No. 22-1103

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

State Statutes

Regulations

INTRODUCTION

Defendants-Appellees N.C. Department of Transportation and Federal Highway Administration (collectively "Agencies") do not deny that almost every aspect of the analysis of the Toll Bridge has changed since the last opportunity for public review. Nonetheless, the Agencies contend that because *they* privately concluded that "the Bridge alternative would still offer greater overall benefits" than other options, they had no legal duty to disclose reams of significant new information to the public before a decision to construct it was made. Resp. Br. at 19.

The Agencies are wrong. The test for whether a Supplemental Environmental Impact Statement ("EIS") is required is whether new information "present[s] a *seriously* different picture" from what an agency previously envisioned. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). Whether or not agencies still think a project is a good idea has nothing to do with the requirement for supplemental analysis and public disclosure.

The analysis of the Toll Bridge demonstrates why. There is nothing empirically true about the Agencies' view that the Toll Bridge is still the best option to solve traffic congestion on the Outer Banks of North Carolina. By many measures, alternatives to the Toll Bridge now fare better than was expected in the Final EIS—they are less expensive, less destructive, do not involve pricey tolls,

and even serve hurricane evacuation purposes better. At the same time, benefits from the Toll Bridge have diminished—the time it will save drivers is now anticipated to be much less than previously expected, fewer drivers are expected to use it, and its financial feasibility is in question.

Like any major infrastructure project, the Toll Bridge has benefits and disadvantages. That is precisely where the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347, ("NEPA") comes in. NEPA is a democratic disclosure tool to guide decisionmaking thereby ensuring "the public and government agencies will be able to analyze and comment on the action's environmental implications." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005).

The Agencies had a legal duty to present the public with information about the impacts and the feasibility of the Toll Bridge, as well as alternative options, before they made the official determination to construct it. Instead, the Agencies used an unlawful analysis that hid the true impact of the Toll Bridge to the Outer Banks, and then failed to publicly update that analysis despite seven years of significant change. The Agencies violated NEPA.

ARGUMENT

I. The Agencies Were Required to Prepare a Supplemental EIS to Publicly Disclose Significant New Information About the Toll Bridge.

In their brief, the Agencies disregard the well-established standards governing when to prepare a Supplemental EIS and fail to demonstrate that the changes in the seven years between the Final EIS and publication of the Record of Decision were not significant.

A. The Court Should Apply the *Hughes* Test and Disregard the Agencies' Misdirection

Absent from Defendants' brief is any mention of this Court's well-established test to review an agency's failure to prepare a Supplemental EIS:

> 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.

Hughes, 81 F.3d at 443.

Rather than heed this standard, the Agencies' brief is a series of misdirection and attempts at wholly new tests.

First, the Agencies state that no Supplemental EIS is required because they have decided (internally) to proceed with the project. *See, e.g.*, Resp. Br. at 18–19, 21, 22, 27, 29, 33, 34. This is nonsense. NEPA is not a substantive statute, but one about process. *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 601 (4th Cir. 2012). Thus, the Agencies' claim they were not required to "prepare

a Supplemental EIS merely to reiterate [their same] conclusion" misses the point.[1] Resp. Br. at 21. It is not the "conclusion" in NEPA that is important. What matters is the presentation of the merits and pitfalls of different alternatives to guide the decisionmaking process.[2]

The Agencies further mislead when they suggest the Conservation Groups wish to impose a new test "that would trigger supplementation whenever the public is interested in a project." Resp. Br. at 36. But it was not the public interest that triggered the need for a Supplemental EIS, it was the fact of significantly changed circumstances. *See* Opening Br. at 32–43. And *Amici* are equally off-base when they warn against endless reopening of the environmental analysis. *Amicus* Br. at 21. Here, the analysis did not need to be reopened, it was ongoing. The Conservation Groups simply argue that to fulfill NEPA's purpose it should have been made public before a final decision was made. *Cf. Vermont Yankee Nuclear*

[1] The Agencies suggest the Court should defer to their "reasoned determination" which "implicates substantial agency expertise." Resp. Br. at 21. But "deference . . . does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). This Court cannot blindly defer to an agency but must undertake the inquiry set out in *Hughes*, 81 F.3d at 443.

[2] Elsewhere, the Agencies obliquely admit this point, noting NEPA's role is to "ensure that agencies complete a full analysis," rather than ensure agencies "mak[e] the right choice." Resp. Br. at 22.

Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553 (1978) (describing an agency's limited responsibility to consider information brought to its attention *after* a decision has been made, but emphasizing the agency's duty to consider "every significant aspect" *before* making a decision).

Next, the Agencies brush aside the public disclosure aim of NEPA and go so far as to claim it is unimportant. Resp. Br. at 36. But the only case the Agencies cite for this novel proposition does not support them. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, the Supreme Court merely stated NEPA's disclosure requirements may be tempered in unique circumstances, such as where a project implicates classified national security information. 454 U.S. 139, 143–45 (1981). Here, where there are no national security concerns, the case is irrelevant. Indeed, case law is clear that the only time public disclosure can be relaxed is if another statute expressly conflicts with transparency. *See, e.g.*, *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1976) (explaining agencies must comply with NEPA unless "a clear and unavoidable conflict in statutory authority exists").

The Agencies also wrongly embrace the district court's novel interpretation that the Supplemental EIS requirement does not apply when significant new information relates to the alternatives analysis. *See, e.g.*, Resp. Br. at 23, 24, 27, 33. The Conservation Groups already explained how untenable this position is.

Opening Br. at 27–31. The Agencies make no attempt to respond to the Conservation Groups' concerns and fail to address the majority of cases cited where courts *did* consider the alternatives analysis relevant. *See, e.g.*, Resp. Br. at 23–26 (failing to address *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288 (11th Cir. 2019); *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051 (D.C. Cir. 2017); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003)).

The Agencies' disregard for the alternatives analysis is clear throughout their brief. For example, the Agencies argue the vastly different traffic forecasts are insignificant by stating the Toll Bridge still meets the purpose and need for the project. Resp. Br. at 18–20. But the relevant issue is that the comparative advantage the Toll Bridge previously held over other alternatives has changed significantly. 40 C.F.R. § 1502.14(b) (1978) (alternatives should be discussed in detail "so that reviewers may evaluate their comparative merits."); *see also* Opening Br. at 33–36. The Agencies make similar wrong-headed arguments with respect to toll revenue, Resp. Br. at 22–23, population growth, *id.* at 27, and sea level rise, *id.* at 28–29.

Finally, the Agencies turn to inapposite case law to excuse their illegal actions. But the Agencies cite only to cases where minor changes to a project were

insufficient to warrant a Supplemental EIS, all of which stand in contrast to the seven years of significant changes in the Toll Bridge analysis. Resp. Br. at 20.

The Agencies' citation to S*ave Our Sound OBX, Inc. v. N.C. Department of Transportation*, 914 F.3d 213 (4th Cir. 2019), for example, serves to illustrate what a comprehensive public review process should look like. Resp. Br. at 20, 21. In that case, agencies performed environmental analyses of a planned bridge in 2008, 2010, 2013, and 2016, all of which involved substantial opportunity for public engagement, before publishing a Record of Decision a few months later. 914 F.3d at 219–20. Despite this robust review and disclosure, parties opposed to the bridge argued that because its alignment had become more precise with time, the agencies should draft a new EIS. *Id.* at 222. Following the *Hughes* test, this Court made a careful and searching review of the decision and determined there was nothing newly significant about the alignment change that had not already been studied and disclosed. *Id.* at 222–23.

By contrast, *no* public analysis of the Toll Bridge was undertaken for seven years before the decision to construct was made. [JA03070]. In the intervening period almost every aspect of the project changed significantly. The difference between these two cases could not be more stark.

Plaintiffs in *Save Our Sound OBX* also complained that a new analysis was needed to disclose new data about a previously eliminated beach nourishment

alternative. 914 F.3d at 223. The Court held the changes were not significant to the alternatives analysis because the beach nourishment alternative had been eliminated based on separate criteria, including the fact that it would result in breaches and overwash and was legally incompatible with the federal wildlife refuge. *Id.* Because none of these dispositive factors had changed, there was no need to evaluate minor changes in erosion rates and sand supply. *Id.* In reaching this conclusion, the Court thus did not disregard the alternatives analysis as unimportant, it did the opposite and thoroughly reviewed the agencies' determination to ensure that new information *could not* affect the alternatives analysis before finding the agencies' decision reasonable. *Id.* at 223–24.

By contrast, every major factor used to select the Toll Bridge over other alternatives—traffic forecasts, funding and financing limitations, hurricane evacuation, population growth—has changed. *See* Opening Br. at 31–43. A Supplemental EIS is required.

B. The Significant New Information Required Publication of a Supplemental EIS.

Having attempted to brush away the Supplemental EIS requirement with a series of incorrect tests and inapposite case law, the Agencies fail to demonstrate

the changes between the Final EIS and the Record of Decision were not significant.

As a primary matter, the Agencies' characterization of the information as insignificant does not square with how they treated it. *Cf. Nat. Res. Def. Council v. Lujan*, 768 F. Supp. 870, 887 (D.D.C. 1991) (holding defendants' extensive reliance on an updated oil and gas report "belie[d] any assertion" the information was insignificant). The Agencies spent more than three years compiling the internal reevaluation of information they now deem "unimportant." *See* [JA03076]. The Reevaluation Study Report ("Reevaluation") consisted of 659 pages and eight separate appendices. Scores of consultants were paid to spend years collecting and analyzing the information, including fifteen separate technical reports prepared between 2012 and 2019. [JA02579-82]. As the Agencies note, the Reevaluation was discussed with federal and state agencies over several years. Resp. Br. at 37. But it was not made public.[3]

New information was presented on water quality, endangered species, wetlands, historic resources, noise impacts, and, most significantly as discussed below, on the central aspects of a coastal Toll Bridge: traffic forecasts, growth

[3] That the Conservation Groups obtained an early draft of the Reevaluation through a public records request does not excuse the Agencies of their legal NEPA duties. *Contra* Resp. Br. at 36.

projections, and sea level rise. Just like in *Lujan*, "[e]ven if each of these matters alone would not be 'significant' . . . when considered together they are 'significant' within the meaning of the NEPA regulations." 768 F. Supp. at 888.

1. The Changes to Traffic Forecasts Were Significant.

The Agencies do not deny that in the seven years between the Final EIS and Record of Decision, the level of expected traffic congestion decreased substantially. Resp. Br. at 18–20. Instead, they attempt to justify their failure to share this information by asserting it did not change their own internal conclusions, noting without explanation that they "confirmed that the Bridge was still a wise selection." *Id.* at 22. But as discussed above, the Agencies' intransigence does not make the information insignificant, or excuse their failure to disclose it. *See supra* pp. 3–4.

i) The significantly different traffic forecasts implicate the Toll Bridge's relative merit in improving traffic congestion.

To the extent the Agencies offer any explanation for their decision to disregard the new traffic forecasts, their arguments fail. The Agencies assert vaguely that "travel times between the mainland and the Outer Banks would remain high without a Bridge."[4] Resp. Br. at 19. As with their other arguments,

[4] The Agencies' insistence that all changes to traffic forecasts can be disregarded because some need remains calls into question the purpose of their earlier detailed

this assertion fails to explore whether the Toll Bridge, with all its costs, is the best solution to meet the (significantly lower level) needs that remain.

The Conservation Groups already detailed at length the significant changes between the forecasts of massively high traffic congestion disclosed in the Final EIS, and the much more modest forecasts that emerged later. Opening Br. at 17–19. The Agencies themselves summed this up, observing "[t]he notable reduction in congested VMT [vehicle miles travelled] identified with the Preferred Alternative in the Final EIS *was not found* in the updated analysis," [JA02489] (emphasis added), and that "the total annual congested VMT traveled in 2040 is now similar between the No-Build Alternative and the [Toll Bridge]," [JA03113].

Given that the Toll Bridge was primarily justified as a means to alleviate summer traffic congestion, *see* [JA01125]; [JA01214], this reduced benefit is highly significant to the question of whether to proceed with the $600 million project. That the Agencies believe the Toll Bridge is still "a wise selection" does not absolve them of their duty to put the new information to the public.

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analysis of traffic in the Final EIS. Resp. Br. at 19. If all NEPA required was to show some vague "need," their analysis could have been more cursory. But, of course, NEPA demands much more, and the significant changes cannot be summarily disregarded.

ii) The significantly different traffic forecasts implicate the analysis of hurricane evacuation.

The Agencies mislead where they assert the new data "reaffirmed" their conclusion the Toll Bridge would improve hurricane evacuation times. Resp. Br. at 19. In fact, the Agencies' new forecasts show hurricane evacuation is now expected to take *longer* with the Toll Bridge than the Existing Roads alternative. [JA02474]. Both the Agencies and *Amici* ignore the data and repeatedly tout the proposed Toll Bridge's utility for improving hurricane clearance times. *See Amicus* Br. at [18–20]. But since the project's inception, federal agencies have repeatedly conveyed that the Toll Bridge will not improve evacuation times. *E.g.*, [JA03136]; [JA03460]; [JA03148]; [JA03475]. The Agencies' data show that in the event Virginia closes its border, the Toll Bridge would actually add 2.9 hours to hurricane clearance time *above the No-Build alternative*. [JA02474]. Perhaps, if the Agencies had fulfilled their duty to publicly disclose this information, *Amici* would not have such a factually incorrect view of the project's utility.

iii) The significantly different traffic forecasts implicate the analysis of financial feasibility.

The Agencies also err where they disregard concerns about how diminished traffic forecasts could jeopardize toll financing plans. The Agencies admitted they have not taken a "hard look" at this issue yet. Dkt. 91 at 24 (explaining "effects of the updated data *as it relates to toll revenue and financing* was not analyzed in the

Reevaluation . . . ."); Dkt. 93 at 26. Now, in their brief, the Agencies state vaguely that "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.'" Resp. Br. at 23.

Again, the Agencies disregard the alternatives analysis. The Toll Bridge was selected over other less damaging alternatives in the Final EIS because of its ability to be financed via toll revenue. Opening Br. at 34 (citing [JA01209]; [JA00251]). Changes to this reality about the relative merits of the different alternatives should have been disclosed to the public. *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 430 (4th Cir. 2012) ("Misleading economic assumptions . . . can also preclude meaningful public participation 'by skewing the public's evaluation of' the action"). The issue is relevant to "environmental concerns," *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983), because it plays a key role in whether an alternative is selected that will have more environmental harm than other options. And just like *Alaska Wilderness Recreation and Tourism Association v. Morrison*, the significant changes to the Toll Bridge's financial feasibility[5] are a key change that calls the Agencies' entire analysis into question. 67 F.3d 723, 730 (9th Cir. 1995).

[5] In addition to the lower level of projected toll financing, the Toll Bridge also lost its statutory earmark since publication of the Final EIS. [JA02883].

Moreover, the Agencies' self-serving assertion that "the reduced toll funding could be made up in other areas," is unsupported. Resp. Br. at 23. The Agencies' citations all point to funding mechanisms that *do* rely on toll revenue. [JA02430-31]; [JA02887-91]; [JA02901-02]. Any additional claim to the contrary at this juncture would be nothing more than an improper post hoc rationalization. *N.C. Wildlife Fed'n*, 677 F.3d at 604.

2. The Changes to Growth and Development Projections Were Significant.

The Agencies argue that because numbers of tourists and homeowners are still *generally* rising, significant changes to the expected *rate* of growth and development did not merit preparation of a Supplemental EIS. Resp. Br. at 26–27. The Agencies are wrong. The decision to construct the Toll Bridge was justified, in part, on the explosive growth that was previously forecasted. [JA00180-81]; [JA01204]. The fact that rates of tourism and new home development have slowed to nearly half that projected in the Final EIS is significant information that should have been disclosed. Opening Br. at 37 (citing [JA02448]). Moreover, rather than support the Agencies in their assertion that they considered whether the slowdown would affect their selection of the Toll Bridge, the citations the Agencies point to demonstrate they did not. Resp. Br. at 27 (citing [JA02448], which merely lists development assumptions and [JA02475], which discusses traffic congestion). The

Agencies' failure to take a hard look at this issue fails at *Hughes* step one. *Hughes*, 81 F.3d at 443.

3. The Changes to Sea Level Rise Projections Were Significant.

The Agencies do not justify their failure to consider and disclose the significant changes to sea level rise that occurred between the Final EIS and the Record of Decision. Instead, the Agencies first claim they did not have this federally published data, next that the data were insignificant, and finally that even if the data were significant, the Toll Bridge would still have utility as a causeway off an inundated island—an eventuality they failed to study.

i) The Agencies ignored relevant data that were before them.

The Agencies claim ignorance of the publicly available, widely disseminated sea level rise projections compiled by the Federal Highway Administration's sister federal agencies.[6] Resp. Br. at 31. Such ignorance seems implausible at best. The Agencies included chapters from the Fourth Climate Assessment in their original Administrative Record making clear they were aware of NOAA's preparation of its then-latest National Climate Assessment and accompanying reports. Dkt. 20-1

[6] The Agencies' plea for deference of their "expertise" elsewhere in their brief rings hollow where they also argue that while studying the need for a coastal bridge, they could not access federally available sea level rise data without being pointed to it by outside parties. *E.g.*, Resp. Br. at 21.

(listing "Fourth National Climate Assessment" and "U.S. Global Change Research Program, Climate Science Special Report"). The Assessment included authors from U.S. Department of Transportation, and it defies belief that federal Defendant, at least, was unaware of it and other relevant reports about sea level rise. *See* [JA01936 n.2]; *Nat'l Audubon Soc'y*, 422 F.3d at 193–94 (an agency cannot "sweep[]" contrary record evidence "under the rug").

Prior to publication of the Record of Decision, the Conservation Groups sent a letter to the Agencies requesting they "carefully consider how sea-level rise projections will play out during [the fifty-year life span of the Toll Bridge]." [JA01883]. And further explained that "[t]he analysis should extend to the increased development pressure that will be placed on the Outer Banks and the increased traffic that will result on NC 12, as well as other direct and indirect environmental impacts." *Id.* The Agencies had a duty to take a hard look at this key issue, and they had the information "before them" to do so.[7] *See Hughes*, 81

[7] The Agencies counsel attempt, post hoc, to dismiss the data's relevance, Resp. Br. at 30–31, but the only question before the Court is whether the Agencies took a "hard look" at relevant changes to sea level rise projections and whether the changes were significant. *N.C. Wildlife Fed'n*, 677 F.3d at 604 ("The basis articulated by the agency is the administrative record, not subsequent litigation rationalizations.")

F.3d 443. [8]

ii) The sea level rise information was significant.

The Agencies next attempt to dismiss the sea level rise information they failed to consider as insignificant. The Agencies contend that because in the Final EIS they considered an *amount* of sea level rise that is also projected in the 2017 NOAA data, Resp. Br. at 29, the data "merely confirms what the Agencies already knew: sea levels are rising," *id.* at 32. But this explanation misses the point: the NOAA data show the amount of sea level rise expected in the Final EIS by 2100 will now happen 50 years sooner. The *rate* of sea level rise has increased significantly. NOAA now anticipates 81.1 inches of sea level rise by 2100, [JA03677]; [JA03607-08]; [JA03652], an amount more than double what was expected by the Final EIS that time, [JA01298-99] (expecting only 23.3 inches by 2100 under "high" scenario).[9]

[8] Other documents in the Administrative Record sent to the Agencies in 2019 simply serve to demonstrate just how much publicly available data there were with regard to sea level rise at the time they made their decision. *See* Opening Br. at 14, 19–21 (citing [JA03576]; [JA01298–99]; [JA03677]; [JA03607–08]; [JA03652]).

[9] The Agencies attempt a straw man argument by asserting they were not required to consider the "worst-case scenario" of sea level rise. Resp. Br. at 31–32. But the Conservation Groups did not suggest they should. *See* Opening Br. at 38–41. The term "worst-case scenario" was used in the Agencies' own Final EIS. The Conservation Groups simply note that this "worst case" scenario has become so outdated it is now the most likely scenario. *Id.* at 39.

The magnitude and timing of this rate of sea level rise has significant consequences for the project area and feasibility of the Toll Bridge, as explained in Conservation Groups' opening brief. Opening Br. at 38–40. Under the more up-to-date data, the 23 inches of sea level rise the Final EIS anticipated the Toll Bridge *would never* experience[10] are now expected to occur well within the Toll Bridge's lifetime and finance period. *Compare* [JA03677] *with* [JA01298-99]; *see also* [JA03654]. Furthermore, the base of the Toll Bridge is expected to be inundated or extremely vulnerable to flooding, and both US 158 and NC 12 will be inundated resulting in an inaccessible "bridge to nowhere." *See* [JA03680]; [JA03551]. These new projections of sea level rise affect traffic patterns, toll financing, and expected development, as currently available land will either be permanently or routinely flooded. [JA03682-83]. But the Agencies never considered such consequences because they ignored more recent projections.

iii) Changes to the purpose of the Toll Bridge must be studied and disclosed.

The Agencies' last defense of their failure to look at up-to-date sea level rise data is their most absurd. Faced with the irrefutable fact that the project area is now expected to become inundated much earlier than previously expected, the

[10] Indeed, the Agencies previously brushed off discussing the impacts of 23 inches of sea level rise because they did not expect the higher levels of sea level rise to occur within the lifetime of the Toll Bridge. [JA01299].

Agencies assert insignificance by claiming the Toll Bridge will still be a "useful" project. Resp. Br. at 29, 32. By "useful" the Agencies appear to mean the Toll Bridge may become the only causeway off the otherwise flooded Outer Banks.[11] *Id*. at 29. But the purpose and need established in the Final EIS does not come close to mentioning such a purpose for the project, and the Agencies point to nowhere in the Administrative Record where they grappled with whether the Toll Bridge is the best option to serve such an eventuality. Such analysis is important. For example, if the Bridge became the only way off the island, it could no longer include a toll. *See* N.C. Gen. Stat. § 136-89.197 (prohibiting tolls for roads with no parallel alternative route).

NEPA requires analysis and public disclosure. A vague assertion that a project will still be "useful," without support, fulfills neither requirement. Certainly, the Agencies' late attempts to find a new purpose for the project does not render the new information insignificant. If the Agencies believe the Toll Bridge can be useful in a flooded future, they must compile an EIS based on the new purpose and need, new relevant environmental information, and compare a range of alternative solutions. To change course so thoroughly without public review renders NEPA a nullity.

[11] That could occur as soon as 2050, twenty years into the Toll Bridge's lifetime. *See* [JA03680].

II. The Agencies Failed to Analyze the True Impacts of Constructing the Toll Bridge.

Just as the Agencies fail to rebut the Conservation Groups' arguments about the need to supplement the EIS, the Agencies likewise fail to demonstrate their backwards analysis of the Toll Bridge in 2012 passed legal muster.

The Agencies admit that "more development would proceed if the Bridge is built than if it is not." Resp. Br. at 47. But they insist this additional construction on the Outer Banks—more than 800 acres of additional development on a fragile barrier island—is not an "effect" of the Toll Bridge. *Id.* at 46. As a result, they told the public the Toll Bridge would not increase development on the Outer Banks and never analyzed the harmful effects of this additional development. *E.g.*, [JA01325]; [JA01528]; [JA01546]. Instead, the Agencies called the *lack* of such additional development an "effect" of alternatives where no bridge is built. [JA01433]. Because there are no environmental impacts from a lack of development, the Agencies avoided disclosing and analyzing the impacts of the increased development caused by the Toll Bridge.

Moreover, the Agencies used the traffic levels that would only occur with the Toll Bridge to dismiss other alternatives. Strikingly, in their brief, the Agencies do not dispute or attempt to defend this serious error.

The Agencies' reliance on these faulty assumptions about development and traffic are not valid exercises of agency expertise; they are fundamental flaws that prevented a meaningful comparison between alternatives and require a Supplemental EIS.

A. The Agencies Did Not Analyze the Environmental Effects of the Toll Bridge.

As a result of the Agencies' erroneous approach, the NEPA documents contain no evaluation of the effects on a fragile barrier island of the massively increased development that would accompany the Toll Bridge. The Agencies admit the Toll Bridge "would likely allow between 1,600 and 2,400 more [housing] units to be built and about 800 more acres to be developed" on the Outer Banks than if a bridge was not built. Resp. Br. at 40. But crucially the NEPA documents contain no analysis of the impacts of this additional development on the Outer Banks. In fact, the Agencies repeatedly concluded in their NEPA documents that the Toll Bridge would have "*no reasonably foreseeable change* in the location, rate, or type of development . . . compared to the No-Build Alternative." [JA01896] (emphasis added); [JA01520]; [JA01528]; *see also* Opening Br. at 50–54.

1. The Agencies Did Not Analyze the Impacts on the Outer Banks.

In their brief, the Agencies claim they evaluated the Toll Bridge's effects in the Final EIS (calling them "minor components of the cumulative impacts") and purport to list those effects. Resp. Br. at 42. But every one of their cited examples ignores the increased development that the Toll Bridge will bring to the Outer Banks.

For example, the Agencies cite a brief discussion of water quality impacts, *id.*, but that discussion only acknowledged an increase in impervious surfaces "*on the mainland*"—not the Outer Banks, [JA01336] (emphasis added). This same page of the Final EIS relied on the conclusory statement that "[e]stuaries/water quality would be largely affected by the anticipated growth *independent of any detailed study alternative*," with no acknowledgement of the more than 800 acres of additional Outer Banks development. *Id.* (emphasis added). The Agencies cite "sediment loading and turbidity," Resp. Br. at 42, but fail to note that these are impacts to submerged aquatic vegetation in the Currituck Sound, not the Outer Banks, [JA01337]. Similarly, the Agencies point to a reference to increased "ambient noise and light" as an effect on waterfowl habitat, Resp. Br. at 42, but the Final EIS merely referred to that issue generically; it did not differentiate between

the significantly different development levels of the various alternatives, [JA01337].

The Agencies cite the Final EIS' discussion of indirect effects, Resp. Br. at 41, which purports to evaluate "the impact of changed development patterns on the area's notable ecosystem and cultural/socioeconomic features," [JA01332]. But that section clearly lists the only notable changes resulting from the Toll Bridge as "[a] change in the *order* in which available lots on the NC 12-accessible Outer Banks would develop." *Id.* It does not address the additional development on the Outer Banks that *would occur* with the Toll Bridge and *would not occur* with the other alternatives. And while the Agencies do acknowledge a minor increase in development on the mainland ("[a]pproximately 68 acres of business development"), they left out any similar analysis for the Outer Banks. *Compare* [JA01544] *with* [JA01532-34].

The Agencies claim they "described the effects of the varied levels of development" on other pages of the Final EIS and the Reevaluation. Resp. Br. at 43. But the pages of the Final EIS they cite to do not describe any impacts that would result from the Toll Bridge's increased development; they merely note the numbers of additional housing units that would be developed with the Toll Bridge, without any analysis of the environmental impact of this additional development. *See* [JA01325-26]; [JA02564-65].

Indeed, at every point where the Agencies purport to have analyzed the effects of the Toll Bridge on the Outer Banks, the record is consistent that they ignored impacts of increased development. *See* [JA01546]; [JA01325-26]; [JA01327]; [JA01528]; [JA01328-29]. As a result, there is no analysis of the effects of this significantly increased development, such as its impacts on ecosystems and habitat.[12]

As for the Agencies' citation to the Reevaluation, that document merely updated the Final EIS numbers for the Toll Bridge's increased development (*e.g.*, adding 60 acres to the Outer Banks). This increase was presented, as it was throughout the NEPA documents, in terms of assertions that the No-Build alternative would "reduce" development, rather than the Toll Bridge increasing it. *See* [JA02564-65]. Just like the Final EIS, the Reevaluation does not contain an analysis of the effects of over 800 acres of additional development on the Outer Banks. And in any event, even if it had contained the missing analysis, the Reevaluation, which was not public, could not salvage the Agencies' failure to comply with NEPA in the Final EIS. *See Marsh v. Or. Nat. Res. Council,* 490 U.S. 360, 371 (1989).

[12] Contrary to the Agencies' claims, *e.g.*, Resp. Br. at 43–45, the fact the NEPA documents contain evidence of the Agencies' mistake—here, documentation that more development would result from the Toll Bridge than other alternatives—is no excuse for their failure to analyze the *impacts* of this additional development.

In short, the Agencies admit there will be over 800 acres of extra development if the Toll Bridge is built. Resp. Br. at 40. But not one of the statements they now point to demonstrates they analyzed and disclosed the impact of this development. This was a substantive failure to analyze environmental impacts, as well as a failure of transparency by repeatedly telling the public the Toll Bridge would result in no increased development on the Outer Banks. *See N.C. Wildlife Fed'n*, 677 F.3d at 603.

2. The Increased Development Is Attributable to the Toll Bridge and Its Environmental Effects Should be Evaluated as Such.

Having admitted the level of development would only occur if a bridge is built, the Agencies concurrently, and bizarrely, insist that the development is not an impact of the Toll Bridge. *Compare* Resp. Br. at 39–40 ("[T]his level of build out could be reached . . . only if a bridge is built.") *with* Resp. Br. at 46 (asserting that "describing the increase in development that would proceed if the Bridge is built as a direct 'effect' of the Bridge would not be accurate . . .").

But it is well established that NEPA mandates a hard look at the "reasonably foreseeable . . . 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). Growth that would not occur without a proposed highway project is an indirect effect of that project and

its impacts on the environment must be analyzed. As one court in this Circuit explained,

> It is an irrefutable reality that the easier it is to get somewhere, the more people will be inspired to do so. This seems particularly true with respect to North Carolina beaches, which have been massively developed following highway improvements . . . . [I]f a major federal action makes it likely that such changes will occur, the action will have an indirect effect on the environment.

Mullin v. Skinner, 756 F. Supp. 904, 921 (E.D.N.C. 1990); *accord Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985) ("The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis . . . . *The agency cannot ignore these uncertain, but probable, effects of its decisions*."

Here, the increased development the Toll Bridge will bring to the Outer Banks was not only foreseeable, it was actually foreseen. The Agencies calculated how much more development would occur with the Toll Bridge than without it. [JA01325]. Yet the Agencies maintain that they had no obligation to examine the environmental impacts of that development because purportedly "the Bridge itself will not drive the demand for development." Resp. Br. at 46.

This makes no sense. Bridges and roads do not "drive the demand for development," *id.*, as an attraction in their own right—instead, they provide a new transportation corridor with additional capacity for the movement of vehicles that allows development to occur when and where it would not otherwise. The

Agencies' argument has been thoroughly refuted decades ago: to describe a project like this one as a "mere accessory accommodation to inevitable . . . development . . . stands reality on its head" and is "nothing more than bureaucratic doubletalk." *City of Davis v. Coleman*, 521 F.2d 661, 674 (9th Cir. 1975). If upheld, the Agencies' argument would undermine NEPA's required analysis of indirect effects by allowing agencies to avoid analyzing the effects of most, if not all, transportation induced growth.

B. The Agencies' Unreasonable Analysis of the Toll Bridge Prevented a Valid Comparison Between Alternatives.

The Conservation Groups explained in their opening brief that the Agencies (1) erroneously evaluated non-Bridge alternatives' performance against traffic levels they later admitted would only occur with the Toll Bridge, and (2) obscured that the Toll Bridge would increase traffic and hurricane clearance times compared to other alternatives. Opening Br. at 55–58. This defective alternatives analysis by itself violated NEPA.

The Agencies offer *no response* to the fact the traffic forecasts used to evaluate alternatives "assume[d] full build-out of the NC 12-accessible Outer Banks," Opening Br. at 56–57 (quoting [JA02725-26]), despite admitting the scenario would only occur with the Toll Bridge, Resp. Br. at 39. "[A]n appellee who simply ignores arguments in the appellant's brief has forfeited a response."

W. Va. Coal Workers' Pneumoconiosis Fund v. Bell, 781 F. App'x 214, 226 (4th Cir. 2019).

The Agencies admit they included the Toll Bridge and its effects in their "development baseline." Resp. Br. at 44. Doing so prevented a fair comparison between alternatives, because the Agencies used the higher levels of traffic brought on by the increased development of the Toll Bridge to evaluate the non-Bridge alternatives. "The project's original traffic forecasts for 2035 and the new 2040 forecasts assume full build-out of the NC 12-accessible Outer Banks," [JA02725]; *see also* [JA01325], meaning they assumed the Toll Bridge would be constructed, since the Agencies admit that is the only scenario in which full build-out would occur. The Agencies selected the Toll Bridge over other alternatives in large part due to those alternatives' supposed inability to address high traffic levels and hurricane clearance—needs that only exist if the Toll Bridge is constructed. *E.g.*, [JA00251]; [JA02725-26]. As the Conservation Groups have noted, this illegal approach by the same actors, performed at the same time, has already been rejected by this Court and should be again.. Opening Br. at 46–48.

CONCLUSION

For the forgoing reasons, the Conservation Groups respectfully request the Court reject the district court's analysis and ruling, declare the Record of Decision

arbitrary and capricious, and remand this case to the district court with instructions to vacate the Record of Decision.

Respectfully submitted July 11, 2022.

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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 6,497 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 July 11, 2022, I electronically filed the foregoing Reply 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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