No. 22-1103

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO MID-CURRITUCK BRIDGE-CONCERNED CITIZENS AND VISITORS OPPOSED TO THE MID-CURRITUCK BRIDGE; NORTH CAROLINA WILDLIFE FEDERATION,

Plaintiffs – Appellants,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; EDWARD T. PARKER, in his official capacity as Assistant Division Administrator, Federal Highway Administration; ERIC BOYETTE, in his official capacity as Secretary, N.C. Department of Transportation,

Defendants – Appellees,

and

JAMES H. TROGDON, III,

Defendant.

Appeal from the United States District Court for the
Eastern District of North Carolina
No. 2:19-cv-00014-FL (Hon. Louise W. Flanagan)

DEFENDANTS-APPELLEES' JOINT RESPONSE BRIEF

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GLOSSARY

APA	Administrative Procedure Act
The Bridge	Mid-Currituck Bridge
MCB	Bates stamps indicating citations to portions of the administrative record filed in 2:19-cv-00014-FL
The Agencies	Federal Highway Administration, North Carolina Department of Transportation
FHWA	Federal Highway Administration
NEPA	National Environmental Policy Act
NCDOT	North Carolina Department of Transportation
Plaintiffs	No Mid-Currituck Bridge-Concerned Citizens and Visitors Opposed to the Mid-Currituck Bridge; North Carolina Wildlife Federation
ROD	Record of Decision

INTRODUCTION

This case concerns the State of North Carolina's plan to build a bridge to connect the northern portion of the North Carolina Outer Banks with the State's mainland. As development on the Outer Banks has increased, so too has traffic congestion. Congestion and backups on area roadways complicate efforts to respond to accidents and emergencies, and hurricane evacuation clearance times are above state standards. Ensuring safe passage between the Outer Banks and the mainland will become even more important as sea levels rise and storm surges become more dangerous.

After years of study, the State sought federal funding to proceed with the bridge project. Consistent with its responsibilities under the National Environmental Policy Act, the Federal Highway Administration worked with the North Carolina Department of Transportation to prepare an Environmental Impact Statement (EIS) analyzing the project's environmental impacts. Before signing the Record of Decision several years later, the Agencies confirmed that none of the updated information available to them implicated the project's environmental impacts either significantly, or in a manner the Agencies had not yet considered.

Plaintiffs critique the Agencies' analyses, but they identify no flaws. The Agencies reasonably decided not to prepare a supplemental EIS, and their analyses appropriately compared the environmental effects of the Bridge alternatives to a no-action, or "no-build," baseline. Thus, the district court properly granted the Agencies' motions for summary judgment, and that judgment should be affirmed.

STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370m, a federal statute.

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment resolving all of Plaintiffs' claims. ECF 99.

(C) The district court entered that judgment on December 13, 2021. *Id.* Plaintiffs filed their notice of appeal on January 31, 2022 or 49 days later. *Id.*

STATEMENT OF THE ISSUES

1. Did the Federal Highway Administration (FHWA) and the North Carolina Department of Transportation (NCDOT) (together, the Agencies) reasonably decide not to prepare a supplemental EIS after they took a hard look at updated information and concluded that it was either not significant or did not implicate their existing analysis of the project's environmental impacts?

2. Did the Agencies comply with NEPA when they used a reasonable method to determine the amount of development that would proceed under the action alternatives relative to the no-build alternative and reasonably evaluated and disclosed the environmental impacts of that development?

STATEMENT OF THE CASE

A. National Environmental Policy Act

NEPA requires federal agencies to prepare a detailed statement on the environmental impacts of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "Because NEPA is a procedural and not a results-driven statute, even agency action with adverse environmental effects can be NEPA-compliant so long as the agency has considered those effects and determined that competing policy values outweigh those costs." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 191 (4th Cir. 2009).

NEPA simply requires that the agency take a "hard look" at environmental impacts before taking major actions. *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005); *accord Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). Thus, an agency's EIS must describe "any adverse environmental effects which cannot be avoided," 42 U.S.C. § 4332(2)(C), and "[r]igorously explore and objectively evaluate" alternatives—including a "no-action" alternative—that would minimize adverse impacts, 40 C.F.R. § 1502.14(a), (d); *Save Our Sound OBX, Inc. v. NCDOT*, 914 F.3d 213, 218 (4th Cir. 2019).[1]

[1] The White House Council on Environmental Quality (CEQ) revised its NEPA regulations in September 2020 and again in April 2022. *See* 87 Fed. Reg. 23,453 (Apr. 20, 2022). The analyses under review were completed before those revisions, however, so this brief cites the regulations that were in effect before September 2020.

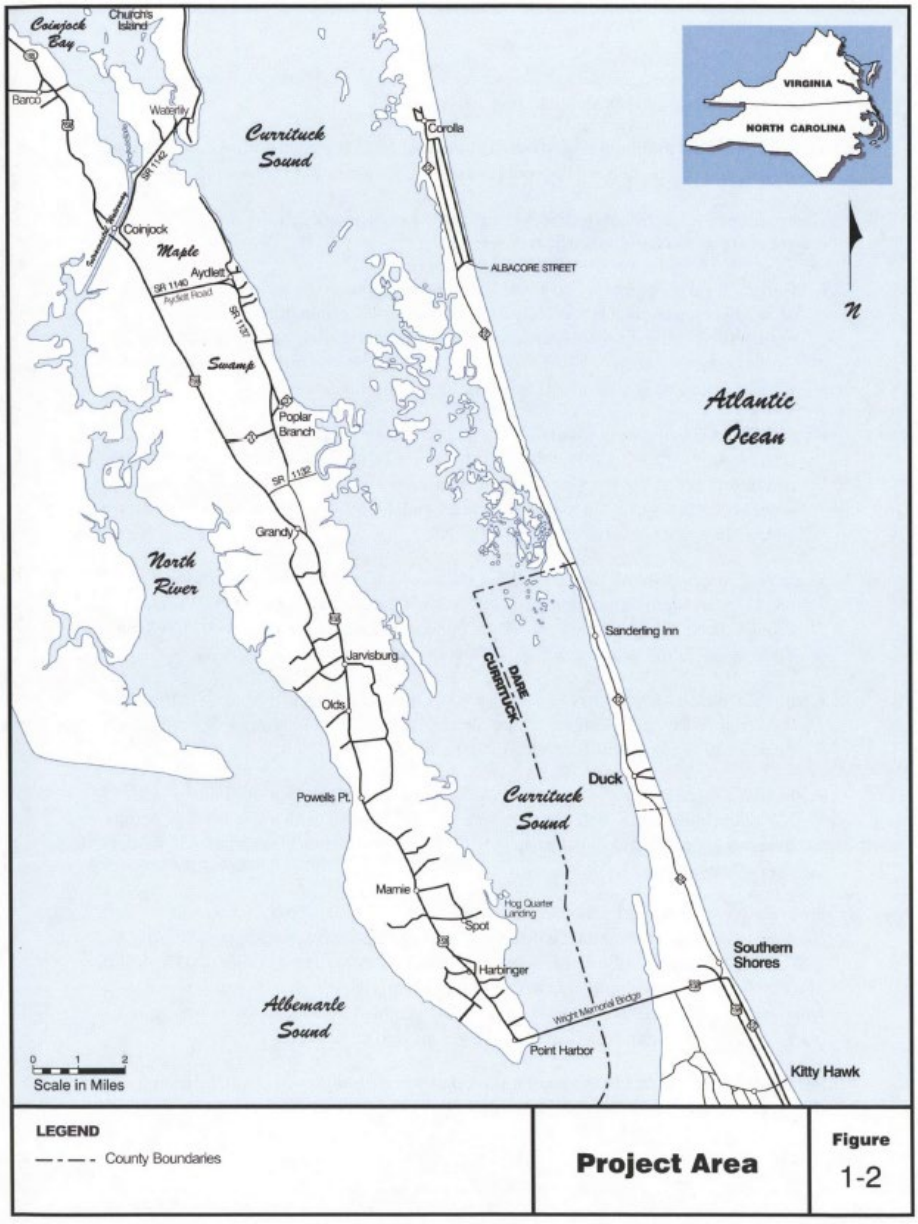
An agency may be obligated to supplement an existing EIS in some narrow circumstances. FHWA's regulations require supplementation when "[c]hanges to the proposed action would result in significant environmental impacts that were not evaluated" or "information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS." 23 C.F.R. § 771.130(a). CEQ's regulations specify that a supplemental EIS is required only when an agency makes substantial changes to a project or receives new information that is "significant," "relevant to environmental concerns and bear[s] on the proposed action or its impacts." 40 C.F.R. § 1502.9(c); *see also id.* § 1508.27 (defining "significantly" for purposes of NEPA); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989) (discussing supplementation requirement).

Once a reviewing court is assured that the agency has taken the requisite hard look at the environmental impacts of the proposed action, the court should defer to the agency's decision. *Nat'l Audubon Soc'y*, 422 F.3d at 185 (explaining that a court "may not . . . use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency"). Courts should not "'flyspeck' an agency's environmental analysis, looking for any deficiency, no matter how minor." *Id.* at 186. "Deference is due where the agency has examined the relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the choice made." *Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs*, 828 F.3d 316, 321 (4th Cir. 2016) (internal citation omitted).

B. Factual background

1. Project area and need

North Carolina's Currituck Sound region faces unique transportation challenges. The region attracts millions of visitors each year but has limited access from the mainland. JA 135; *see* JA 130. The Wright Memorial Bridge on US 158, depicted in the map below (JA 131), is the only road crossing of the Sound. JA 2491.



The area's main thoroughfares, US 158 and NC 12, are severely congested, increasing travel times between the mainland and Currituck County Outer Banks. Significant traffic jams are common, especially in the summer, when the region's population booms. As planned development continues, that congestion will worsen. JA 132–33, 2461. By 2040, it will take an average of more than two hours to travel the roughly 40 miles from the Currituck County mainland to the Currituck County Outer Banks on an average summer day. JA 166–67, 3127.

Additionally, hurricane evacuation clearance times on two of the area's evacuation routes, US 158 and NC 168, exceed state standards. JA 132–33, 167–68, 3127 (depicting projected clearance times).[2] Reducing those times by even a few hours could enable several thousand more people to reach safety during a storm. JA 2492.

To address these problems, the State decided to evaluate the prospect of building a bridge across the Currituck Sound.

2. NEPA analysis

a. Initial and benchmark analyses

In the late-1990s, FHWA and NCDOT prepared a draft EIS evaluating an early version of the bridge project. Before finalizing that draft, however, the Agencies rescinded it and published a notice of intent to prepare a new EIS that would account

[2] The "evacuation clearance time" begins when the "first evacuating vehicle enters a roadway segment in a given evacuation corridor and ends when the last vehicle leaving the corridor reaches a point of safety." JA 1160.

for an expansion of the project study area, modify the purpose and need statement, and analyze additional alternatives. 73 Fed. Reg. 31,733, 31,733–34 (June 3, 2008); *see* JA 3072–73. The Agencies assembled a Turnpike Environmental Agency Coordination Group comprised of representatives from local, state, and Federal agencies, to guide the preparation of a variety of "benchmark" documents. JA 635–39. Those documents informed, and were incorporated into, the final EIS at issue here. JA 1367–68.

2008 Statement of Purpose and Need: The Statement of Purpose and Need, which was published after multiple rounds of public comment, identified three project purposes: (1) "substantially improve traffic flow" on US 158 and NC 12; (2) "substantially reduce travel time for persons" traveling between mainland North Carolina and the Currituck County Outer Banks; and (3) "substantially reduce evacuation times from the Outer Banks for residents and visitors who use US 158 and NC 168 as an evacuation route." JA 133–34.

2009 Alternatives Screening Report: The Agencies also prepared an Alternatives Screening Report to identify categories of alternatives that merited detailed study. *See* JA 215–20. The report considered multiple alternatives—alone and in combination—including the no-build alternative and alternatives that included improving existing roads, shifting rental times to spread out arrivals and departures, and offering different modes of transportation such as buses and ferries. The report also considered nine different bridge corridor locations, multiple alignment refinements and two design options. *Id.*

The Agencies solicited comments on the report from other agencies and the public, JA 268–72, 284–85, 295, and they decided which alternatives to carry forward for detailed study based on each alternative's ability to meet the project's purpose and need, ability to improve the transportation system's efficiency, economic feasibility, and impacts on communities and natural resources. JA 221.

The Agencies rejected several alternatives, including the shifting rental time alternative and the bus and ferry alternatives because they would not satisfy the project's purpose and need. JA 256–68. The Agencies also concluded that the shifting rental time alternative was not feasible because no government agency has the authority to control check-out times in the region. JA 256.

Indirect and Cumulative Effects Reports: The Agencies prepared an initial Indirect and Cumulative Effects (ICE) Technical Report in 2009. *See* JA 308–19. That report used an eight-step process to assess the indirect and cumulative effects of the study alternatives identified in the Alternatives Screening Report. JA 318; *see* JA 1422.

Based on public comments, the Agencies revised the ICE Report in 2011 to consider the effects of beach driving and accelerated sea level rise. *See* JA 1412–30. The updated ICE Report also evaluated how development and population growth would proceed under each alternative. JA 1512–32. An addendum to the ICE Report was prepared in 2012 to discuss potential impacts related to an increase in visitors to roadless areas on the northern parts of the Currituck County Outer Banks. *See* JA 1888–93.

b. Environmental Impact Statement

The Agencies prepared a draft EIS in 2010 and solicited comments on that document. JA 1122–23. In 2012, they published a final EIS. *See* JA 1116–44. The final EIS analyzed a no-build alternative and five action alternatives. JA 1125–38. A summary of the alternatives follows; each will be explained in further detail below as appropriate.

- No-Build Alternative: This alternative assumed the proposed project would not be implemented, but other planned transportation projects independent of the alternatives under review would proceed. JA 1180.
- Alternative ER2: This "existing roads" alternative contemplated widening US 158 and NC 12 to more traffic, without constructing a bridge. JA 1161–65.
- Mid-Currituck Bridge (MCB) 2 Alternatives: The MCB2 alternatives included construction of a Mid-Currituck Bridge as well as substantial improvements to NC 12 and US 158. JA 1165–70. The Agencies evaluated the MCB2 alternatives along two alignments, one north and one south. JA 1172.
- MBC4 Alternatives: Under these alternatives, the Mid-Currituck Bridge would be constructed but only limited improvements would be made to NC 12 and US 158. JA 1170–78. The Agencies evaluated MCB4 alternatives along northern and southern alignments too. JA 1172.

The final EIS considered how effectively each alternative would satisfy the Project's purpose and need, as well as each alternative's effects on the local community,

development, cultural resources, terrestrial and aquatic wildlife, and water quality. *See* JA 1122–55.

Alternative MCB4 along the northern alignment was the Agencies' preferred alternative. JA 1179–80, 1214–16. It "would provide substantial congestion reduction and travel time benefits while minimizing the widening of NC 12," avoid impacts to properties listed on or eligible for listing in the National Register of Historic Places, and require filling a smaller area of wetlands than would any other action alternative. JA 1214–16; *see also* JA 3073–74 (explaining that the U.S. Army Corps of Engineers identified this alternative as the "least environmentally damaging practicable alternative" under the Clean Water Act).

As the Agencies prepared the draft and final EIS, they informally consulted the National Marine Fisheries Service and Fish and Wildlife Service to confirm that the project would not adversely affect species protected by the Endangered Species Act, which would require formal consultation. JA 1136, 1285. Both consulting agencies confirmed that further consultation was not warranted. JA 1285. The Agencies also collected and responded to questions from the public. JA 1122–23, 1130, 1410; *see also* JA 1351–52 (describing coordination meetings with local officials and other agencies); JA 1362–65 (listing agencies, organizations, and people who reviewed the draft and final EISs).

c. Reevaluation of the final EIS

Although the Agencies finalized the EIS in 2012, a change in the State's funding priorities prevented them from proceeding to sign the Record of Decision (ROD). JA 2430–31. In 2017, however, the Project was funded as part of North Carolina's State Transportation Improvement Program, and the Agencies could proceed to next steps. JA 3106.[3]

FHWA is required by regulation to reevaluate an existing EIS "if major steps to advance the action," like the signing of a ROD, "have not occurred within three years after the approval of the final EIS." 23 C.F.R. § 771.129(b). So in 2019, FHWA published a "Reevaluation of Final Environmental Impact Statement," *see* JA 3103–27, and associated Reevaluation Study Report, *see* JA 2407–14 (together "the Reevaluation") to decide whether preparation of a supplemental EIS was warranted. The Reevaluation assessed updated traffic studies, changes in the project setting, land use planning, and other changes in the project area that had occurred since the EIS was completed. JA 2439–60, 3106–09.

The Reevaluation also identified minor changes to the no-build alternative, the existing roads alternative, and the preferred bridge alternative. *See* JA 3110. The existing roads alternative and the preferred alternative were modified slightly to reflect updated traffic projections and to minimize environmental impacts. JA 2420–25 (preferred

[3] The project remains funded in the current State Transportation Improvement Program. JA 3106.

alternative); JA 2425–27 (existing roads alternative). The description of the no-build alternative was also modified slightly to account for changes to project programming different from those presented in the EIS, including projects that had been completed and added over time. JA 2418–20.

The Reevaluation also revisited several alternatives eliminated from detailed study—including the shifting rental times alternative and the bus and ferry alternatives—but confirmed that they remained unreasonable. JA 2491–505. The Reevaluation confirmed that, relative to the other alternatives, the preferred alternative would offer the greatest overall traffic-flow benefits and greatest travel time benefits relative to the other alternatives. JA 2475, 2484, 2490-92. The Agencies also project that the evacuation clearance time improvements associated with the preferred alternative "translate to roughly some 9,000 evacuees being able to escape in certain time constrained situations that could not escape otherwise." JA 2492.

The Reevaluation also considered updated traffic forecasts, more information about development in the project area, and additional sea level rise projections, and assessed whether changes in the project area and project design would affect the project's environmental impacts. JA 2432–505, 2523–42, 2553–54, 2557–69. The Agencies ultimately concluded that "[t]here are no substantial changes in the substance of the proposed action nor are there significant new circumstances or information relevant to environmental concerns." JA 2575. And although the alternatives under review were revised in some respects, "they have not undergone any substantial change

in location or features"; indeed, the "[c]hanges primarily reduced the area of impact of the alternatives." *Id.* The Agencies ultimately concluded that a supplemental or new EIS "is not required because there are no substantial changes in the proposed action nor are there significant new circumstances or information relevant to environmental concerns." JA 2575, 3115 (citing 40 C.F.R. § 1502.9(c)(1)); *see* JA 2576–78 (summarizing updated information and changes since approval of the EIS).

d. 2019 Record of Decision

In March 2019, FHWA issued a ROD memorializing the Agencies' selection of the preferred alternative identified in the final EIS with revisions based on the Reevaluation. JA 3066–102; *see* JA 3071 (map). As approved in the ROD, the Mid-Currituck Bridge (the Bridge) will be 4.7 miles long with two lanes. JA 3070–102. The Bridge project will also include construction of an interchange west of the Bridge, an intersection east of the Bridge, and "limited improvements" to the existing highways on either side of the Bridge. JA 3070, 3084–85.

For residents and millions of vacationers who visit the Outer Banks each year, the Bridge will substantially improve traffic flow, reduce travel time, and shorten evacuation clearance times during a hurricane or other disaster. JA 3070. The project enjoys widespread local support. *See e.g.*, JA 2594–609 (letters of support).

C. Procedural history

Plaintiffs sued the Agencies in April 2019, asserting that their environmental analyses violated NEPA. The parties cross-moved for summary judgment, and the district court granted the Agencies' motions. JA 70.

Relevant here, the court began by rejecting Plaintiffs' argument that the no-build alternative the Agencies used was flawed because it expected that some changes would occur in the region even without construction of the Bridge. That approach did not undermine the Agencies' analysis, the court reasoned, because the Agencies correctly disclosed the assumptions underlying their analysis and responded to public concerns. JA 91–96.

The court also rejected Plaintiffs' argument that the Agencies erred in failing to prepare a supplemental EIS before signing the ROD. JA 108–21. Because the Agencies carefully evaluated any relevant changes that occurred between finalization of the EIS in 2012 and the signing of the ROD in 2019 and reasonably concluded that the changes would yield no significant impacts beyond those already studied in the final EIS, the court determined that the Agencies' decision not to prepare a supplemental EIS was reasonable. *Id.* This appeal followed.

SUMMARY OF ARGUMENT

1. The Agencies reasonably decided not to prepare a supplemental EIS. They took a hard look at updated information that had become available since the EIS was prepared, and they determined that none of the information revealed significant

environmental impacts not evaluated in the EIS. Nor did it implicate the Agencies' alternatives analysis or require the development of new alternatives.

Specifically, the Agencies considered updated traffic projections and concluded that the reduction in projected traffic neither yielded additional un-studied environmental impacts, nor undermined the Agencies' decision to proceed with the Bridge. Likewise, the Agencies considered data projecting slower population growth in the region and concluded that it also did not implicate the existing effects analysis. And finally, the Agencies considered additional sea level rise projections and reasonably concluded that they were consistent with the Agencies' existing analysis. Indeed, the Agencies decided that rising seas make the Bridge even more important.

2. The Agencies' NEPA analysis facilitated a fair comparison of the alternatives under review. The Agencies explained how each alternative would either facilitate or constrain the development mapped out in local land use plans and affect the location and density of development. Although the Bridge would allow planned development to continue, resulting in the construction of more dwellings within the project area than would the no-build alternative, it would not be the primary driver of demand for development. The Agencies explained the methods they used to complete this analysis, and why they used the methods they did.

Plaintiffs struggle to liken the Agencies' analysis to other NEPA analyses that have been held inadequate. But the record shows that those cases are readily distinguishable, and Plaintiffs' assertions to the contrary are at odds with the record.

For those reasons, the district court correctly denied Plaintiffs' motion for summary judgment, and that decision should be affirmed.

STANDARD OF REVIEW

This Court's review of the district court's legal conclusions on summary judgment is de novo. *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 434 (4th Cir. 2011).

The Court reviews compliance with NEPA under the deferential standard of the Administrative Procedure Act (APA). *Ohio Valley Envtl. Coal.*, 828 F.3d at 321. Under the APA, a court will set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "This inquiry must be searching and careful, but the ultimate standard of review is a narrow one." *N.C. Wildlife Fed'n v. NCDOT*, 677 F.3d 596, 601 (4th Cir. 2012) (internal quotation marks omitted). Indeed, the court's review under the APA is "ultimately narrow and highly deferential." *Webster v. USDA*, 685 F.3d 411, 422 (4th Cir. 2012); *accord Ohio Valley Envtl. Coal.*, 556 F.3d at 192 (recognizing a "presumption in favor of finding the agency action valid").

Judicial review is particularly deferential where, as here, "resolution of th[e] dispute involves primarily issues of fact" that implicate "substantial agency expertise." *Am. Whitewater v. Tidwell*, 770 F.3d 1108, 1115 (4th Cir. 2014) (quoting *Marsh*, 490 U.S. at 376–77). "[S]o long as the agency provides an explanation of its decision that includes a rational connection between the facts found and the choice made, its decision should

be sustained." *Nat'l Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 991 F.3d 577, 583 (4th Cir. 2021) (citation omitted).

ARGUMENT

I. The Agencies reasonably decided not to prepare a supplemental EIS.

Plaintiffs contend that the Agencies had to prepare a supplemental EIS to consider updated traffic projections, changes in trends in population growth and development on the Outer Banks, and information about sea level rise that Plaintiffs deem "significant." Opening Brief at 31–32; *see id.* at 26–43. But the record shows that the Agencies took a hard look at the information before them, determined that it was not significant, and reasonably decided not to prepare a supplemental EIS. Plaintiffs' assertions to the contrary lack merit.

A. The Agencies correctly determined that updated traffic forecasts did not require a supplemental EIS.

Plaintiffs first contend that the Agencies should have prepared a supplemental EIS to consider revised traffic forecasts showing a "substantial decrease in anticipated traffic" within the Project area. *See* Opening Brief at 32–36. But the Agencies considered this updated information and reasonably determined that it did not warrant a supplemental EIS because it did not reveal significant impacts beyond those already considered. Plaintiffs overlook the Agencies' careful analysis and fault them for failing to adhere to standards that neither the statute nor regulations impose.

1. The Agencies took a hard look at updated traffic forecasts and reasonably decided they did not implicate the Project's environmental impacts.

Traffic forecasts enable the Agencies to predict projected roadway network congestion under no-build and build conditions and can provide information necessary to decide whether project alternatives will meet a project's purpose and need. JA 2445. The 2012 EIS relied on a report that predicted the number of cars that would pass through various links in the project area's thoroughfares in the year 2035 under the no-build, existing roads, and bridge alternatives on an average day and on a summer weekday. JA 1158–59, 1204–06. The updated traffic forecasts that Plaintiffs refer to made those same projections for the year 2040 and revealed that the number of vehicles passing through the relevant links would increase relative to current figures at nearly every location, but to a lesser extent than was predicted in the final EIS. JA 2448–50.

The Reevaluation took a hard look at the updated traffic forecasts. JA 2445–52, 2461–70 (comparing analyses in EIS with updated traffic forecasts). The Agencies recognized that, with a smaller increase in traffic in the region, the travel time savings associated with the Bridge would be lower than anticipated in the EIS. JA 2450. They further recognized that the possible constraint on development associated with the no-build alternative could reduce congestion in some areas relative to some of the predictions in the EIS. JA 2463–66. But the updated data still revealed that "[w]ith either constrained or unconstrained development, the project area's main thoroughfares . . .

are becoming increasingly congested, and congestion will become even more severe in the future." JA 2467; *see also* JA 2448–50, 2461–62, 2464–67, 2751–54.

The updated data also reaffirmed the Agencies' conclusion that the Bridge would be valuable to improve traffic flow, reduce the existing elevated travel time between the mainland and the Outer Banks, and improve hurricane evacuation clearance times. JA 2461–70, 3109, 3112–15. Indeed, travel times between the mainland and the Outer Banks would remain high without a Bridge. *See* JA 2467–68. The final EIS predicted that in year 2035 under the no-build alternative, it would take 3 hours and 53 minutes to travel the roughly 41 miles from the Currituck County mainland to the Currituck County Outer Banks on a summer weekend—a trip that would take one hour under uncongested conditions. JA 2467. The Reevaluation concluded that the same trip would take 3 hours and 7 minutes in 2040. JA 2468. Either way, the congested travel time "remains far above the uncongested travel time." *Id.* The Agencies also explained that capacity improvements are still necessary to address hurricane evacuation clearance times. JA 2468–70.

The Agencies also compared the relative traffic benefits and travel time improvements of the existing roads, no-build, and Bridge alternatives in light of the updated data. JA 2475–92. They confirmed that the Bridge alternative would still offer greater overall benefits than would the no-build and existing roads alternatives, particularly on summer weekends. JA 2489–92, 2569.

Finally, the Reevaluation revisited several of the alternatives that the Agencies had previously eliminated from detailed study and confirmed that the updated traffic forecasts do not change their decisions not to proceed with those alternatives. JA 2492–05. They even considered a "composite alternative" suggested by Plaintiffs that combined road improvements, shifting rental times, bus transit, and a ferry. JA 2494, 2504–05. The Agencies rejected that alternative as unreasonable, however, given its costs, "notable community and dredging impacts," and difficult implementation. JA 2505.

In short, the Agencies carried their burden to take a hard look at the updated traffic information, and they reasonably explained their conclusion that none of that new information required a supplemental EIS. *See, e.g.*, *Save Our Sound OBX*, 914 F.3d at 222–23 (concluding that the defendant agencies took a sufficiently hard look at new information when they "describe[d] the similarities and differences" between the current project and project as it was previously evaluated and "went into detail"); *accord Hodges v. Abraham*, 300 F.3d 432, 446 (4th Cir. 2002) ("If the [agency] concludes, based on . . . a preliminary inquiry, that the environmental effect of the change is clearly insignificant, it has taken the 'hard look' required by NEPA, and no further NEPA documentation is necessary."). NEPA requires nothing more.

2. Plaintiffs' arguments to the contrary lack merit.

Even though the relevant regulations require the Agencies to supplement existing EISs only when new information reveals significant environmental impacts,

Plaintiffs do not assert that the updated traffic forecasts implicate the project's environmental impacts. 23 C.F.R. § 771.130(a); 40 C.F.R. § 1502.9(c). Instead, they argue that the updated traffic forecasts were "significant" because they undermined the Agencies' rationale for selecting the Bridge and thus should have prompted the Agencies to revisit the alternatives they had rejected. Opening Brief at 33; *see also id.* at 30, 34, 36, 38. These arguments lack merit.

The Agencies evaluated the information and concluded that it was not, in fact, "significant." JA 2575–78; *see* JA 3115 (explaining that "updates and changes demonstrate that there are no new issues of significance associated with th[e] project" and that a "supplemental EIS is not required because there are no substantial changes in the proposed action nor are there significant new circumstances or information relevant to environmental concerns"). It is that reasoned determination, and not Plaintiffs' bald assertion, that matters here. *Marsh*, 490 U.S. at 376 (explaining that an agency's assessment of whether information "suffices to establish a 'significant' effect" is an assessment that "implicates substantial agency expertise").

In any event, as explained above, the Agencies *did* consider how the reduced traffic forecasts implicated their decision to select the Bridge alternative over the others, and they proffered good reasons to continue with the Bridge. They were not required to prepare a supplemental EIS merely to reiterate that conclusion. *See Save Our Sound OBX*, 914 F.3d at 223–24.

Likewise, Plaintiffs' suggestion that the Agencies must prepare a supplemental EIS because, in their view, the Bridge alternative may no longer be the *best* alternative, *see* Opening Brief at 36 (asserting that the Agencies need to consider "how well" each alternative meets the project's purpose and need), is at odds with NEPA. NEPA exists to ensure that agencies complete a full analysis of a project's environmental impacts, not to ensure that an agency is making the right choice. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (explaining that "NEPA merely prohibits uninformed—rather than unwise—agency action"); *see also infra* at 35–38.

Plaintiffs may disagree with the Agencies' conclusions, but "NEPA is not a suitable vehicle for airing grievances about the substantive policies adopted by an agency, as NEPA was not intended to resolve fundamental policy disputes." *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) (internal citation and quotation marks omitted). In any event, the Agencies confirmed that the Bridge was still a wise selection—it would reduce existing and still worsening congestion and improve evacuation clearance times, as explained above. JA 2461–67, 2475, 2489, 3070.

Plaintiffs also assert the updated traffic information implicates the "financial feasibility of the Toll Bridge compared to the other alternatives," creating a "significant change in circumstances that should have been disclosed to the public" in a supplemental EIS. Opening Brief at 34. This argument fails too. For one, the Agencies did not ignore the fact that a decline in traffic would yield a decline in toll revenues. *See* JA 2429–31 (discussing revised cost assumptions for preferred and existing road

alternatives); JA 2445–46, 2901–02. Indeed, they explained that a "new investment grade traffic and revenue forecast is being prepared" to confirm that the project would still be financially feasible even under worst-case toll-generating scenarios. JA 2446; *see id.* (explaining how assumptions underlying revenue analyses differ from those underlying environmental analyses).

They also explained, however, that even if the updated traffic and revenue forecast were to determine that toll revenue would be less than predicted in the Reevaluation, the reduced toll funding could be made up in other areas. JA 2430–31; (explaining that current funding allocations "demonstrate[] the state's reasonable ability to fund and deliver this project," and identifying additional funding sources); *see also* JA 2887–91, 2901–02 (responses to comments that raised concerns about Bridge's funding sources). And if for some reason the revenue analysis demonstrates that the toll revenue would be insufficient to finance the Bridge, "then the bridge project would be terminated." JA 2902.

Nothing more was required of the Agencies. When information about a project's funding does not implicate a project's environmental impacts, it need not be elaborated upon in a final EIS, and it does not require a supplemental EIS. NEPA seeks to ensure that an "agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant *environmental* impacts." *Robertson*, 490 U.S. at 349 (emphasis added). How a project may be funded is not part of that analysis. *See Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983) (explaining

that "[t]he theme of [NEPA] is sounded by the adjective 'environmental' " and that NEPA analyses need only address "the impact or effect on the environment").

Plaintiffs resist this conclusion, asserting that any information that implicates some aspect of the project discussed in an EIS merits preparation of a supplement. Opening Brief at 33–35. As they see it, "all aspects of the NEPA process . . . are environmental." *Id.* at 35. To be sure, new information need not be environmental information in itself to implicate a project's environmental impacts and require discussion in a NEPA document. But, as the district court correctly recognized, ECF 98 at 41–42, the new information must still "present a seriously different picture of the *environmental impact* of the proposed project." *Save Our Sound OBX*, 914 F.3d at 221–22 (internal citation omitted). The financial information that Plaintiffs cite does not present such a picture, and they do not assert that it does.

None of the cases that Plaintiffs cite support their attempt to broaden NEPA's supplementation requirement. Plaintiffs cite *Marsh v. Oregon*, Opening Brief at 26–27, but that case simply confirms that supplementation is required only when new information "is sufficient to show that the remaining action will 'affec[t] *the quality of the human environment*' in a significant manner or to a significant extent not already considered." 490 U.S. at 374 (emphasis added, citation omitted). *Marsh* does not support Plaintiffs' assertion that any information that bears generally on a project considered in a NEPA analysis warrants supplementation without regard to environmental effects.

Indeed, "[n]ot every new circumstance requires a supplemental EIS." *Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990).

Likewise, the D.C. Circuit's decision in *Mayo v. Reynolds,* 875 F.3d 11 (D.C. Cir. 2017), did not "ma[k]e clear" as Plaintiffs assert, that the supplementation requirement "is not limited to instances where the expected environmental impact of a proposed action changes," Opening Brief at 28–29. It only confirms that agencies need not prepare new NEPA analyses to evaluate previously studied actions as those actions are implemented. 875 F.3d at 21 (explaining that an agency "is not required to repeat its analysis simply because the agency makes subsequent discretionary choices in implementing the program"). Plus, the language that Plaintiffs rely on from *Mayo* is simply a recitation of the "rule of reason" standard, *see id.*; it says nothing about supplementation.

The district court decision in *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991) is also of no use to Plaintiffs. The court did not hold, as Plaintiffs suggest, Opening Brief at 29–30, that even information that does not "seriously change the environmental picture" could still require a supplemental EIS. Instead, the court held just the opposite, reasoning that a supplemental EIS was required in that case *because* new circumstances "substantially . . . increase[d] the probability that environmental harms will occur" and caused an "increase [in] the probability of environmental impacts." *NRDC v. Lujan*, 768 F. Supp. at 887. Thus, the

case has no bearing here, and it should not otherwise be read to extend the supplementation requirement beyond the applicable statutory and regulatory text.

B. The Agencies reasonably determined that updated population and development information did not require a supplemental EIS.

Plaintiffs' next assert that "[s]ignificant changes to anticipated growth and development patterns also required preparation of a Supplemental EIS." Opening Brief at 36. Again, Plaintiffs cannot make the information "significant" simply by calling it so. Here too, the Agencies considered the information before them and reasonably concluded that it neither implicated the project's impacts nor undermined the final EIS.

Plaintiffs' assertions fail on other fronts too. To start, the revised data that Plaintiffs contend was so significant simply reflected that the permanent and tourist population of the project area would continue to grow, but at a lower rate than was forecasted in the final EIS. JA 2447–48. The permanent population increased steadily from 1990 through 2006, and then "slowed from compound growth rates of approximately 3 percent per year to less than 1 percent per year since 2006." JA 2448. Other data suggested that population growth in the project area would continue at a rate of about 1 to 1.6 percent annually. *Id.* The growth in tourism in the region had also slowed but was continuing. *Id.*

Plaintiffs assert that the information casts doubt on the need for the Bridge and its financial feasibility. Opening Brief at 37. But the Agencies considered whether the anticipated slowdown in the rate of population and tourism growth implicated the

selection of the Bridge alternative, and they concluded that it would not. JA 2448, 2475. Population growth and tourism growth are relevant to the Bridge because they affect traffic. And as explained above, the traffic projections showed that congestion would remain a problem, and the Agencies determined that the Bridge was still the best solution. JA 2461–67, 2475, 2489. Finally, Plaintiffs' concerns about the financial feasibility of the Bridge are unfounded and do not cast doubt on the Agencies' decision not to prepare a supplemental EIS is any event. *See supra* at 23.

C. Updated information about sea level rise did not require a supplemental EIS.

Plaintiffs next contend that "[d]ramatic changes to projections of sea level rise" require a supplemental EIS. But the record shows that the Agencies considered how sea level rise would affect both the project itself and the project's impacts and reasonably determined that a supplemental EIS was unnecessary. Plaintiffs do not show otherwise.

1. The Agencies reasonably concluded that sea level rise projections did not merit supplementing their existing analysis.

The final EIS considered how the project area would look under seven different sea level rise scenarios that depicted the region under 2.4 to 23.2 inches of sea level rise. JA 1298–99. The models "were used to identify land and . . . transportation infrastructure that, without protection, would be regularly inundated by the ocean or would be at-risk of periodic inundation as a result of storm surge." JA 1299. Those

projections revealed that, by the year 2100, between 1.5 and 2.5 miles of the road network within the project area will likely be permanently under water, and 3.8 to 7.7 miles of the road network could experience intermittent flooding during storm surges. *Id.* Areas likely to be permanently inundated within the Bridge corridor would be bridged, and other roads would need to be raised in elevation. JA 1299. The Bridge itself would not be inundated under any of those scenarios. *Id.*

In total, the Agencies predicted that the project area would see a 6.7-inch rise in sea levels by 2035. JA 1300. But they also evaluated the effects of even one meter (39.4 inches) of sea level rise to consider an extreme scenario. JA 1299. Even that level of sea level rise, the Agencies concluded, would not substantially affect the Bridge. *Id.* Only roadway components near the base of the Bridge on the North Carolina mainland would be affected. *Id.* Other roadways, however—including roadways that would be improved under the existing roads alternative—would be flooded. *Id.* (explaining that the other alternatives under consideration would "suffer the same levels of inundation and impact from" flooding "as the existing roads that they improve," thus yielding fewer benefits).

As a result, the Agencies' sea level rise analysis only bolstered their decision to proceed with the Bridge. The Bridge, they concluded, would be "a useful asset in reducing the impact of sea level rise resulting from climate change on the project area's road system." JA 1298. Indeed, sea level rise projections in the final EIS explain that at some point between now and 2100, frequent flooding will regularly render some

roads—including NC 12—impassable, making the planned Bridge "the only way to get off the Currituck County Outer Banks." JA 1143; *accord* JA 1299 (explaining value of Bridge given projected sea level rise).

The Agencies revisited that analysis in the Reevaluation. JA 2553–54. There, they considered a report prepared by the North Carolina Coastal Resources Commission Science Panel in 2016. JA 2553. That report, in turn, relied on emissions scenarios prepared by the Intergovernmental Panel on Climate Change. *Id.* The 2016 report concluded that, by 2045, sea level rise at the Town of Duck—a town within the project area—could range from 4.4 to 10.6 inches. *Id.* The Agencies explained that the updated projections remained within the ranges studied in the final EIS. JA 2554. The Reevaluation reiterated that accelerated sea level rise would make the Bridge project even more important because it would "provid[e] an alternate route to and from the Outer Banks if sea level rise were to result in a breach in NC 12." JA 2434–35; *accord* JA 2553.

Finally, the Agencies addressed the uncertainty that sea level rise and associated storm events present, explaining that while the Agencies "are aware of the risks and vulnerability, the [Bridge] is still a useful project," and that the State will follow FHWA's resilience and preparedness policies "to minimize climate and extreme weather risks and protect transportation infrastructure." JA 2554. With that, the Agencies ultimately concluded that "the findings of the [final EIS] related to sea level rise are unchanged,"

and that no supplemental EIS would be necessary. *Id.*; *see also* JA 2563, 2575–76, 2952–53.

2. The information that Plaintiffs proffer does not call the Agencies' analysis into question.

Despite that careful analysis, Plaintiffs contend that the Agencies had to prepare a supplemental EIS to consider worst-case scenario sea level rise information that Plaintiffs presented to the Agencies in a letter after the ROD was signed. Opening Brief at 20–21, 39–40 (citing JA 3677). Once again, they do not assert that the information undermines the Agencies' analysis of the project's environmental impacts; instead, they contend that it has "significant consequences for the viability of the Toll Bridge and seriously undermine[s] other assumptions the Agencies made about traffic and growth in the project area." *Id.* at 38–41.

Plaintiffs' 2019 letter compiles data from, among other documents, a 2017 technical report prepared by the National Oceanic and Atmospheric Administration, *see* JA 3576–84, a printout of a webpage hosted by a nonprofit interested in sea level rise, JA 3652–54, and maps prepared by experts hired by Plaintiffs, JA 3680–81. The basis for Plaintiffs' project area-specific calculations is unclear; Plaintiffs' Opening Brief asserts that "the Toll Bridge is expected to see 28.3 inches of sea level rise by 2050 and 81.1 inches by 2011," Opening Brief at 20–21, but the record page Plaintiffs cite in support presents *global* figures and shows that sea level rise exceeding 2 meters (78.84 inches) is very unlikely to occur. *See id.* at 20–21, 39 (citing JA 3607 (showing that under

the worst-case emissions scenario, the probability of global mean sea level rise exceeding 2 meters is only 0.3% likely)).

Plaintiffs assert that the Agencies failed from the start because they never took a "hard look" at the information provided in Plaintiffs' letter. Opening Brief at 40; *id.* at 21 (asserting that none of this post-decisional information "was analyzed or disclosed by the Agencies"). But the Agencies cannot be faulted for failing to consider information that was not before them when they made the decision now under review. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (The "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). Indeed, the district court permitted Plaintiffs to proffer post-decisional information only to the extent that the information "raise[s] issues as to whether defendants considered all relevant evidence pertaining to new information and changed circumstances since development of the EIS." ECF 74 at 7.

The information that Plaintiffs proffer does not show that the Agencies disregarded relevant evidence. As explained above, the Agencies already concluded that even a meter of rise would not materially affect the Bridge or result in significant environmental impacts not yet evaluated in the final EIS. JA 2554. Proceeding with only the no-build and existing road alternatives, on the other hand, could yield impassable roads and leave some people stranded during storms. JA 2434–35.

Plaintiffs essentially fault the Agencies for failing to complete their version of a worst-case scenario analysis. But NEPA does not require that sort of analysis, in either

original EISs or in supplements. *Robertson*, 490 U.S. at 354–56; *see Marsh,* 490 U.S. at 369–70 (holding that court erred in holding agency's NEPA analysis defective on ground that it did not contain a "worst case analysis"). Agencies must instead consider impacts that are "reasonably foreseeable," *Robertson*, 490 U.S. at 356, and the Agencies did that (and more) here, examining reasonably foreseeable scenarios ranging from 2.4 to 23.2 inches, as well as an extreme rise of one meter. *See supra* at 28; JA 1298–1300.

Plaintiffs also assert that the Agencies' supplementation decision was arbitrary because it did not consider the most up-to-date information. Opening Brief at 40. But "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh,* 490 U.S. at 373. A supplement is necessary only when new information presents a "*seriously* different picture of the environmental landscape." *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1055–56 (D.C. Cir. 2017) (citation omitted).

Here, Plaintiffs' letter merely confirms what the Agencies already knew: sea levels are rising, and building another connection between mainland North Carolina and the Outer Banks will ensure that people can safely reach the mainland when flooding occurs. Plaintiffs' assertion that scenarios the Agencies once considered worst-case may now be more likely does not mean that the Agencies' existing analysis was inadequate. *See Protect Our Comms. Found. v. LaCounte*, 939 F.3d 1029, 1041 (9th Cir. 2019) ("[N]ew information is not significant because it merely confirmed concerns that" a prior analysis "already articulated and considered." (citation omitted)).

Also unpersuasive is Plaintiffs' speculation that updated sea level rise figures implicate the Project's viability and usefulness, *see* Opening Brief at 39–40. This argument fails for at least two reasons. For one, the Agencies did not ignore the fact that sea level rise could affect the Bridge; instead, they expressly acknowledged that even though the Bridge would be vulnerable to sea level rise, it "is still a useful project." JA 1299, 2554. Second, Plaintiffs' belief that climate change will render the Bridge a poor investment does not mean that the Agencies violated NEPA. Indeed, as explained above at 22–23, NEPA is not for defending policy decisions or resolving policy disputes. *See Grunewald*, 776 F.3d at 903. In any event, the Agencies confirmed the usefulness of the Bridge in a range of sea-level-rise scenarios, and that analysis (and resulting decision that the Bridge remained valuable) is entitled to substantial deference. *See Webster*, 685 F.3d at 430.

Plaintiffs disagree, asserting it is not their "contention that NEPA prohibits the construction of the Toll Bridge." Opening Brief at 41. This is beside the point. NEPA does not prohibit agencies from making particular decisions, and it does not require them to prove that they are making the best decision. Where, as here, "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA" from selecting one alternative over another. *Robertson*, 490 U.S. at 350.

D. The Agencies need not prepare a supplemental EIS to inform the public about the changes that are neither individually nor cumulatively significant.

Finally, Plaintiffs suggest that the updated traffic forecasts, growth projections, and information about sea-level rise should be "considered together," because "the combined effect of the various changes" implicates the Agencies' "analysis of the best transportation solution." Opening Brief at 41. At the very least, they contend, the Agencies should have prepared a supplemental EIS to "present an updated analysis of the different alternative solutions in away the public could scrutinize and provide input." *Id.* at 41–42.

As just explained, however, the Agencies looked at all of the updated information available to them, evaluated whether it would change their previous analysis of the Project's effects on the environment, and ultimately decided that it would not. They also revisited their alternatives analysis and concluded that the Bridge alternative remained an appropriate solution. The Agencies carried out their obligations under NEPA, and Plaintiffs provide no reason why they should have prepared a supplemental EIS.

Relying on *Alaska Wilderness Recreation and Tourism Association v. Morrison*, 67 F.3d 723 (9th Cir. 1995), Plaintiffs assert that the Agencies must indeed prepare a supplemental EIS because updated information implicates the Agencies' decision to proceed with the Bridge alternative. Opening Brief at 42–43. *Alaska Wilderness* does not help Plaintiffs. There, the court simply held that the U.S. Forest Service had to prepare

a supplemental EIS to reconsider its alternatives analysis, where the cancellation of a timber processing contract suddenly broadened the universe of alternatives available to consider. *Alaska Wilderness*, 67 F.3d at 729–30. Because all the alternatives considered in the existing EIS were designed to meet the requirements of the cancelled contract and it was "impossible to tell" what alternatives the Service might have considered or selected without the contract, further analysis was necessary. *Id.* at 730.

Plaintiffs identify no key change that throws the Agencies' analysis into question as the contract cancellation did in *Alaska Wilderness*. Instead, they identify *updated* information—information that the Agencies considered and reasonably decided did not implicate the project's impacts or warrant further discussion. Indeed, when the Agencies considered the updated information, they concluded not only that their existing analysis remained valid, but that their information *reinforced* their decision to proceed with the Bridge. JA 2553–54, 2575. Thus, *Alaska Wilderness* does not undermine the Agencies' decision not to prepare a supplemental EIS here. *See Friends of Cap. Crescent Trail*, 877 F.3d at 1061 (distinguishing *Alaska Wilderness* on similar grounds).

Finally, Plaintiffs err in asserting that the Agencies had to prepare a supplemental EIS at least to present updated information to the public. Opening Brief at 41–43.[4] To

[4] Indeed, the suggestion that a supplemental EIS is necessary to present information to the public pervades Plaintiffs' brief. *See* Opening Brief at 33 ("new reduced [traffic] forecasts . . . should have been presented to the public in a supplemental EIS"); 34 ("the overall comparison of alternatives should be publicly revisited based on . . . new facts"); 38 (similar), 41 (a supplemental EIS "should have been prepared so that the public and decisionmakers had all relevant information and an opportunity to provide input").

be sure, NEPA seeks to make sure that agencies "consider every significant aspect of the environmental impact of a proposed action," and to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co.*, 462 U.S. at 97. Even though an agency's compliance with NEPA may involve the dissemination of information, NEPA does not impose a freestanding disclosure requirement. NEPA's disclosure requirement applies only when an agency has prepared an EIS. So if an agency determines that a project will not have significant impacts—or, in this case, that updated data does not change impacts the agency already evaluated and presented to the public—then NEPA does not require a supplemental EIS merely to keep the public up-to-date. *Cf.* 23 C.F.R. § 771.130(a); 40 C.F.R. § 1502.9(c) (identifying narrow circumstances in which supplementation is required); *see Weinberger v. Cath. Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981) (warning that NEPA's decisionmaking and disclosure aims are not "coextensive"). Plaintiffs seek to replace the settled test for determining when an agency must supplement an EIS with one that would trigger supplementation whenever the public is interested in a project. Opening Brief at 41. That cannot be the rule.

In any event, the Agencies' process was hardly secret. Plaintiffs and their counsel requested and received a draft of the Reevaluation, and they submitted comments. MCB69513 (draft Reevaluation); JA 2877–960 (Plaintiffs' comments). Although not required to, the Agencies responded, *id.* (Agencies' responses), and the Reevaluation confirms that Plaintiffs' comments were taken into account, JA 2575. As noted above

at 20, Plaintiffs also submitted their own proposed variation of the existing roads alternative. The Agencies reviewed that proposal and provided reasons for their decision not to study it in more detail. JA 2494, 2504–05, 2918–32.

The Agencies also contacted and met with a number of federal and state agencies, including the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, the North Carolina Wildlife Resources Commission, North Carolina Division of Marine Fisheries, and the North Carolina Division of Water Resources, to solicit updated information about the Project area's natural environment. JA 3114; *see also* JA 3017. They also sought input from Dare County, Currituck County, and the Towns of Southern Shores, Duck, and Kitty Hawk. JA 3114. Plaintiffs' assertion that the Reevaluation was conducted in "private" and "behind closed doors," Opening Brief at 3, 33, is thus incorrect.

* * *

Thus, the Agencies appropriately considered the updated information before them and reasonably determined, applying the correct supplementation standards, that no supplemental EIS was necessary.

II. The Agencies' no-action alternative analysis facilitated a reasonable analysis of the Project alternatives.

CEQ's NEPA regulations require agencies preparing EISs to consider a "no action alternative" that reflects what the project area would look like if the Agencies did not take any of the actions being considered. 40 C.F.R. § 1502.14(d). Presenting the no-

action alternative allows policymakers and the public to understand the difference between proceeding with the project and proceeding with the status quo. *See Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010).

Plaintiffs assert that the Agencies worked from a "flawed baseline," which prevented them from evaluating the Bridge's effects on development in the project area and resulted in an unreasonable analysis of project alternatives. Opening Brief at 43–58. But the record shows that the Agencies reasonably used the information available to them to model development under all of the alternatives—including the no-build alternative—and to compare the effects of each.

A. The Agencies modeled how development would proceed under each alternative and the effects of that development.

The traffic forecasts the Agencies considered in both the final EIS and Reevaluation assumed "full build out" in the parts of the project area accessible by paved roads (namely, NC 12), "and a continuation of recent building trends" in areas accessible only by unpaved roads. JA 1325, 2447. The exact contours of a full build out scenario are set forth in local land use plans (Currituck County and several towns within nearby Dare County, JA 1232), which dictate where residential and commercial development can occur; the density of that development; and the zoning, environmental, and social constraints that apply. JA 1330–32, 1334–40; *see* JA 2941. Specifically, the remaining undeveloped land on the Currituck County Outer Banks that

is accessible by paved roads is already zoned, subdivided, and its anticipated density known. *See* JA 1524, 2447.

The Agencies' decision to rely upon local land use planning data as the starting point for developing build and no-build scenarios is consistent with direction from Congress that federally funded highway and transit projects must flow from metropolitan and statewide transportation planning processes. *See* 23 U.S.C. §§ 134, 135; 49 U.S.C. §§ 5303–5306; *accord* 23 C.F.R. Pt. 450, App. A. When the Agencies prepared the final EIS, the applicable land use plans assumed that the Bridge would be built. *See, e.g.*, JA 1232 ("A bridge is widely supported and included in the land use plans of the affected jurisdictions.").[5]

In the final EIS, the Agencies projected that if development proceeds according to existing trends and in a manner consistent with the relevant land use plans, then the average development across the project area's paved and unpaved areas will reach 86 percent of full build out by 2035—a total of about 13,200 homes or hotel rooms (units) across the project area. JA 1325; *see id.* (explaining that "full build out" amounts to 15,400 units total). The Agencies also made clear, however, that this level of build out could be reached only if development trends continue, and they explained that those trends would continue only if a bridge is built. *Id.* (explaining that the bridge alternatives would prevent traffic congestion from reaching a level that would constrain

[5] The relevant land use plans are publicly available. *See* DE96 at 16.

development). The development trends are less likely to continue under the existing roads or no-build alternatives because traffic congestion under those alternatives "would become great enough to constrain development in the Outer Banks portion of the larger project area." *Id.*

Indeed, the Agencies projected that under the no-build alternative, development would reach only 70 percent of the maximum, or about 10,800 units total. *Id.* And under the existing roads alternative, development would reach only 75 percent of the maximum, or about 11,600 units total. JA 1325–26. Under these "constrained development" scenarios, "the acres developed on the Outer Banks would be approximately 525 to 800 acres less, or approximately 1.6 to 2.4 percent of the 32,988 acres of total development" anticipated in the Currituck County land use plan. JA 1336. Put another way, a bridge would likely allow between 1,600 and 2,400 more units to be built and about 800 more acres to be developed than would the non-bridge alternatives. JA 1325–26; *see* JA 2565 (Reevaluation study explaining calculations).[6]

The Agencies also explained how different levels of development across the Project area would affect the environment. "[P]rivate development and the provision of infrastructure to serve that development" would be one of the impact-causing

[6] The Reevaluation modified the build-out figure for the Bridge alternative slightly, shifting the total units to be built under that alternative from 13,200 down to 13,100. JA 2564-65, 3002 (explaining that build out under the Bridge alternative will be 85 percent of maximum, not 86 percent). With this correction, the maximum difference in acres developed under the Bridge alternative relative to the non-Bridge alternatives fell from about 800 acres to 770 acres. JA 2565.

activities in the project area, along with the proposed project itself, other transportation projects, and accelerated sea level rise. JA 1321; *see also* JA 1322 (explaining that the private development "generally would occur with or without the implementation of one of the detailed study alternatives"). Proceeding with the Bridge would cause a "change in the order in which available lots on the NC 12-accessible Outer Banks would develop," JA 1332, with "more Currituck County lots developing before Dare County lots," JA 1521, 1540. The Bridge would also yield "[a]pproximately 68 acres of business development" on currently agricultural land near the base of the planned Bridge, not on the Outer Banks, but on the Currituck County mainland. JA 1332; *see* JA 1532–34 (discussing anticipated development in mainland Currituck County).

The Agencies also explained, however, that in area north of NC 12, where roads are unpaved, there would be "no reasonably foreseeable change in the location, rate, or type of development" under the Bridge alternative compared to the no-build alternative. JA 1327. Even though the time savings associated with the Bridge would suggest that the demand for development and access to the non-paved areas would increase, several other factors "would overcome the influence of" those "travel time savings." *Id.* For one, the Bridge "would do nothing to mitigate the congestion point of driving into the sand at the end of NC 12," *id.*; *see supra* at 5 (map). Local policies limiting development in areas with unpaved roads would also remain a barrier. For example, zoning laws require any new subdivisions in those areas to have lot sizes of at least three acres, thereby limiting the amount of development that can occur. JA 1328.

The continued development that would occur if the Bridge is built would affect estuaries and water quality and that the construction of additional impervious surfaces would yield runoff, but these would be "minor components of the cumulative impacts." JA 1336. The no-build and existing road alternatives would not "lead to a demonstrable improvement in surface water quality" compared to the action alternatives. *Id.* Continued development would also increase sediment loading and turbidity but would likely improve "once developed with a perennial ground cover." JA 1337. Development would also "introduce increased levels of ambient noise and light," alter waterbird habitat, affect neighborhoods and communities in the project area, and change the "scenic and natural area character" of the region. JA 1332–38; *see also* JA 1546–50 (ICE report identifying changes to natural environment under various alternatives). In short, the Agencies appropriately identified the degree to which development would likely proceed under each alternative, as well as the effects of that development.

B. Plaintiffs' arguments to the contrary are at odds with the record.

Plaintiffs' assertion that the Agencies "unlawfully includ[ed] the Toll Bridge in the baseline for their analysis" thereby "obscuring the Toll Bridge's true effects," Opening Brief at 43, is misleading. To be sure, the Bridge was part of *a* baseline—the "development baseline"—which showed how the community and Agencies expected to proceed if it were to proceed without constraint. JA 2940; *accord* JA 2941 (explaining

that the "baseline of future development used for project planning is the 'expected and planned for development' as expressed in the local" land use plans).

But the Bridge was not part of the NEPA *no-action*, or here, "no-build," baseline. *See* 40 C.F.R. § 1502.14(d). As explained above, the Agencies worked from the development baseline to arrive at the no-build baseline, which depicted how much development would occur without the Bridge. They did not, as Plaintiffs assert, "exclud[e] 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." Opening Brief at 45.

Instead, they explained that there would be less development under the no-build alternative than the bridge alternatives, and they described the effects of the varied levels of development. JA 1325–26, 2564–65. NEPA requires agencies to evaluate a no-action baseline; it does not tell agencies how to arrive at that baseline. Indeed, agencies are afforded significant discretion when they develop these sorts of models and technical judgments. *Nat'l Audubon Soc'y*, 991 F.3d at 586; *accord Druid Hills Civic Ass'n, Inc. v. FHWA,* 772 F.2d 700, 711 (11th Cir. 1985) (explaining that because "the court is not a 'super professional transportation analyst'" its "task is simply to determine whether the EIS furnishes the 'statutory minima' required by NEPA").

Plaintiffs liken this case to *North Carolina Wildlife Federation v. NCDOT*, 677 F.3d at 602, *cited in* Opening Brief at 46–48, but that case is distinguishable on its facts. There, the plaintiffs asserted that agencies' NEPA analysis was flawed because it did not

disclose to the public that the no-action alternative baseline assumed the action under consideration would proceed. *Id.* at 602–05. Indeed, the agencies in that case acknowledged that they did not realize that fact until the administrative process was underway and thus did not inform the public. *Id.* at 602–03. The Court issued a narrow decision in plaintiffs' favor, holding that the agencies erred because they proceeded "without disclosing the data's underlying assumptions and by falsely responding to public concerns." *Id.* at 605. The agencies' failure to disclose the ins and outs of the data they relied on, the court held, skirted NEPA's "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.* at 604 (quoting *Robertson*, 490 U.S. at 349).

Here, however, the Agencies did not include the Bridge in the no-build alternative baseline. To be sure, they worked back from "development baseline" that included the Bridge to explain how development would proceed without the Bridge. But they also explained their model and the data and inputs on which it relied, and they made clear that the *development* baseline included the Bridge, but that they then worked backward to generate the *no-build* baseline that did not. JA 1325–26. Unlike the model used in *North Carolina Wildlife Federation*, the model the Agencies used here allows them to fairly compare the alternatives under review. The case therefore has no bearing here.

Plaintiffs' reliance on the district court's decision in *Catawba Riverkeeper Found. v. North Carolina Department of Transportation*, is similarly misplaced. *See* Opening Brief at 47

(citing No. 5:15-CV-29-D, 2015 WL 1179646, at *7 (E.D.N.C. Mar. 13, 2015), *vacated and remanded*, 843 F.3d 583 (4th Cir. 2016)). There, the district court held that "defendants violated NEPA and the APA by using the same set of socioeconomic data . . . to assess the environmental impacts of the Build and No Build alternatives" and assumed that the project under review would "have no effect on overall growth" in the region. 2015 WL 1179646, at *7. Here, however, the Agencies did not rely on a single data set for the build and no-build scenarios. Rather, they reasonably treated the land use data from local planners as a build scenario and then calculated how much less development would occur if the Bridge is not built. JA 1325–26, 1336, 2564–65.

It also does not matter for NEPA purposes that the Agencies described the decrease in development associated with the no-build alternative as an "effect" of that alternative, as Plaintiffs assert. *See* Opening Brief at 50; *see also id.* at 44, 53–54, 56–57. First, the Agencies' semantic choice did not affect the substance of their analysis. As explained above, they made clear that there would be more development under the Bridge alternatives than under the no-build alternative. Plaintiffs' assertions that the Agencies "failed to evaluate the Toll Bridge's effects on the Outer Banks in any form," Opening Brief at 50, and that the final EIS is "devoid of any analysis" of the impacts of development," *id.* at 54, are simply inaccurate.

Second, casting the decrease in development as an "effect" of the no-build alternative accurately conveys what will happen on the ground. Under the no-build alternative, traffic congestion may prevent some of the development anticipated in the

local land use plans from proceeding. If the Bridge is built, the development will continue as planned. On the other hand, describing the increase in development that would proceed if the Bridge is built as a direct "effect" of the Bridge would not be accurate, since the Bridge itself is not driving the demand for development in the region. JA 1144, 1512, 1520–23; *see* JA 1525 (explaining that "the Outer Banks are in themselves the primary engine of growth for the region"); JA 1909 (explaining that the Bridge itself would not foreseeably "induce[] development on the Outer Banks"). In any event, Plaintiffs' semantic quibble about the Agencies' use of the word "effect" does not establish that the Agencies' analysis was arbitrary and capricious. *See Nat'l Audubon Soc'y*, 422 F.3d at 186.

Likewise, Plaintiffs identify no support for their assertion that the record somehow "obscure[d] the fact" that more development would occur if the Bridge is built. Opening Brief at 49. As explained above, the Agencies specifically identified how development would proceed under each alternative, and they identified the effects of that development. *See supra* at 40–41.

Undeterred, Plaintiffs cherry pick several statements in the record where the Agencies explained that the Bridge would not yield a "foreseeable change" in the type and density of development in the Outer Banks. *See* Opening Brief at 12, 45–46, 50, 51, 53 (citing JA 1325, 1327, 1520, 1546, 1909). But the cited statements are consistent with the fact that the Bridge itself will not drive the demand for development. They also reflect that although the Bridge would allow development to continue within the Project

area (as anticipated in local land use plans), it would not yield a net increase in development across the Outer Banks as a whole. *See, e.g.*, JA 1520 (anticipating no foreseeable change in development "throughout the Outer Banks resort area"); JA 1533 (explaining that the analysis of the action alternatives does "not indicate a net increase in overall business or residential development on the Outer Banks").

Most importantly, Plaintiffs overlook the sentences that directly follow the ones they quote, which clearly explain that "differential in realized development could occur if traffic congestion becomes a constraint," resulting in less development under the no-build alternative than the Bridge alternative. JA 1325 (EIS discussing development in NC 12-accesible Outer Banks); JA 1327 (EIS discussing differentials in non-paved road-accessible Outer Banks); JA 1520 (ICE Report discussing differentials in NC 12-accessible Outer Banks); JA 1546 (clarifying that less development will result if no bridge is built and traffic congestion constrains development); JA 1909 (explaining that the Bridge is not expected to drive development but that more development may result). The statements that Plaintiffs cite from the record must be read in context, and that context shows that the Agencies forthrightly acknowledged that more development would proceed if the Bridge is built than if it is not.

Finally, Plaintiffs' assertion that the Bridge will "result in more people coming to the area for permanent residency and visitation," thereby causing "significantly higher traffic levels and longer hurricane clearance times," Opening Brief at 57, has no basis in the record and thus does not undermine the Agencies' analysis. *See Nat'l Parks &*

Conservation Ass'n v. U.S. DOT, 222 F.3d 677, 680 (9th Cir. 2000) (rejecting similarly unsupported "if you build it, they will come" argument).

The Agencies anticipate only a "[n]egligible or slight increase" in permanent residents on the Outer Banks under the Bridge alternative. JA 1323. No significant change is expected because "the Outer Banks is a unique resort community with a high average price of housing." *Id.* As a result, "the number of workers that could live there irrespective of changes in access to the Outer Banks is limited," as travel times to primary employment centers in the region would still be too long. *Id.* Indeed, most of the existing homes on the Outer Banks are second homes and rental properties "designed to serve vacationers and not permanent residents." JA 1324.

As for day visitors, the Agencies recognized that there would be "[s]ome potential for an increase over the No-Build Alternative, with the potential higher in the non-road-accessible" part of the project area. *Id.* Several factors limit even day visitation, though, including the selection of other day-trip options available to potential visitors, tolls, and the fact that amenities important to day-trip visitors—beach access, parking, public facilities, and other services—are "limited to modest" compared to other day trip locations in the region. JA 1325. Still, the Agencies analyzed the effects of this increase in day visitors, explaining that more visitors may result in more beach driving, increased visits to wild horse habitat, and driving on or walking through dune areas (in violation of local regulations and laws). JA 1334, 1336, 1546, 1549–50. Thus,

Plaintiffs' assertions notwithstanding, the Agencies did indeed assess how a slight increase in day visitors could affect the project area.

* * *

If Plaintiffs had been tasked with modeling these various alternatives, they might have chosen to do so differently. But the Agencies' methods reflect their expertise on the relevant issues. They modeled the effects of the alternatives in a way that facilitated rational projections and meaningful comparisons, and they explained why and how they did so. That analysis facilitated a fair evaluation and comparison of each alternative and therefore satisfied NEPA.

CONCLUSION

For these reasons, the district court properly granted the Agencies' motions for summary judgment, and its judgment should be affirmed.

Respectfully submitted,

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June 30, 2022
90-1-4-15734

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(g)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, using Microsoft Word 2016.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,891 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f).

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