaking process.’” 877 F.3d 1051, 1058 (D.C. Cir. 2017) (quoting *Marsh*, 490 U.S. at 374). More specifically, the court in that case recognized there is an assumption “that NEPA requires a SEIS where new information justifies reconsideration of a more environmentally favorable alternative . . . .” *Id.* at 1062. The court’s analysis in that case did not depend on a distinction between information about environmental impacts or “non-environmental” impacts; in fact, the court specifically *did* consider how the changed information might impact the agency’s consideration of alternatives in relation to the project’s purpose and need. *Id.* at 1061–62.

In *Mid States Coalition for Progress v. Surface Transportation Board*, the agency carefully responded to comments about a new alternative and determined the alternative was not feasible. 345 F.3d 520, 548 (8th Cir. 2003). In upholding the agency's conclusion, the court did not hold that the alternatives analysis was irrelevant to the supplementation requirement, rather it held the new information was simply not significant. *Id.* In *Center for Biological Diversity vs. U.S. Army Corps of Engineers*, the court reached the substantive conclusion that changes in ownership of a mine would have no impact on the analysis of alternative solutions and their environmental impacts. 941 F.3d 1288, 1304 (11th Cir. 2019). Again, this holding did not rest on a legal conclusion that the alternatives analysis is irrelevant to the supplementation inquiry. *Id.* And the court in *Trenton Residents Against 29 v. Federal Highway Administration*, stated merely that changed safety conditions that were not tied to environmental concerns did not trigger additional NEPA analysis, a conclusion and distinction that has no relevance to the issues here. 176 F.3d 658, 667 (3d Cir. 1999).

**B. The Agencies Were Required to Prepare a Supplemental EIS to Disclose Significant Information Relevant to the Decisionmaking Process Regarding the Toll Bridge.**

In the seven years between publication of the Final EIS and ROD, significant new information regarding traffic forecasts, development expectations, sea level rise projections, feasible alternatives, and other circumstances emerged

that called into question the need for, the validity of the analysis of impacts and alternatives, and the relative utility and financial feasibility of the Toll Bridge.

The district court did not dispute the fact of all these significant changes. Instead, the court incorrectly held that NEPA did not require publication of a Supplemental EIS because each change related primarily to the comparison of alternative solutions. But each of the changes presented “a seriously different picture of the environmental impact of the proposed project from what was previously envisioned,” and a Supplemental EIS was required. *Hughes*, 81 F.3d at 443; *Louisiana Wildlife Fed’n, Inc. v. York*, 761 F.2d 1044, 1051 (5th Cir. 1985).

The Agencies violated NEPA because they failed to take a hard look at significant new information and because they disregarded the significant changes they did look at. As a result, their decision not to prepare a Supplemental EIS was arbitrary and capricious. *Hughes*, 81 F.3d at 443.

### **1. New Traffic Forecasts Were Significant**

Significant changes to projections of future traffic in the project area should have been presented to the public in a Supplemental EIS for review and comment. In their earlier, public analysis, the Agencies relied on projections of summer gridlock to justify constructing the Toll Bridge. *See* AR-34963.

More recent forecasts made clear that every single prediction underlying the Agencies’ original asserted “need” was no longer true. The new forecasts, which

projected out to 2040, showed significantly lower expectations of future traffic. The annual average daily traffic expected on the proposed Toll Bridge decreased by 39 percent, from 12,600 to 7,700 vehicles. AR-68826. At the same time, projected summer weekday traffic between US 158 and the proposed Toll Bridge decreased by 47 percent, rendering other alternatives focused on upgrading existing roads more feasible. *Id.* Other traffic forecasts were similarly diminished. *Id.*; see Tables 1 and 2 *supra* p. 18.

The substantial decrease in anticipated traffic was highly significant and required publication of a Supplemental EIS for two reasons. First, the older projections of extreme traffic congestion were one of the main justifications proffered by the Agencies in the Final EIS to select the Toll Bridge over other alternatives, because the Agencies maintained it was the only alternative capable of sufficiently improving traffic flow. *See, e.g.*, AR-34963; 34953; 9398; 9400–10. The Agencies rejected alternatives focused on upgrading existing roads based largely on the fact the initial traffic forecasts showed that such options were unable to “improve system efficiency” or offer significant congestion relief. AR-9406. The new reduced forecasts undermined these conclusions and should have been presented to the public in a Supplemental EIS. *See, e.g.*, AR-68826; 68827 (acknowledging in private Reevaluation that reduced traffic projections “lower[] the travel time savings associated with using the Mid-Currituck toll bridge, which



results in some trips no longer shifting from the existing thoroughfare system to the Mid-Currituck Bridge”).

Second, the diminished traffic projections are significant because they affect the financial feasibility of the Toll Bridge compared to other alternatives. In 2012, the Toll Bridge was selected in part based on its ability to generate high levels of toll revenue. *See* AR-34958; 9406. The diminution in expected traffic necessarily means a corresponding loss of toll revenue, a significant change in circumstances that should have been disclosed to the public for review and comment before a final decision was made. The Agencies previously dismissed other alternatives because they could not generate revenue, and so the overall comparison of alternatives should be publicly revisited based on these new facts. *See, e.g.,* AR-9406 (concluding that the Existing Roads alternative is “impractical from an economic standpoint” because it cannot be financed with toll revenue).

The district court did not dispute that the new traffic forecasts were significant, nor did the court challenge the Conservation Groups’ assessment that the forecasts “undermine the stated need for the Toll Bridge, place its financial viability in question, and demonstrate that other alternative solutions are more viable than previously thought.” Dkt. 98 at 44 (quoting the Conservation Groups’ Opening Brief, Dkt. 89 at 22). Nonetheless, the court concluded the Agencies did not need to prepare a public-facing Supplemental EIS.

To reach this conclusion, the district court asserted that “[a]ny changes to the financial feasibility and the need for the Mid-Currituck Bridge . . . are not changes in the environmental impacts of the bridge-project,” and did not require a Supplemental EIS, because they relate to the assessment and comparison of alternatives. Dkt. 98 at 45.

The court admitted this was not a distinction that has been recognized by the Fourth Circuit. *Id.* Nor could it be. As explained above, NEPA is an “action-forcing” statute, which requires agencies to take a careful look at impacts and alternatives and disclose them to the public for review and comment. The promise of NEPA is that more informed decisions will lead to better environmental outcomes. *Robertson*, 490 U.S. at 349; *see also* 40 C.F.R. § 1500.1(c) (1978) (“The NEPA process is intended to help public officials *make decisions* that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” (emphasis added)). NEPA is about making decisions. As such, any significant new information which would affect the “democratic decisionmaking process” must be included in a Supplemental EIS.

Such information is not “non-environmental,” as the district court suggested. Dkt. 98 at 46. Rather, all aspects of the NEPA process—from the creation of the statement of purpose and need, to the comparison of alternatives, to the disclosure of environmental impacts—are environmental. They are intended to “forc[e]”

better environmental outcomes through an informed public process. *Robertson*, 490 U.S. at 348.

The district court's insistence that the Agencies have "broad discretion" to define the purpose and need for the project is correct, but irrelevant. *See* Dkt. 98 at 46. The pertinent fact is that the Agencies have a duty under NEPA to analyze and disclose how well different project alternatives meet the pre-established purpose and need, as well as what the impacts of those different alternatives would be. 40 C.F.R. §§ 1502.14; 1502.16 (1978). Here, where a more environmentally damaging alternative was selected, in part, because of an outdated traffic forecast analysis which showed the Toll Bridge was needed to address dire future traffic congestion which no longer exists, the updated traffic forecasts are essential to the informed comparison of alternatives that NEPA requires. Similarly, where other alternatives were rejected because the Toll Bridge promised to deliver robust toll revenue, those conclusions should be revisited now that the Toll Bridge is anticipated to see far fewer customers.

## **2. New Growth and Development Patterns Were Significant**

Significant changes to anticipated growth and development patterns also required preparation of a Supplemental EIS. In the 2012 Final EIS, the Agencies assumed that the project area would reach "full build-out," AR-35074, and relied on the accompanying growth in development to both justify the need for the

project and serve as the basis for the Agencies' analysis of alternatives and impacts, *see* AR-5428–29; 34953.

Significant changes to growth patterns occurred after the Final EIS was published. Permanent population growth in both Dare and Currituck County slowed significantly. AR-68825. Tourism and home construction slowed to nearly half of what the Final EIS had projected. *Id.*; AR-75283. All told, there was an almost 100 percent reduction in development rates in the seven years between the Final EIS and the ultimate decision to build the Toll Bridge. AR-75283.

Despite all these changes, the Agencies did not even take the required “hard look” to determine if they were significant. *Hughes*, 81 F.3d at 443. Yet the changes in anticipated development are significant for both the assessment of the need for the Toll Bridge over other alternatives, and the assessment of its financial feasibility through toll revenue-based financing. Less development means fewer people, fewer cars, and fewer tolls being paid.

Again, the district court did not dispute these significant changes occurred. Instead, after vaguely asserting that the Agencies *did* analyze these new trends (without pointing to any such actual assessment), the court again dismissed the significance of the new information because it related to the analysis of the need for the project and the comparison of alternatives. Dkt. 98 at 47. This, the district court incorrectly stated, “is a distinct question from whether that information

present a seriously different picture of the environmental impact of the proposed project.” *Id.*

But, as explained above, the requirement to prepare a Supplemental EIS is not so narrow. The fact that growth and development is now expected to be significantly less in the project area has clear implications for the analysis of environmental impacts and alternatives. Just as with projections of traffic, the level of future growth in the area has implications for what type of transportation solution is needed, and how financially viable a bridge that relies on toll revenue will be. Where part of the justification for selecting the Toll Bridge was based on high growth rates, *see* AR-34893, those conclusions should be revisited and disclosed to the public now that growth has slowed.

### **3. New Sea Level Rise Projections Were Significant**

Dramatic changes to projections of sea level rise also required the preparation of a Supplemental EIS.

Based on data from the 1990s and early 2000s, the Agencies concluded in the Final EIS that sea level rise during the project’s design life would be at most 6.7 inches. AR-35049. Long term, they concluded that a “worst-case sea level rise scenario” would result in 23.2 inches of sea level rise by 2100. AR-35047–49. The Agencies did not perform any robust analysis of this long-term trend because

they asserted the Toll Bridge “would never experience the highest sea level rise” predictions because it would be replaced by 2100. AR-35048.

Significant advances in sea level rise data and modeling since 2012 made clear these assumptions and projections were flat wrong. Updated sea level rise projections show the 2100 “high” sea level rise scenario relied on by the Agencies in the Final EIS (23.2 inches), is now the “low end” sea level rise projection.

*Compare AR-35048 with AR-78910; 78267–68; 78454.* New projections anticipate 28.3 inches of sea level rise by 2050 and 81.1 inches of sea level rise by 2100 in the Outer Banks. AR-78910 (applying data from NOAA’s Technical Report); 78267–68.

The Toll Bridge is now expected to experience a higher amount of sea level rise within the next 25 years than the Agencies expected would occur in seventy-five years in a worst-case scenario. AR-78910; 78267–68. Indeed, the new projections show the Agencies underestimated sea level rise by almost 400 percent.

By failing to analyze these new projections, the Agencies ignored the fact that by 2050 (just twenty-eight years from today), the base of the Toll Bridge is expected to be inundated or extremely vulnerable to flooding, and both US 158 and NC 12 will be inundated, resulting in a “bridge to nowhere.” AR-78913; 75591. And the Agencies disregarded the fact that under the updated sea level rise projections, the Toll Bridge is now expected to experience more flooding in its first

25 years than the Final EIS predicted it would experience in its lifetime. *Compare* AR-78910 *with* AR-35047–48; *see also* AR-78456.

In failing to address this significant new information about sea level rise, the Agencies committed two legal errors. First, unlike traffic forecasts, where the Agencies at least did take an internal look at some of the new information, the Agencies failed entirely to consider the most up-to-date and geographically relevant sea level rise data. *See* AR-68930–31. By failing to even take this “hard look,” the agencies violated the first prong of *Hughes*, 81 F.3d at 443. Second, the agencies violated NEPA because they failed to present the significant new information in a Supplemental EIS. The updated projections have significant consequences for the viability of the Toll Bridge and seriously undermine other assumptions the Agencies made about traffic and growth in the project area. If land is inundated, there will be fewer houses, and thus fewer travelers using the Toll Bridge. And if roads are inundated, the Toll Bridge may become inaccessible. *See, e.g.*, AR-75592; 75594. The latest financial plan requires generation of toll revenue through 2073, and information which shows high levels of inundation before that time is highly significant for the feasibility of the Toll Bridge, and essential to any analysis of alternatives.

Again, the district court did not dispute the fact that this significantly different data on sea level rise exists. Dkt. 98 at 48–49. Instead, the court again

dismissed the new information because it relates to the analysis of whether the Toll Bridge or other alternatives will be the most viable in the future. *Id.* at 48–49.

Once again, the court erred by failing to acknowledge that supplementation is required whenever NEPA’s action-forcing process can be meaningfully assisted.

The district court further erred where it concluded that because NEPA, as a procedural statute, “does not prohibit unwise agency action”, *id.* at 48 (cleaned up), significant new information about the future viability of the Toll Bridge “is not implicated,” *id.* at 49. But it is not the Conservation Groups’ contention that NEPA *prohibits* the construction of the Toll Bridge in light of updated sea level rise predictions that show it will ultimately be unusable and impossible to finance. *See* Dkts. 89 at 26–29; 95 at 11–18. Rather, a Supplemental EIS including the new data should have been prepared so that the public and decisionmakers had all relevant information and an opportunity to provide input before a final decision was made. *See* Dkts. 89 at 29; 95 at 12, 18.

#### **4. New Information Central to the Alternatives Analysis that Should Have Been Disclosed to the Public**

The significant changes in traffic forecasts, expected growth, and projections of sea level rise were so significant that each individually required the Agencies to prepare a Supplemental EIS. When considered together, the combined effect of the various changes has even more serious implications for the analysis of the best transportation solution. The Agencies had a responsibility under NEPA to present



an updated analysis of the different alternative solutions in a way the public could scrutinize and provide input before the decision to construct the Toll Bridge was made.

As such, this case parallels *Alaska Wilderness Recreation and Tourism Association v. Morrison*, where the court required a Supplemental EIS to be prepared when a longstanding timbers sales contract—a key assumption woven throughout the relevant EISs—fell through, with significant ramifications for the analysis of alternatives. 67 F.3d 723, 730 (9th Cir. 1995). The *Alaska Wilderness* court explained:

While we cannot predict what impact the elimination of the APC contract will have on the Forest Service’s ultimate land use decisions, clearly it affects the range of alternatives to be considered. Because consideration of alternatives is “the heart of the environmental impact statement,” 40 C.F.R. § 1502.14, we hold that the cancellation of the APC contract, which opened for consideration alternatives which could not be freely reviewed when the APC contract was in force, is an event requiring serious and detailed evaluation by the Forest Service.

*Id.* Likewise, the many significant changes here to traffic, growth expectations, and sea level rise “clearly . . . affect[] the range of alternatives to be considered” and required “serious and detailed evaluation.” The case relied on by the district court below similarly recognized that a Supplemental EIS is required when a change to the project “undercut the rationale upon which the agency action depended.” Dkt. 98 at 46 (citing *Friends of Cap. Crescent Trail*, 877 F.3d at 1061).

Under NEPA’s action-forcing approach, the question before the agency was not, as the district court suggested, whether subsequent to the changed circumstances the Toll Bridge could “still meet[] its traffic congestion, travel time, and hurricane clearance time purposes.” *Id.* Rather, the question was whether the information was significant enough to warrant public review and disclosure. *See Marsh*, 490 U.S. at 373–74. As explained above, the information was significant. It implicates both the utility and viability of the Toll Bridge and calls into question whether a less damaging alternative could meet the stated needs, or indeed meet them better. That question should have been presented to the public in a transparent Supplemental EIS for review and input. That is the democratic decisionmaking process NEPA was designed to foster.

## **II. The Agencies Unlawfully Included Construction of the Project in Their “No-Build” Scenario.**

Not only did the Agencies fail to support their decision with an up-to-date analysis, but the underlying, outdated analysis in the Final EIS was fatally flawed to begin with. The Agencies misled the public and violated NEPA and the APA by unlawfully including the Toll Bridge in the baseline for their analysis, thus obscuring the Toll Bridge’s true effects—thousands of additional housing units and hundreds of acres of additional development on the Outer Banks—and overstating the supposed need for a Toll Bridge compared to other alternatives in the first place.

This Court has repeatedly rejected the faulty approach of incorporating a preferred alternative into the baseline by these same Agencies and should do so here. The district court's attempt to excuse the error on the grounds that the Agencies did include the required analysis finds no support in the record. The Agencies consistently disavowed any development effects of the Toll Bridge on the Outer Banks, and their faulty analysis conjured up a need for a transportation solution to a problem only the Toll Bridge itself would cause.

NEPA alternatives must be compared to a "No-Build" alternative that represents what would happen if the Agencies did not build the project. 40 C.F.R. § 1502.14(d) (1978). "A no action alternative in an EIS allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010). The No-Action alternative "is meant to provide a baseline against which the action alternative . . . is evaluated." *Id.* (internal quotations omitted). "Without [accurate baseline] data, an agency cannot carefully consider information about significant environment impacts . . . resulting in an arbitrary and capricious decision." *N.C. Wildlife Fed'n.*, 677 F.3d at 603 (citation omitted) (alteration in original).

Here, the Agencies used as their baseline land use plans that include construction of the Toll Bridge. The Agencies claimed this approach was justified

because these plans represent “the current state of anticipated growth and development in the project area,” Dkt. 91 at 43; *see also* Dkt. 93 at 44–45, without regard to the fact that “a Mid-Currituck Bridge. . . [is] included in the land use plans of the affected jurisdictions.” AR-34981; *accord* AR-68810 (the “area [Coastal Area Management Act] land use plans . . . include a *Mid-Currituck Bridge*.” (emphasis added)). The land use plans themselves make clear that the Toll Bridge would induce significant development on the Outer Banks: “the Mid-County Bridge will have a huge influence on development patterns throughout much of Currituck County . . . pressure for additional development in Corolla and especially Carova will increase dramatically with improved access to these two areas.” AR-16904 (quoting the Currituck County Land Use Plan). Yet the Agencies excluded the Toll Bridge’s increased development on the Outer Banks from their evaluation of the Toll Bridge’s effects, by treating this development as part of their baseline. Including the Toll Bridge in the baseline invalidated the Agencies’ analysis.

As explained in more detail below, the Agencies’ own information indicated that far more development on the Outer Banks—thousands of housing units and hundreds of acres of additional development—will occur if the Toll Bridge is constructed than if it is not. AR-35074–75. Nonetheless, the Agencies insisted the Toll Bridge would not induce development. Instead, they concluded that the Toll

Bridge would have “no reasonably foreseeable change in the overall type and density of development” on the Outer Banks. AR-35704; 35706 (stating “no reasonably foreseeable change in the location, rate, or type of development . . . compared to the No-Build Alternative”). The district court ignored this grave error. Dkt. 98 at 24.

These same Agencies were rebuked by this Court for similar NEPA baseline manipulation in *N.C. Wildlife Federation v. N.C. Department of Transportation*. 677 F.3d at 603. In that case, the same Agencies predicted land development patterns and travel time based on an anticipated roadway network that included the proposed highway project. *Id.* at 599–600. This Court found the Agencies had “incorporated ‘build’ assumptions into the ‘no build’ baseline,” and the analysis was arbitrary and capricious and in violation of NEPA. *Id.* at 600–03. This Court later described such a “material misapprehension of the baseline conditions” as an “obvious and fundamental blunder” that violates the APA. *Friends of Back Bay v. U.S. Army Corps of Eng’rs*, 681 F.3d 581, 588 (4th Cir. 2012); *see also Ohio Valley Env’t. Coal., Inc., v. U.S. Army Corps of Eng’rs*, 883 F. Supp. 2d 627, 643 (S.D.W. Va. 2012), *aff’d*, 716 F.3d 119 (4th Cir. 2013).

The same agency behind the NEPA analysis the Fourth Circuit already rejected—the N.C. Turnpike Authority—prepared the Toll Bridge analysis during the same period as the analysis rejected in *N.C. Wildlife Federation*. A third

highway project, also analyzed by this same agency during the same time, suffered from a similar flaw, and the district court for the Eastern District of North Carolina rejected the analysis for that highway project as well, citing the same fundamental baseline error. *Catawba Riverkeeper Found. v. N.C. Dep't of Transp.*, No. 5:15-CV-29-D, 2015 WL 1179646 at \*7 (E.D.N.C. Mar. 13, 2015).<sup>6</sup> The NEPA reviews for all three projects were prepared concurrently and all contain the same fundamental flaw in their baseline analysis. *See N.C. Wildlife Fed'n*, 677 F.3d at 603; *Catawba Riverkeeper*, 2015 WL 1179646 at \*7.

Here, the forecasts the Agencies used as a baseline to assess the impacts of the Toll Bridge assumed the Toll Bridge would be built. AR-35074; 5429. Thus, the Agencies have once again violated NEPA by “incorporate[ing] ‘build’ assumptions into the ‘no build’ baseline.” *N.C. Wildlife Fed'n*, 677 F.3d at 600–03.

Moreover, just as in *N.C. Wildlife Federation*, the Agencies failed to be transparent with the public about their flawed analysis. The Agencies misled the public by persistently presenting the development and traffic effects of the Toll Bridge as baseline conditions and without evaluating their impacts on the sensitive environment of the Outer Banks. *See* Dkt. 89 at 43; *see also* AR-35074; 35706.

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<sup>6</sup> The opinion was later vacated as moot when the highway project was abandoned. *Catawba Riverkeeper Found. v. N.C. Dep't of Transp.*, 843 F.3d 583 (4th Cir. 2016).

The Agencies obscured their unlawful approach by basing it on land use plans not included in the administrative record.<sup>7</sup> And worst of all, the Agencies used their faulty baseline to conclude that the Toll Bridge would not affect development on the Outer Banks. *See, e.g.*, AR-35074; 35705–07; 35605.

All of these problems are serious violations of NEPA’s required transparency, as well as of the mandate to evaluate environmental effects against a “No-Build” baseline, and to rationally compare and contrast alternative solutions.

**A. The Flawed Baseline Rendered the Agencies’ Analysis of Environmental Impacts Arbitrary and Capricious.**

NEPA requires that “to the fullest extent possible,” the Agencies must evaluate a proposal’s impacts. 42 U.S.C. § 4332(2)(C). Such an evaluation includes “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8(b) (1978). The Agencies are also required to analyze cumulative effects, which are “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions[.]” *Id.* § 1508.7 (1978).

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<sup>7</sup> Because the land use plans the Agencies rely on are not part of the record, they cannot justify the Agencies’ actions. As FHWA argued below, “the focal point for judicial review should be the administrative record.” Dkt. 72 at 20 (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

“[A]gencies *must* measure the indirect and cumulative environmental effects of proposed actions,” and “[c]onclusory statements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA.” *N.C. Wildlife Fed’n*, 677 F.3d at 602 (emphasis in original). “By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Id.* at 601–02 (quoting *Marsh*, 490 U.S. at 371).

Here, the Agencies made the Toll Bridge scenario of maximum development on the Outer Banks their baseline. This was a fundamental blunder because the full development on the Outer Banks depends upon construction of the Toll Bridge, yet the Agencies treated this development as part of the baseline, rather than analyzing its impact as an effect of the Toll Bridge.

The Final EIS obscures the fact that full development would occur with the Toll Bridge but not with the No-Build or Existing Roads alternatives. The forecasts used to study all alternatives assume that an 86 percent build-out is the *baseline* for development. AR-35074. The Agencies refer to this as “full build-out.” *Id.* However, such “full build-out” is expected to occur *only if the Toll Bridge is built*. *Id.* The Agencies forecast that if the Toll Bridge is not built and no improvements are made to the project area, there would be a markedly lower build-out of just 70 percent. *See* AR-35074–75. That difference means the Toll



Bridge would cause 2,400 additional homes and hotel rooms and 800 additional acres on the Outer Banks to be developed, mainly in the northern roadless area, compared with the No-Build alternative. AR-35074 (number of housing units); 35075 (much of the change in development would occur “in the non-road area”); 35085 (800 more acres developed with “unconstrained” scenario vs. “No-Build”).

Rather than disclosing and analyzing the impacts that would occur with the Toll Bridge, the Agencies described the *lack* of full development as an “effect” of the No-Build scenario, which they treated as a fictional “constraint” on development that supposedly would occur otherwise. *See, e.g.*, AR-35704; 35605. The problem with this backwards approach is that there are no environmental impacts from a *lack* of development. By ignoring the development associated with the Toll Bridge on the assumption that it was part of the baseline, and instead treating the No-Build scenario as having the “effect” of less development, the Agencies failed to evaluate the Toll Bridge’s effects on the Outer Banks in any form.

Using this faulty approach, the Final EIS irrationally concluded that “there would be no reasonably foreseeable change in the overall type and density of development” with the Toll Bridge and that “[n]egligible or no increase in the demand for houses and businesses throughout the Outer Banks resort area would be foreseeable over the No-Build Alternative.” AR-35692. The Agencies

proffered the same conclusion specifically for the roadless area of the Northern Outer Banks: “there would be no reasonably foreseeable change in the location, rate, or type of development with implementation of the detailed study alternatives,” including the Toll Bridge. AR-35076.

Likewise, the 2011 Indirect and Cumulative Effects Technical Report, just like the Final EIS and other documents, misleadingly and incorrectly states that “[t]here is no reasonably foreseeable induced development on the Outer Banks.” AR-35718. The report finds the Toll Bridge “would not notably contribute to cumulative impacts.” AR-35732. And nothing is different in the 2012 update to this report: the Agencies once again insisted there would be “no reasonably foreseeable induced development on the Outer Banks” from the Toll Bridge. AR-46094. These conclusions are all directly contrary to the actual growth projections, which show that full development would occur with the Toll Bridge but not the Existing Roads or No-Build alternatives.

Yet the Agencies did not use this information to analyze the Toll Bridge’s effects. *See* AR-35074. Instead, the Agencies insisted throughout the NEPA process that the Toll Bridge would cause *no additional development* on the Outer Banks and made no attempt to evaluate the effect of the Toll Bridge’s additional development on the habitat, wildlife, and natural resources of the Outer Banks. AR-35718; 35074–75; 35077–78.

The decision below failed to acknowledge this fundamental flaw. It claimed the Agencies' approach was acceptable because their "ultimate conclusion" was not inseparable from a "demonstrably incorrect assumption." Dkt. 98 at 26 (quoting *Friends of Back Bay*, 681 F.3d at 589). But the opposite is true: the Agencies' conclusion that the Toll Bridge would bring no additional development to the Outer Banks was possible only because of their demonstrably incorrect assumption that all of that development was part of the baseline.

Citing the non-public Reevaluation (AR-68824), the district court also stated erroneously that "the future development planned in those land use plans is not contingent on the building of the project and will proceed, under those plans, absent building of a Mid-Currituck Bridge. Accordingly, use of those land use plans did not result in a 'material misapprehension of the baseline conditions.'" Dkt. 98 at 26 (quoting *Friends of Back Bay*, 681 F.3d at 588) (internal citations omitted). However, the Reevaluation, at the page cited by the district court, actually stated: "Like in the FEIS, it is recognized that not building the Mid-Currituck Bridge could place a constraint on the construction of planned and expected development." AR-68824. In other words, the Agencies recognized that only with the Toll Bridge is the full development that they treated as their baseline assured. Accordingly, the Agencies' reliance on land use plans that include the

Toll Bridge did in fact result in a material misapprehension of the baseline conditions.

The district court likewise erred in concluding the Agencies “openly revealed that any bridge project might have an influence on development in the area, and delineated that influence region by region.” Dkt. 98 at 27. This is simply incorrect. The Agencies repeatedly concluded the Toll Bridge would have *no* influence on development on the Outer Banks. And nowhere did they evaluate the Toll Bridge’s impacts on the Outer Banks or compare those impacts to those of other alternatives.

The district court cited sections of the Final EIS and 2011 Technical Report (AR-35071–77, 35697–98, 35700–01, 35704, 35707) for its erroneous conclusion, but these documents only confirm that the Agencies ignored the Toll Bridge’s impacts on the Outer Banks. The Final EIS, in the pages cited by the district court, told the public that the Toll Bridge would cause “no reasonably foreseeable change in the overall type and density of development” compared to the No-Build scenario on the NC 12 accessible Outer Banks. *See, e.g.*, AR-35074; 35700. Likewise, “[f]or the non-paved road-accessible Outer Banks (sometimes referred to as Carova or non-road accessible), there would be no reasonably foreseeable change in the location, rate, or type of development with implementation of the detailed study alternatives compared to the No-Build Alternative.” AR-35076.

These conclusions cannot be reconciled with the fact that the Toll Bridge would see 2,400 more housing units than the No-Build Scenario, primarily in the roadless Outer Banks. AR-35074–75. By describing this increase as if the No-Build alternative were instead “constraining” preordained development, the Agencies negated the actual effect of the Toll Bridge—dramatically increased development—and thus avoided any analysis of its impacts on the Outer Banks. And contrary to the district court’s assertion, the record is devoid of any analysis of these impacts. *Compare* Dkt. 98 at 27 *with* AR-35074; 35700.

As the 2011 Technical Report cited by the district court stated, the Agencies’ conclusions “do not indicate a net increase in overall business or residential development on the Outer Banks.” AR-35705. As explained above, that conclusion ignores all the Outer Banks development of the Toll Bridge and misleads the public. And while the district court cited a portion of this report (AR-35697–98) that stated transportation improvements could affect “which land will develop first,” *see* Dkt. 98 at 24, that does not address the Agencies’ own information showing thousands of housing units and hundreds of acres would be developed with the Toll Bridge that would not be developed *at all* under the No-Build Scenario. Likewise, the Technical Report only acknowledged an impact around the mainland terminus of the Toll Bridge from “[s]ome business development that might otherwise have been scattered;” it ignored entirely the

increased development on the Outer Banks and did not evaluate the environmental impacts of any of this development. *See* AR-35704–06.

In sum, the Agencies included the Toll Bridge in their baseline, leading them to the faulty conclusion that the Toll Bridge would not increase development on the Outer Banks. Their failure to disclose the true impact of the Toll Bridge to the public rendered their analysis unlawful. That fundamental flaw must be corrected.

**B. The Flawed Baseline Rendered the Agencies’ Analysis of Alternatives Arbitrary and Capricious.**

The Agencies’ flawed baseline also violated NEPA because it biased the analysis of alternatives. The alternatives analysis is “the heart of the environmental impact statement,” and should “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14 (1978). The faulty baseline here resulted in an alternatives analysis that prevented a fair comparison of the alternatives.

As discussed above, the Agencies selected the Toll Bridge based on its purported ability to, among other things, “substantially improve traffic flow” and “substantially reduce hurricane clearance time for residents and visitors.”

AR-9397–98. But because the traffic forecasts used to measure the performance of the alternatives erroneously assumed levels of people and cars that would only

occur with the Toll Bridge, the Agencies biased the alternatives analysis against other alternatives and in favor of the Toll Bridge in two key ways.

First, the Agencies used the skewed baseline to eliminate non-Bridge alternatives. For example, the Agencies rejected the Existing Roads alternative because it “would not improve system efficiency and offers a low level of benefit in terms of reducing congestion and travel time.” AR-9406. But this rejection was based on the high forecasts of traffic which assumed the Toll Bridge would be constructed. *See* AR-69102–03 (“The project’s original traffic forecasts for 2035 and the new 2040 forecasts assume full build-out of the NC 12-accessible Outer Banks . . . . These forecasts do not presume that development would be constrained . . . .”). And in fact, when the Agencies revisited their analysis in the internal Reevaluation,<sup>8</sup> it became clear that the traffic demands under the “full build-out” conditions of the Agencies’ faulty baseline would not occur if the Existing Roads alternative were selected. *See* AR-68866 (“The notable reduction in congested VMT [vehicle miles traveled] identified with the Preferred Alternative in the FEIS

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<sup>8</sup> The Agencies did eventually include a “constrained” development scenario in the non-public Reevaluation, yet they continued to use the “unconstrained” scenario as well, despite admitting that less growth will occur without the Toll Bridge. *See* AR-68837 (“the constrained development estimates most closely represent what is considered likely to occur”). But because the Agencies eschewed a Supplemental EIS, their decision must be supported by the Final EIS, which was based on the flawed baseline and traffic forecasts.

[compared to the Existing Roads and No-Build alternatives] was not found in the updated analysis when constrained development was considered.”).

The Agencies thus manufactured a need for the Toll Bridge by assuming it would be built. They then eliminated other alternatives that could not handle the traffic growth the Toll Bridge would bring. This type of manipulation prevents a fair analysis of alternatives and is exactly the reason “courts not infrequently find NEPA violations when an agency miscalculates the ‘no build’ baseline or when the baseline assumes the existence of a proposed project.” *N.C. Wildlife Fed’n*, 677 F.3d at 603.

Second, the flawed approach obscured the fact that the Toll Bridge would *exacerbate* traffic concerns that the Agencies treated as part of the baseline.<sup>9</sup> The Toll Bridge alternative would result in more people coming to the area for permanent residency and visitation, which increases the strain of traffic congestion and hurricane evacuation clearance. AR-35074 (“[T]he existence of a Mid-Currituck Bridge does indicate that potential demand would increase for day trips.”). By treating this traffic as part of the baseline, the Agencies failed to weigh the Toll Bridge’s significantly higher traffic levels and longer hurricane clearance times when comparing the Toll Bridge to other alternatives. *See* AR-5428–29.

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<sup>9</sup> This point was made early on in the development of Toll Bridge by several state and federal resource agencies. *See, e.g.*, AR-69905–06; 69922–23; 69798.



Thus the Agencies both fabricated a need for the Toll Bridge and obscured the impact the Toll Bridge would have on traffic congestion. By ignoring significant downsides of the Toll Bridge in their alternatives analysis in this way the Agencies violated NEPA.

### CONCLUSION

For the foregoing reasons, the Conservation Groups respectfully request the Court reject the district court's analysis and ruling, declare the Record of Decision is arbitrary and capricious, and remand this case to the district court with instructions to vacate the Record of Decision.

Respectfully submitted this 5th day of April, 2022.

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## **REQUEST FOR ORAL ARGUMENT**

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Fourth Circuit Rule 34(a), the Conservation Groups respectfully request oral argument to answer any questions the Court may have.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(b)(1) because it contains 12,940 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman font.

**CERTIFICATE OF SERVICE**

I hereby certify that on April 5, 2022, I electronically filed the foregoing Opening Brief with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification of the filing to the following:

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