**No. 13-2215**

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

DEFENDERS OF WILDLIFE and
NATIONAL WILDLIFE REFUGE ASSOCIATION,

*Plaintiffs-Appellants*,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION;
ANTHONY J. TATA, Secretary, North Carolina Department of Transportation;
FEDERAL HIGHWAY ADMINISTRATION; and JOHN F. SULLIVAN, III,
Division Administrator, Federal Highway Administration,

*Defendants – Appellees,*

CAPE HATTERAS ELECTRIC MEMBERSHIP CORPORATION,

*Intervenor/Defendant – Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

# PAGE-PROOF OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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December 9, 2013

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2215 Caption: Defenders of Wildlife et al. v. N.C. Dept of Transportation et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Defenders of Wildlife
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Julia F. Youngman Date: October 10, 2013

Counsel for: Appellant Defenders of Wildlife

## CERTIFICATE OF SERVICE

**********

I certify that on October 10, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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s/Julia F. Youngman (signature) October 10, 2013 (date)

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No. 13-2215 Caption: Defenders of Wildlife et al. v. N.C. Dept of Transportation et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Wildlife Refuge Association
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Julia F. Youngman Date: October 10, 2013

Counsel for: Appellant Nat'l Wildlife Refuge Assn.

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I certify that on October 10, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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## JURISDICTIONAL STATEMENT

Plaintiffs Defenders of Wildlife and National Wildlife Refuge Association (the "Conservation Groups") filed suit in the U.S. District Court for the Eastern District of North Carolina challenging the final agency actions of Defendants North Carolina Department of Transportation ("NCDOT") and the Federal Highway Administration ("FHWA") in issuing a Record of Decision for a highway construction project on North Carolina's Outer Banks. The Conservation Groups alleged violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70h; Section 4(f) of the Department of Transportation Act of 1966 ("Section 4(f)"), 23 U.S.C. § 138, 49 U.S.C. § 303; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361.

The district court entered a final judgment that disposes of all parties' claims on September 16, 2013. On October 1, 2013, the Conservation Groups timely filed notice of appeal. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## ISSUES PRESENTED FOR REVIEW

1. Whether Defendants illegally "segmented" their analysis of the project in violation of NEPA, where the single segment of the project evaluated in the Record of Decision does not have independent utility, does not have logical termini, and restricts consideration of alternatives for the remainder of the project?

2. Whether Defendants violated Section 4(f) by issuing a Record of Decision selecting a project alternative that uses National Wildlife Refuge property, without ensuring it will cause the least harm to the Refuge and without including all possible planning to minimize harm?

3. Whether Defendants violated Section 4(f) by selecting a project alternative that uses Refuge property when there are prudent and feasible alternatives that would not use the Refuge?

4. Whether the district court erred in holding that the "joint planning" exception to Section 4(f) applies to the project even though the Road in question was created long after the Refuge.

## STATEMENT OF THE CASE

On July 1, 2011, the Conservation Groups filed this action challenging Defendants' Record of Decision because it disclosed only one segment of a transportation project, thereby denying decision-makers and the public a full environmental review of the entire project under NEPA, and impermissibly restricting the range of alternatives for the remainder of the project. Defendants decided to build a bridge that will be useless without an access road and additional bridges being maintained and built through an eroding, unstable section of Hatteras Island and Pea Island National Wildlife Refuge. Yet they elected not to identify, disclose, or evaluate a plan for that access route. In so doing, Defendants

unlawfully segmented the project, in violation of NEPA, to avoid considering the serious environmental impacts of keeping access to the bridge open through the Refuge. The Conservation Groups also challenged Defendants' plans for the project because they violated Section 4(f) by rejecting an alternative that would not use National Wildlife Refuge land, by failing to minimize harm to the Refuge, and by improperly invoking an exemption to that statute.

The district court entered an order denying the Conservation Groups' summary judgment motion and granting Defendants' summary judgment motions on September 16, 2013. On October 1, 2013, the Conservation Groups timely filed notice of appeal.

## STATEMENT OF FACTS

### I. PROJECT LOCATION

The "NC 12 Replacement of Herbert C. Bonner Bridge" project ("Project") will create a transportation route on the Outer Banks of North Carolina, between Bodie Island and the Village of Rodanthe on Hatteras Island – a distance of approximately 15 miles. AR091957-58. Defendants chose Rodanthe as the end-point of the Project because it is south of high-erosion areas that regularly shut down the only road between Bodie and Hatteras Islands, Highway NC-12. AR091958, AR058329. Defendants recognized that a replacement bridge alone does not meet the Project's purpose and need, and that the Project must include a

solution to the erosion along NC-12 so that access to a new bridge is not cut off. AR091963.

The Outer Banks are a system of long, narrow barrier islands along North Carolina's coastline. Oregon Inlet separates Bodie Island to the north and Hatteras Island to the south, and it connects Pamlico Sound with the Atlantic Ocean. AR091957. The current 2.5-mile-long Bonner Bridge was built in 1962 and provides the only road access across Oregon Inlet, from Bodie Island to the northern end of Hatteras Island along NC-12. AR058330, AR058327. Ferries provided access to Hatteras Island before Bonner Bridge was constructed and still provide emergency access during the frequent shutdowns of NC-12 that result from storms, flooding, ocean overwash, and breaches between Bonner Bridge and Rodanthe. AR058329. NC-12 travels the length of Pea Island National Wildlife Refuge ("the Refuge"), which occupies the northern-most 13 miles of Hatteras Island and ends at Rodanthe, the island's first population center. AR058532, AR058537-38.

The Refuge and the portion of NC-12 running through it are located on a very unstable portion of Hatteras Island. AR058329; AR059861-79. The island is just one-quarter mile wide in places. AR058538. The ocean and storms, including hurricanes, continually erode its eastern shoreline and threaten to sever it into segments. AR059872-74. A system of dunes that is artificially maintained to try

to protect NC-12 from erosion prevents ocean overwash that would otherwise deposit sand on the Sound side of the island as the ocean side erodes. AR059879-80. The result of natural forces, in combination with NCDOT's efforts to shore up the road, is a continual narrowing of the island and its beaches over time. *Id.*

The Refuge was established in 1938 by Executive Order 7864 as a "refuge and breeding ground for migratory birds and other wildlife." AR000074. It is home to hundreds of species, some of which are protected under the Endangered Species Act. AR058600; AR058732-37.

The United States acquired the lands comprising the Refuge directly from private landowners through condemnation proceedings in 1937 and 1938. AR000023, AR000069, AR000077. The State of North Carolina had no rights to these lands prior to their condemnation and did not retain any rights or easements in them afterwards. *E.g.*, AR000071. Only in 1954 did the U.S. Department of the Interior ("DOI") grant an easement to North Carolina for a right-of-way for NC-12 through the Refuge. AR001108; AR068658-62.

In 1991, scientists retained by NCDOT identified three "hot spots" within the Refuge: the "Canal Zone, Sandbag Area, and Rodanthe 'S' Curves." AR058329; AR058326 (map); AR009720-68 (1991 report). These are the areas with the highest erosion rates (up to 15 feet per year), where NCDOT deemed the creation of new inlets most likely to occur. AR058329; AR030088-89. Because

of Hatteras Island's narrowing and westward movement, NCDOT has relocated NC-12 to the western-most edge of (and occasionally outside) its right-of-way in many places within the Refuge. AR075640-44.

Major storms regularly shut down NC-12 for long periods. For example, Tropical Storm Ida shut down traffic at the Rodanthe S-Curves hot spot in November 2009. *E.g.,* AR077259, AR077261-71 (photos showing NC-12 damage). In August 2011, Bonner Bridge was closed to traffic for seven weeks while NCDOT tried to repair NC-12 after Hurricane Irene breached it at the Rodanthe S-Curves and created a new inlet near the Sandbag Area.[1] PRM000134. A temporary bridge installed over this new "Pea Island Inlet" soon began to fail because of continued erosion. PRM000017. In October 2012, Hurricane Sandy again breached sections of NC-12 near Rodanthe, cutting off access to Bonner Bridge for another two months. In the wake of that storm, an NCDOT engineer commented that "[m]uch of the right-of-way is in the ocean."[2]

Smaller storms and high tides also frequently cut off access to Bonner Bridge by making NC-12 impassable for anywhere from a few hours to a few

[1] *See* Cornelia Dean, *A North Carolina Lifeline Built on Shifting Sands*, N.Y. Times, Mar. 5, 2012, at D1, *available at* http://goo.gl/gU4TpW.

[2] *DOT Struggling with Highway 12 Repairs at the S-Curves; More Ferries Added for Holiday*, Island Free Press, Nov. 16, 2012, http://goo.gl/VHdQZL.

weeks; these events can occur several times per month. AR036922-26 (listing NC-12 relocation and construction after past storms); AR058727 (table showing repairs); AR064433 (NCDOT noting the "continual … stabilization that currently goes on" to restore NC-12). NCDOT observed that overwash at the S-Curves area "often forces N.C. 12 to close."[3] Each shutdown of NC-12 also cuts off Bonner Bridge.

In sum, because this unstable stretch of NC-12 is so vulnerable to storms, erosion, and shoreline migration, access to Bonner Bridge depends entirely upon continual construction to repair and restore NC-12 in the Refuge. For the same reason, access to any replacement for Bonner Bridge will require construction of improvements to the high-erosion "hot spot" areas of NC-12 between Oregon Inlet and Rodanthe.

## II. HISTORY OF THE PROJECT

Throughout the NEPA process that produced the Record of Decision ("ROD") challenged in this case, Defendants have defined the scope of the Project as extending from Bodie Island to Rodanthe in order to include a solution to the

[3] NCDOT, *Buxton*, Rebuilding NC 12 (Apr. 3, 2013), http://nc12repairs.blogspot.com/ (last visited Nov. 9, 2013). "Information that is readily accessible through" a state agency's own "website is a matter of public record, of which the Court may take judicial notice." *Hanks v. Wavy Broad., LLC*, 2:11-cv-439, 2012 WL 405065, *4 (E.D. Va. Feb. 8, 2012) (quotations and citations omitted).

NC-12 "hot spots" that regularly cut off access to the Bonner Bridge. AR091958, AR091963.

Defendants began work on a project to replace Bonner Bridge and maintain a transportation route to Rodanthe in 1993, with the preparation of a draft environmental impact statement ("DEIS"), but they did not complete the required studies at that time. AR012090. The DEIS focused on replacing Bonner Bridge with a bridge near its original location. AR058363.

NCDOT reconsidered that plan after recognizing the risks associated with trying to maintain NC-12 in its current unstable location. AR058381; AR064433. The enactment of the National Wildlife Refuge System Improvement Act of 1997 also imposed new restrictions on transportation projects within wildlife refuges.

The Project resumed in 2002 when a NEPA/Section 404 Merger Team of state and federal agency representatives was constituted as "a formal means for early involvement in the project development process" for agencies with permitting authority or other interests in the Project. AR058381-82. The Merger Team included: FHWA, NCDOT, U.S. Army Corps of Engineers ("Corps"), U.S. Environmental Protection Agency ("EPA"), U.S. Fish and Wildlife Service ("FWS"), National Marine Fisheries Service ("NMFS"), National Park Service, N.C. Department of Environment and Natural Resources ("NCDENR"), and N.C. Department of Cultural Resources. The Merger Team met to consider and concur

formally in key decisions in the NEPA process, including defining the Project's purpose and need and selecting alternatives to be studied. It defined the Project as a transportation route from Bodie Island to Rodanthe. AR027511, AR091963. It identified the following project purpose: "Provide a replacement crossing that will not be endangered by shoreline movement through year 2050" – to meet this need:

> *Needs Addressed*: The southern terminus of Bonner Bridge is north of portions of NC 12 threatened by shoreline erosion and overwash. Placing the southern terminus of a replacement bridge south of these areas, or including a long-term NC 12 maintenance and protection component, will reduce the need for frequency of maintenance of these threatened segments of NC 12.

AR058330.

Also in 2002, NCDOT commissioned a study of alternatives for the Project that included a causeway that would bypass the Refuge by traveling from Bodie Island through Pamlico Sound, making landfall at Rodanthe (the "Pamlico Sound Alternative"). AR058381-89; AR058429 (map/diagram). This alternative would altogether avoid the Refuge and the problems associated with frequent disruption of NC-12 within it.

In 2003, the entire Merger Team, including Defendants, selected the Pamlico Sound Alternative as the *only* alternative to carry forward for detailed study, having determined that the options for a replacement bridge parallel to the existing Bonner Bridge, connected to various options for maintaining NC-12 in the Refuge (the "Parallel Bridge Alternatives"), could not receive several approvals required

under federal law, including a compatibility determination required by the National Wildlife Refuge System Improvement Act of 1997. AR080895; AR023293 (minutes of July 23, 2003 Merger Team meeting, selecting to Pamlico Sound Alternative, referred to as "Alternative 4").

Explaining its decision to pursue the Pamlico Sound Alternative to local government officials, NCDOT stated that conditions within the Refuge meant a Parallel Bridge was "no longer viable." AR080897. At this time, NCDOT planned to begin construction in 2006 and open the Pamlico Sound bridge to traffic by 2010. AR080896.

However, local officials and developers pressured NCDOT to abandon the Pamlico Sound Alternative and revert to one of the Parallel Bridge Alternatives. AR026249-51; AR022661-62; AR026000. Defendants did not consider the cost of the Pamlico Sound Alternative to be an impediment, but at least one local official was concerned that funding it would preclude another bridge project elsewhere on the Outer Banks. AR023756-58. Subsequently, the N.C. General Assembly deleted that project, the Mid-Currituck Bridge, from a list of mandated projects. 2013 N.C. Laws S.L. 2013-183, Sec. 4.5, § 136-176(b2).

In response to this political pressure, NCDOT abruptly reversed its position and stated that it would "cease work on the 17 mile [Pamlico Sound] alternative" and "exert every effort to secure agency concurrence" with a parallel replacement

bridge over Oregon Inlet. AR026281-82. Despite the Merger Team's concurrence regarding the Pamlico Sound Alternative, Defendants reintroduced various "Parallel Bridge Alternatives" in a 2005 supplemental draft environmental impact statement ("SDEIS"), AR031649; 2007 supplement to the SDEIS, AR038890; and 2008 "Final Environmental Impact Statement and Section 4(f) Evaluation" ("FEIS"), AR058273.

During this time, NCDOT inflated its cost estimate for the Pamlico Sound Alternative by well over $1 *billion* in just three years. *Compare* AR038586 (2003 estimate of $260 million) *with* AR058480-81 (2006 estimated range of $929.1 million to $1.426 billion). The dramatic cost increase for the one alternative was questioned by many Merger Team agencies, and in 2007, a majority of the Merger Team refused to concur that cost rendered the Pamlico Sound Alternative impracticable. AR042116-17; *see also* PRM000080-82 (Corps questioning funding information in 2012).

With each of the "Parallel Bridge Alternatives," Defendants again had to deal with the increasingly difficult question of how to keep NC-12 open for access to a parallel bridge over Oregon Inlet. The FEIS identified five options, each involving a parallel replacement bridge over Oregon Inlet, but with different methods for maintaining NC-12 to Rodanthe:

1. "Nourishment": repeatedly depositing sand on the beach and constructing dunes to protect the road;

2. "Road North/Bridge South": relocating the road westward out of its right-of-way, as a road in the north and on a bridge in the south;

3. "All Bridge": relocating the road westward out of its right-of-way on bridges;

4. "Phased Approach/Rodanthe Bridge": maintaining the road in its existing right-of-way by raising it onto bridges as necessary; and

5. "Phased Approach/Rodanthe Nourishment": same as number (4), but maintaining the road near Rodanthe with beach nourishment.

AR058443-70 (including diagrams).

The FEIS identified the "Phased Approach/Rodanthe Bridge Alternative" as the "Preferred Alternative," despite many drawbacks noted in numerous formal comments from Merger Team agencies and others during the public comment period, chiefly that it would turn the Refuge into a continual construction zone and ultimately result in a series of bridges located on the beach, in the ocean waves, and out to sea in the near future, as the Refuge erodes and the island migrates westward out from under the bridges. *E.g.*, AR039948, AR039955-58; AR059072-74, AR059082-86, AR059094-97. In addition, DOI and other commenters reminded Defendants on numerous occasions that it was highly unlikely that a Parallel Bridge Alternative, particularly the Phased Approach, could be found compatible with the purposes for which the Refuge was established, because of the disruption of natural resources caused by construction within the

Refuge. AR042679; AR083769-74. In light of the numerous difficulties with the "Phased Approach" and its "extensive adverse impacts that were identified by the resource agencies in their FEIS comments" (summarized at AR069020-21), Defendants abandoned it as the preferred alternative in 2009. AR069079.

Defendants next proposed selecting the "Road North/Bridge South" alternative. AR069085-87. Although NC-12 is limited to the specific right-of-way granted by the federal government, NCDOT announced that it had located deeds related to the Seashore that would allow it to move the road outside its right-of-way without the permission of the FWS, which manages the Refuge. AR064523 (NCDOT's chief operating officer stating in news article, "Now we're not constrained" by right-of-way); AR069025-26. However, the Conservation Groups pointed out the deeds did not support that conclusion, AR068658-62, and Defendants abandoned that alternative.

Instead, on October 9, 2009, Defendants presented a Revised Final Section 4(f) Evaluation that proposed a new alternative, the "Parallel Bridge Corridor with NC-12 Transportation Management Plan" (the "Selected Alternative"). AR075556; AR075679-84. This alternative is differs from all previous proposals in that it is deliberately incomplete: it involves building a three-mile-long replacement bridge over Oregon Inlet parallel to the current Bonner Bridge as "Phase I," but "delays" decisions about all remaining segments of the Project until

an unspecified later time. AR075561. Thus, this alternative "does not specify a particular action at this time on Hatteras Island beyond the limits of Phase I." AR091967. Despite having identified the highly predictable "hot spots" for erosion and new inlets, Defendants justified the delay by claiming they could not predict their "exact locations and timing." AR075560.

For the so-called "Later Phases," Defendants propose "mixing and matching" methods for maintaining a transportation route to Rodanthe from among "the five Parallel Bridge Corridor alternatives" (*see* p. 12 above), as well as from other methods they declined even to identify. AR075561 ("later phases *could* consist of, *but would not be limited to*, one or more components of any of the [previous] alternatives"). The Merger Team previously declined to approve each of those options because of their environmental impacts and permitting obstacles. *E.g.*, AR034448 (FWS rejecting "Nourishment," "Road North/Bridge South," "All Bridge," "Balanced/Phased Approach," and the option of mixing and matching alternatives, because they are incompatible with the mission and purpose of the Refuge); AR068825-26 (Corps rejecting revised "Road North/Bridge South" as not meeting purpose and need of Project and causing excessive wetlands impacts); AR083741 (NMFS rejecting "Phased Approach" as not being least environmentally damaging practicable alternative); AR040591 (NCDENR-Division of Coastal Management rejecting "Phased Approach" as "inconsistent

with the most basic principles of the Coastal Area Management Act"). The Revised Section 4(f) Evaluation also purported to reject the Pamlico Sound Alternative because of its cost. AR075582.

Defendants issued an Environmental Assessment on May 7, 2010, AR083394-913, purporting to evaluate the new Selected Alternative, but still failing to select from among the many methods for maintaining access to Rodanthe, and failing to identify or evaluate any new methods not previously identified in earlier NEPA documents that they might use. AR083436. FHWA issued the ROD on December 20, 2010, officially choosing the Selected Alternative, and published notice in the Federal Register on January 11, 2011. AR091952-92117; 76 Fed. Reg. 1,664 (Jan. 11, 2011).

Defendants issued the ROD without disclosing any decisions about how the remainder of the Project would be built and without evaluating how the impacts of the remainder would be minimized or mitigated. In the ROD, Defendants state that "Phase I" alone "would not meet the purpose and need of the project" and that the Selected Alternative represents "a commitment … to develop and implement the entire action from Rodanthe to Bodie Island." AR091963. The ROD also states that "environmental review for each phase" would be separately "initiated" at later, unspecified dates. AR091967.

Having issued a ROD that disclosed only the "Phase I" bridge, Defendants now plan to construct two additional two-to-three-mile bridge segments of the Project at the same time they construct the "Phase I" bridge (so-called "Phase II" bridges, at the locations breached by Hurricane Irene), PRM000145,[4] and also are proposing another of the so-called "Later Phases" to occur concurrently – an extensive beach nourishment component near Rodanthe.[5] Each of the additional segments of the Project is being evaluated in isolation, in separate NEPA documents not part of this administrative record, although they are planned to be implemented concurrently.

## STANDARD OF REVIEW

This Court evaluates Defendants' decisions de novo, "without deference to the district court's resolution of the issue." *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 587 (4th Cir. 2012). "[T]he District Court, limited to the administrative record, is in no better position to review the [agencies'] action

[4] NCDOT has a contract for the 2.1-mile "Phase IIa" bridge and construction "can begin as early as Jan. 6, 2014," NCDOT Dec. 5, 2013 News Release, http://goo.gl/QQx19J. NCDOT states that it "plans to award a contract for construction at the Rodanthe breach in Fall 2013," http://goo.gl/5TvTJG (last visited Dec. 9, 2013).

[5] Nourishment will begin "as early as January." Russ Lay, *Corps could get permits soon for Mirlo widening, Judge says*, Outer Banks Voice, Sept. 29, 2013, http://goo.gl/8CIgg3.

than is the Court of Appeals." *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1450 (9th Cir. 1984).

This Court follows the standard of review under the APA. The Court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that was taken "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (D); *N.C. Wildlife Fed'n v. NCDOT*, 677 F.3d 596, 601 (4th Cir. 2012). An agency decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 287-88 (4th Cir. 1999).

In reviewing an agency's compliance with NEPA and Section 4(f), the reviewing court "must not reduce itself to a 'rubber-stamp' of agency action." *N.C. Wildlife Fed'n*, 677 F.3d at 601 (quoting *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973)). Instead, it engages in "a thorough, probing, in-depth review," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), to assess whether the agency has taken the required "'hard look' at environmental consequences [of their proposed action] and provide[ed] for broad

dissemination of relevant environmental information" about the entire project, including its indirect and cumulative effects. *N.C. Wildlife Fed'n*, 677 F.3d at 601-02.

## SUMMARY OF ARGUMENT

This case will determine whether the public has a fair opportunity to evaluate the consequences of significant transportation projects before they are built. NEPA requires an entire project to be evaluated as a whole and compared to other alternatives for the entire project, so that consideration of environmental impacts can inform the decisions about the project before it is too late. Similarly, Section 4(f) prohibits a project that will "use" wildlife refuge land where there is a prudent and feasible alternative for the project as a whole.

Here, Defendants issued a ROD that precludes a fair comparison between the Selected Alternative and other alternatives because it addresses only one segment of the Project. Yet that segment, a bridge over Oregon Inlet, is unusable without the remaining segments to provide access to it over the washed-out areas of NC-12. By limiting the ROD to just the one segment, Defendants are attempting to evade evaluation of the difficult decisions that will determine costs and impacts until after the need to maintain access to this bridge is a foregone conclusion and the opportunity to choose another alternative is gone forever. Thereafter, Defendants will piecemeal the environmental analysis for the

remaining segments. Thus, the public will never have a chance to review and comment on the full cost and environmental impacts of the Selected Alternative and fairly compare it to other alternatives.

Defendants introduced the truncated Selected Alternative late in the NEPA process, because – after abandoning the Pamlico Sound bridge on which all Merger Team agencies had agreed in 2003 – they repeatedly failed to obtain consensus among those agencies on the most controversial portion of all the Parallel Bridge alternatives: how to construct and maintain an access route through the high-erosion areas of the Refuge to the Oregon Inlet bridge. Rather than acknowledging there is no way legally and scientifically to justify any of the Parallel Bridge options through the Refuge, Defendants chose to kick that decision down the road.

By waiting to confront those hard choices until after the first segment is already set in concrete and the opportunity to build anything but a Parallel Bridge alternative is foreclosed, Defendants' plan would force the Merger Team to accept one or more of the unnecessarily harmful options they already properly rejected for maintaining access to the Oregon Inlet bridge. Once the Oregon Inlet bridge is in place, there is no way to make use of it without completing an access route through areas where NC-12 is disrupted on a regular basis. Defendants' plan would also piecemeal the full Project, making the public's right of review and comment virtually meaningless.

It is this eleventh-hour strategy to evade the requirements of NEPA and Section 4(f) that the Conservation Groups challenge. If allowed, it will encourage transportation agencies to adopt a similar strategy for other controversial projects, keeping the public and decision-makers in other agencies in the dark while creating circumstances that make otherwise unacceptable construction unavoidable. This strategy for gaming NEPA and Section 4(f) would enable transportation agencies to force through projects that could not withstand a fair evaluation.

## ARGUMENT

### I. DEFENDANTS VIOLATED NEPA BY IMPERMISSIBLY SEGMENTING THE PROJECT.

Defendants violated the basic principles of NEPA and engaged in illegal "segmentation" by issuing a ROD that disclosed only one initial segment of the Selected Alternative – a segment that will commit them to significant future construction of a road and bridges through a National Wildlife Refuge – while failing to disclose any specific plans for that construction. In so doing, Defendants ignored their own earlier conclusion that "*a decision on the entire corridor through Rodanthe is needed* [for] complete NEPA studies." AR042502 (emphasis added).

After trying unsuccessfully to gain consensus on the entire Project from the permitting agencies of the Merger Team, Defendants decided instead to issue a ROD to implement only one segment (the "Phase I" bridge over Oregon Inlet), and

promised to conduct separate NEPA evaluations for numerous additional segments after construction of the first. DOI's Office of Environmental Policy and Compliance aptly summarized the problem with the Selected Alternative: "An alternative that defers critical decisions to a future date … is not consistent with the NEPA requirement to describe a single and complete project and conduct a rigorous assessment of predictable and uncertain effects." AR082519.

This Court has noted the unique significance of National Wildlife Refuges under NEPA, and stated that in a case involving a refuge an agency must "take particular care to evaluate how its actions will affect the unique biological features of this congressionally protected area." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 186-87 (4th Cir. 2005). Yet Defendants have failed to do so. They have proposed a bridge into one end of Pea Island National Wildlife Refuge that will clearly require extensive construction within the Refuge, but without developing – or at least disclosing – a plan for what they will construct in the Refuge and what the adverse impacts to the Refuge will be. This truncated plan would violate NEPA under any circumstances, but in a wildlife refuge the consequences of Defendants' failure to comply are especially significant.

The district court erroneously held that the first segment of the Selected Alternative for the Project could stand alone under FHWA regulations governing segmentation. This conclusion was incorrect. Without major improvements at

high-erosion "hot spots" in the Refuge to maintain access to the bridge, that bridge lacks independent utility. The deferred decision-making and piecemealed NEPA evaluation of the Selected Alternative are coupled with an irretrievable commitment of resources that restricts the options for the remainder of the Project to a narrow, eroding corridor through the Refuge. Consequently, the Selected Alternative epitomizes illegal segmentation, as explained below.

### A. NEPA Prohibits Piecemeal Environmental Review and Segmentation of Projects.

NEPA establishes "a national policy of protecting and promoting environmental quality." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). It is designed "to promote efforts which will prevent or eliminate damage to the environment," 42 U.S.C. § 4321, and "to sensitize all federal agencies to the environment in order to foster precious resource preservation." *Nat'l Audubon Soc'y*, 422 F.3d at 184.

NEPA and its implementing regulations require agencies to prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An EIS serves the two central purposes of NEPA. First, it "ensures that a federal agency will carefully consider the effects of its actions on the environment." *Nat'l Audubon Soc'y*, 422 F.3d at 184. Second, it promotes informed decision-making

by ensuring "that the public and government agencies will be able to analyze and comment on the action's environmental implications." *Id.*

To accomplish these two objectives, NEPA requires an EIS to be prepared to disclose the full range of impacts of a proposed action. 42 U.S.C. § 4332. An EIS must identify a project's purpose and need, 40 C.F.R. § 1502.13, "[r]igorously explore and objectively evaluate all reasonable alternatives" for accomplishing the purpose and need, 40 C.F.R. § 1502.14(a), and disclose and examine all the direct, indirect, and cumulative impacts of each alternative. 40 C.F.R. §§ 1502.16; 1508.7 "An agency's assessment of environmental impacts … is the 'scientific and analytic bases for the comparison[]' of alternatives." *N.C. Wildlife Fed'n*, 677 F.3d at 602. Dividing a project violates the spirit of NEPA by obscuring the impacts and hindering the comparison of alternatives. For example, in *Thompson v. Fugate*, the court found that the impacts of all segments of a beltway project around Richmond, Virginia had to be considered as a whole. To piecemeal the project would be "to ignore the facts and reasonable inferences to be drawn therefrom." *Id.* 347 F. Supp. 120, 124 (E.D. Va. 1972). *Accord W. N.C. Alliance v. NCDOT*, 312 F. Supp. 2d 765, 775 (E.D.N.C. 2003) ("NEPA does not allow Defendants to subdivide projects . . . simply to expedite the NEPA process or avoid addressing environmental impacts.").

An agency must complete this evaluation of project costs and impacts *before* it begins construction. *Md. Conservation Council v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) ("[C]ompliance with NEPA is required before any portion of the road is built. This conclusion effectuates the purpose of NEPA."). In particular, NEPA mandates that the environmental effects of a single project, as well as projects "related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement" together, and that the evaluation must be completed "before actions are taken," in order to effectuate the dual purposes of NEPA. 40 C.F.R. §§ 1500.1(b), 1502.4(a).

> By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.

*N.C. Wildlife Fed'n*, 677 F.3d at 601-02.

A piecemeal evaluation of the proposed action constitutes illegal "segmentation" under NEPA. Breaking the environmental review of a project "into small component parts," as Defendants have done with their Selected Alternative, "is to engage in illegal 'segmentation.'" *New River Valley Greens v. USDOT*, No. 97-1978, 1998 WL 633959, *3 (4th Cir. Sep. 10, 1998) (citing 40 C.F.R. § 1508.27(b)(7)). "The hallmarks of segmentation are where the proposed component action has little or no independent utility or involves such a large and

irretrievable commitment of resources that it may virtually force a larger or related project to go forward notwithstanding the environmental consequences." *Id.* at *9 (citing *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986)).

Both FHWA and the Council on Environmental Quality ("CEQ") have promulgated NEPA regulations that govern segmentation of a project. Defendants violated both sets of regulations.

**B. The Selected Alternative Violates FHWA Regulations.**

FHWA regulations contain specific requirements for avoiding illegal segmentation in highway projects. For any segment of a highway project to stand alone without evaluation of the remainder of the project, that segment must:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
>
> (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
>
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f).

The district court concluded that segmentation of the Project was "done properly" and satisfied 23 C.F.R. § 771.111(f). Order at 19, 24. This conclusion was erroneous for the following reasons.

### 1. The "Phase I" Bridge Lacks Logical Termini.

Travel across Oregon Inlet requires more than just a bridge – it also requires access to and from that bridge. Under ordinary circumstances, access to a bridge might not be a problem. But as the Merger Team recognized in setting the scope and termini of the Project, Bonner Bridge and its proposed replacement are uniquely dependent on a stretch of NC-12 that is frequently washed out. (*See* discussion of project purpose and need, *supra* p. 8.) At the high-erosion "hot spots," the access route is routinely buried in sand, flooded, breached by storms, and threatened by the westward migration of the shoreline. In order to serve its purpose, any bridge across Oregon Inlet requires additional improvements that address those problems and convey travelers beyond those hot spots. Accordingly, Defendants set the scope of the Project to link two logical termini: Bodie Island (north of Oregon Inlet) and Rodanthe (15 miles to the south, the first population center on Hatteras Island beyond the "hot spots"). The district court erroneously treated the unique circumstances of the Project as a reason to allow segmentation, Order at 21, but, in fact, the exceptional vulnerability of the bridge is the reason Defendants and the Merger Team selected the original terminus at Rodanthe and agreed that the Project be treated as a whole.

FHWA guidelines state that "related improvements within a transportation facility should be evaluated as one project, rather than selecting termini based on

what is programmed as short range improvements."[6] Here, by their definition of the scope of the project, Defendants acknowledged that building a replacement bridge over Oregon Inlet would require more construction to address the high-erosion areas of NC-12 and allow traffic to reach the bridge. Indeed, Defendants explained in the ROD that, due to the unique setting of this project, constructing the "Phase I" bridge requires completion of "the entire action from Rodanthe to Bodie Island" through the Refuge. AR091963.

For the same reason, evaluating the "Phase I" bridge on its own would ignore the FWHA requirement to evaluate a project "of sufficient length to address environmental matters on a broad scope." 23 C.F.R. § 771.111(f)(1). The high-erosion "hot spots" along NC-12 are the crucial "environmental matters" that the Project is meant to address. Defendants' plans for those areas and their impacts cannot be put off while Defendants start constructing the bridge.

Courts look to the nature and purpose of a project in determining whether termini are logical. *E.g.*, *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 18 (8th Cir. 1973). Thus, "[i]f the major objective of a proposal is to connect two cities by expressway, then these two termini should determine the proper scope" of the

[6] FHWA, Development of Logical Project Termini (Nov. 5, 1993), *available at* http://environment.fhwa.dot.gov/projdev/tdmtermini.asp.

analysis. *Id.* Similarly, the court in *Committee to Stop Route 7 v. Volpe* stated: "While no precise mileage for an appropriate length can be specified, the test is whether the length selected assured adequate opportunity for the consideration of alternatives (both whether and where to build) required by the Act." 346 F. Supp. 731, 740 (D. Conn. 1972) (3.1-mile road segment inappropriate for isolated environmental analysis). Here, the original five Parallel Bridge alternatives identified in the FEIS, as well as the Pamlico Sound Alternative, connect the logical termini of Bodie Island and Rodanthe; only the Selected Alternative fails to do so.

The defined purpose and need for the Project are to link Bodie Island to the first population center south of the NC-12 "hot spots." For that reason, Defendants admit in the ROD that "Phase I" does not meet the purpose and need of the Project; it requires additional improvements to overcome the continual disruptions along NC-12. AR091963. As its representative explained, "FHWA requires that the preferred alternative include a reliable corridor through Rodanthe." AR042502. Thus, isolating the "Phase I" bridge is not logical and does not connect logical termini.

Defendants have long recognized the need for a complete plan for the Project, only recently resorting to segmentation when pressured by local politicians to select an alternative for which they could not obtain Merger Team consensus

from the permitting agencies. This about-face in pursuit of a politically-prejudged conclusion was arbitrary and capricious. *E.g.*, *Int'l Snowmobile Mftrs. Ass'n v. Norton*, 304 F. Supp. 2d 1278, 1291 (D. Wyo. 2004). Defendants' attempted end-run around NEPA's requirements cannot be allowed. *See, e.g.*, *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1318 (S.D. Fla. 2005) (finding illegal segmentation where single project "was conceptualized as an integrated whole, progressing in phases," and the first phase "was never intended to stand alone"); *Thompson v. Fugate*, 347 F. Supp. 120, 124 (E.D. Va. 1972) (beltway project must be evaluated as a whole).

**2. The "Phase I" Bridge Lacks Independent Utility.**

Just as the "Phase I" bridge lacks logical termini, it also lacks independent utility. To have independent utility, a project must "be usable and be a reasonable expenditure *even if no additional transportation improvements in the area are made*." 23 C.F.R. § 771.111(f)(2) (emphasis added). Here, construction of the additional segments of the Project and continual repairs and shoring up, are and will continue to be required to keep NC-12 open to traffic. Without these additional improvements, a new Oregon Inlet bridge would be a "bridge to nowhere."

The current stretch of NC-12 between Oregon Inlet and Rodanthe is unsustainable, as NCDOT and other Merger Team agencies have noted repeatedly.

Every few months, significant construction is required to restore the road from recurring breaches, washouts, flooding, and overwash that plague this stretch of highway. *See* AR058727; AR064433. Defendants' own consultant observed that building the "Parallel Bridge would commit to NC-12 maintenance through the Refuge, which is an *immediate need* with near-term costs at the south and north end of the Refuge." AR033563 (emphasis added). And the National Park Service observed that "it is readily apparent to all that the road in its current location within the Refuge is not sustainable without major construction or increased shoreline protection." AR081500.

Recognizing the unsustainability of this stretch of NC-12, NCDOT asked rhetorically in 2005, long before it segmented the Project, "if those hot spots are impassible, what good is the bridge?" AR064433. The answer, of course, is that an inaccessible bridge has *no* utility or public safety benefit.

FHWA itself admitted at a 2007 Merger Team meeting that the alternative to be selected for the Project must "include a reliable corridor through Rodanthe." AR042502. In response to another Merger Team member's statement that "choosing only the Oregon Inlet Bridge (Phase I) would not meet the purpose and need of the project," FHWA responded that "partially meeting the purpose and need still means the alternative does not meet the purpose and need of the project," and that if "the environmental document only assessed the Oregon Inlet crossing,

the cumulative impacts associated with NC 12 maintenance would still need to be addressed" in that evaluation. *Id.* At the same Merger Team meeting, Defendants ultimately agreed that "a decision on the entire corridor through Rodanthe is needed [for] complete NEPA studies." *Id.* Yet when they could not secure Merger Team concurrence on one of the five Parallel Bridge alternatives that did include a plan for maintaining a route to Rodanthe, Defendants abandoned their principles, deciding instead to segment the Project and build the Oregon Inlet bridge they had already agreed would not suffice alone.

Recent events vividly illustrate that the "Phase I" bridge will be useless without construction of additional improvements. The new Pea Island inlet and the frequent severe breaches near the Rodanthe "hot spot" have forced Defendants to propose building more of the "Later Phases" segments – two "Phase II" bridges, each more than two miles long, to span the new inlets, and beach nourishment – at the same time they construct the "Phase I" bridge. These "phases" are being evaluated separately from the first bridge and from each other. PRM000133-181; *supra* n.4.

The district court erroneously ruled that the "maintenance" required along NC-12 "does not ruin the substantial utility of replacing a bridge that is reaching the end of its service life." Order at 22-23. In support, the court cited an inapposite case in which the replacement bridge had no access problem, and thus

did not "require the construction of any other projects to be usable." *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 963 (7th Cir. 2003). Here, a bridge closed numerous times each year because its access route is unstable plainly requires additional improvements "to be usable." Under these circumstances, the replacement bridge does not have independent utility under the FHWA regulation.

Under a very similar independent-utility regulation,[7] a project "in which the components were dependent upon one another" and had been planned together for years was required to be evaluated as a whole. *Crutchfield v. U.S. Army Corps of Eng'rs*, 154 F. Supp. 2d 878, 890 (E.D. Va. 2001). The court found that the extensive record of planning the project as a whole revealed a subsequent claim of independent utility to be a "belated contrivance of expediency." *Id.* at 897. The same is true here; for a decade, Defendants treated the entire Project from Bodie Island to Rodanthe as a single project, and cannot now belatedly claim that a small portion has independent utility for the sake of expediency.

Even a short-term benefit cannot satisfy the standard. For example, one district court ruled that a 13-mile segment of a highway expansion project did not have independent utility or logical termini because without further expansions, it would create a bottleneck in an already congested area. *W. N.C. Alliance v.*

[7] 33 C.F.R. § 330.6(d).

*NCDOT*, 312 F. Supp. 2d 765, 774-75 (E.D.N.C. 2003). The court specifically noted that while that situation "may be justifiable temporarily, it is not a reasonable expenditure if [an adjacent project] is never built" and thus it violated the independent-utility requirement of 23 C.F.R. § 771.111(f)(2). *Id.* Here, the breaches and washouts of NC-12 are so frequent that replacing the Oregon Inlet bridge in isolation likely would not even provide any short-term benefit. There certainly would be no long-term utility to replacing the bridge without additional improvements to NC-12 to provide access to that bridge.

**3. The Selected Alternative Restricts the Remainder of the Project.**

The Selected Alternative also violates the third requirement of the FHWA anti-segmentation regulation: it confines the available alternatives for the remainder of the Project to the narrow "Parallel Bridge Corridor" through the Refuge. *See* 23 C.F.R. § 771.111(f)(3). Indeed, the "Phase I" bridge restricts not merely "reasonably foreseeable transportation improvements," as contemplated by the regulation, but the remainder of a single Project.

Here, constructing the "Phase I" bridge – which the ROD predicted would cost between $265 million and $315 million, AR091971 – would moot any less environmentally damaging alternatives that avoid the "Parallel Bridge Corridor," because of that massive investment. Building "Phase I" is precisely the type of "large and irretrievable commitment of resources" that NEPA prohibits, in order to

prevent an action "virtually forc[ing] a larger … project to go forward notwithstanding the environmental consequences." *New River Valley Greens v. USDOT*, No. 97-1978, 1998 WL 633959, *3 (Sept. 10, 1998). As this Court observed, "[i]t is precisely this sort of influence on federal decision-making that NEPA is designed to prevent." *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986).

The other permitting agencies previously rejected all proposed options for the "Parallel Bridge Corridor" through the Refuge, but now they will be forced to accept one or more of them in order to maintain access to the "Phase I" bridge. That bridge to the northern tip of the Refuge would therefore "stand like [a] gun barrel[] pointing into the heartland of the park …." *San Antonio Conservation Soc'y v. Tex. Highway Dep't*, 400 U.S. 968, 971 (1970) (Black, J., dissenting from denial of certiorari).

The district court mistakenly dismissed the issue of restricted alternatives by postulating that "a [Pamlico Sound] bridge system or ferry system or some combination may still be considered and adopted along Hatteras Island in later phases." Order at 24. That claim is incorrect. Defendants have acknowledged repeatedly that their plan – the "*Parallel Bridge Corridor* with NC 12 Transportation Management Plan" – precludes any and all alternatives outside the

extremely narrow "Parallel Bridge Corridor." AR092062-63; AR083420. Nor did they argue otherwise to the district court.

Indeed, Defendants argued in a 2012 Merger Team meeting regarding bridging the Hurricane Irene breaches that they could not consider either a ferry service or Pamlico Sound bridge because "to pursue these alternatives also would involve re-visiting the decision contained in the [ROD] that identified the … Selected Alternative," PRM000195-196, an admission that the "Phase I" bridge precludes re-consideration of any Project alternatives other than maintaining a route through the Refuge. Thus, there is no support for the district court's conclusion that alternatives outside the narrow "Parallel Bridge Corridor" would remain available if the "Phase I" bridge segment of the Selected Alternative is built. In sum, the Selected Alternative impermissibly restricts the range of available alternatives before a decision on the full Project has been made.

### C. The Selected Alternative Violates CEQ's Segmentation Regulations

While the district court's opinion did not address CEQ's NEPA regulations, the Selected Alternative violates those as well. They require that the following actions be evaluated together:

> (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.
>
> (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

40 C.F.R. § 1508.25(a).

Each of these criteria aptly describes the Selected Alternative. Construction of the "Phase I" bridge will "automatically trigger" the remaining segments of the Selected Alternative because, as stated in the ROD, it represents "a commitment" to construct "the entire action from Rodanthe to Bodie Island" through the Refuge. Indeed, the "Later Phases" will be necessary to keep traffic flowing to the "Phase I" bridge. AR091963. All the segments of the Selected Alternative "are interdependent parts of a larger action" to connect Bodie Island and the first population center on Hatteras Island, Rodanthe. As the ROD states, the "Phase I" bridge alone "would not meet the purpose and need of the project," and "Later Phases" would be triggered. *Id.*

The various segments of the Selected Alternative will also have "cumulatively significant impacts," because they are all components of a major project to construct a 15-mile transportation corridor through extremely fragile

wildlife habitat. This Court has held that NEPA requires that an agency "fully comprehend[] the impacts of its actions" in combination. *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 198 (4th Cir. 2005); *accord Swain v. Brinegar*, 542 F.2d 364, 370 (7th Cir. 1976) ("Since the potential environmental impacts of the [project] components are interrelated, they must be evaluated together" because separate evaluations "of course do not consider the overall environmental effects"); *see also Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339 (D.C. Cir. 2002) ; *W. N.C. Alliance v. NCDOT*, 312 F. Supp. 2d 765, 773 (E.D.N.C. 2003) (agencies must assess cumulative impacts even where projects are not fully planned or funded).

Defendants in this case propose to evaluate each later segment separately from the others: the "environmental review for each phase" will be separately "initiated" after the ROD. AR091967. This piecemeal approach is unlawful, and defeats the dual purposes of NEPA – informed decision-making and public participation.

Defendants' previous NEPA documents, such as the 2008 FEIS, do not adequately account for the impacts of the Selected Alternative, which was first proposed in 2009. The Selected Alternative contemplates the future introduction of alternatives never before identified or evaluated, as well as significant new changes to previously identified alternatives. *E.g.,* AR083439 (Selected

Alternative includes "new transportation solutions … *not* previously identified in the FEIS" (emphasis added)); AR079282 (Selected Alternative includes "any other alternatives deemed at the time to be reasonable, practicable and feasible"); AR068826 (Corps concerned about unevaluated changes to an alternative). As DOI commented, because the Selected Alternative "could include anything … the effects of these undescribed future phases of the project have not been analyzed in any meaningful way." AR083862; *accord* AR083866-67 (DOI finding FEIS and subsequent NEPA documents "deficient" due to inadequate impacts evaluation and other problems).

Evaluation of those new impacts necessarily will take place after construction of the Project has begun and it is too late to change course. As this Court explained, "Further investment of resources by appellees in the proposed route would render alteration or abandonment of the proposed route increasingly costly and, therefore, increasingly unwise. If appellees were thus allowed to limit their options," any subsequent NEPA evaluation "would be a hollow gesture." *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1327 (4th Cir. 1972) (citing *Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1128 (D.C. Cir. 1971)). *Accord W. N.C. Alliance,* 312 F. Supp. 2d at 778 ("If Defendants are allowed to proceed with [the] project … without complying with NEPA, … any subsequent consideration of the cumulative environmental

impacts will be a mere formality and NEPA's goal of taking action only after a full consideration of the environmental impacts will be defeated."). Later, separate NEPA analysis of "Later Phases" of the Selected Alternative would likewise be a "hollow gesture."

In sum, Defendants have violated NEPA by issuing a ROD that discloses only one segment of a larger Project with interdependent parts; that will piecemeal the evaluation of later segments; and that restricts the available alternatives to a narrow corridor. If allowed to proceed, Defendants will force one or more of the Parallel Bridge alternatives that the Merger Team previously rejected. That is precisely the outcome that the procedural requirements of NEPA were designed to prevent. Defendants must disclose a complete plan to their fellow agencies and to the public so that it may be fairly evaluated and fairly compared to alternatives.

## II. DEFENDANTS VIOLATED SECTION 4(f).

Congress enacted Section 4(f) to implement the national policy that "special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. § 303(a).[8] While NEPA imposes procedural requirements, Section 4(f)

[8] Section 4(f) was codified with similar provisions at 23 U.S.C. § 138 and 49 U.S.C. § 1653(f) (recodified as 49 U.S.C. § 303). The two statutes are referred to together as "Section 4(f)."

imposes a "stringent," "prohibitory" mandate on FHWA not to use Section 4(f) property, including refuges, for highway projects. *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1447, 1461 (9th Cir. 1984). In the leading case interpreting Section 4(f), the Supreme Court explained that the law "is a *plain and explicit bar* to the use of federal funds for construction of highways through parks – *only the most unusual situations* are exempted." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971) (emphasis added). Accordingly, Section 4(f) demands "a thorough, probing, in-depth review" of Defendants' decision to use property protected by Section 4(f). *Id.* at 415.

Under Section 4(f), FHWA is prohibited from approving "any program or project" that requires the use of any public parkland, unless "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." 49 U.S.C. § 303(c). The regulations implementing Section 4(f) clarify that FHWA "may approve *only* the alternative that … [c]auses the *least overall harm*" to the property. 23 C.F.R. § 774.3(c)(1) (emphasis added).

Accordingly, under Section 4(f), FHWA must select an alternative that avoids using Refuge lands altogether. If no "prudent and feasible avoidance alternative" exists, FHWA must ensure that the alternative it does select will cause

the "least overall harm" to Refuge lands by incorporating "all possible planning" to minimize any harm to the protected lands.

Here, Defendants selected an alternative that does not and cannot comply with Section 4(f)'s "all possible planning" and "least overall harm" requirements. They failed to demonstrate that an available avoidance alternative was imprudent, and erroneously applied an exemption to the stringent requirements of Section 4(f).

### A. FHWA Failed to Comply with Section 4(f) Before Issuing a Record of Decision.

The district court erred by holding that Defendants' segmented Selected Alternative complied with Section 4(f). Order at 39-40 (concluding that "all possible planning" requirement was satisfied by mitigation for "Phase I" alone and delaying decision-making for rest of the Project "will provide the best opportunity to mitigate direct, indirect and cumulative impacts in the Project area"). First, there is no support in the record or the Order for the assertion that delaying the crucial decisions will minimize harm.

Second, as numerous courts have explained, agencies must ensure that the entire project complies with Section 4(f) *before* they issue a ROD or commence construction. Here, Defendants violated that clear requirement by issuing a ROD that discloses and analyzes only one segment of the Selected Alternative. Moreover, they propose to start construction of that segment before disclosing and

minimizing the impacts of the remaining segments. This plan violates Section 4(f) by impermissibly evading the statute's stringent substantive requirements.

For decades, this type of piecemealing has been held to contravene the purpose and structure of Section 4(f). Where FHWA attempted to authorize two end segments of a single project, without accounting for the segment that would run through Section 4(f) parkland, the Fifth Circuit held that all segments of a single project together must be evaluated for compliance with Section 4(f). The court noted that, just as in this case, "[t]here is nothing in this Record to support the conclusion that the North Expressway has ever been anything but one project for purposes of federal approval." *San Antonio Conservation Soc'y v. Tex. Highway Dep't*, 446 F.2d 1013, 1023 (5th Cir. 1971). The court explained that FHWA's attempted segmentation undermined the purpose of Section 4(f):

> We have already stated that *such fragmentation of a "project" is unauthorized by section 4(f)*. But there is another reason why we refuse to authorize such action: The frustrating effect such piecemeal administrative approvals would have on the vitality of section 4(f) is plain for any man to see. Patently, the construction of these two "end segments" to the very border, if not into, the Parklands, will make destruction of further parklands inevitable, or, at least, will severely limit the number of "feasible and prudent" alternatives to avoiding the Park. The Secretary's approach to his section 4(f) responsibilities thus makes a joke of the "feasible and prudent alternatives" standard, and we not only decline to give such an approach our imprimatur, *we specifically declare it unlawful*.

*Id.* (emphasis added).

Courts consistently have held that portions of a Section 4(f) evaluation cannot be put off until after the ROD; instead, the entire project must comply with Section 4(f) while the "alternatives to the proposed action are under study," 23 C.F.R. § 774.9(a), *i.e.*, before issuance of the ROD.

In one leading case, the D.C. Circuit squarely rejected agency arguments that post-ROD compliance with Section 4(f) was permissible under the regulations. FHWA proposed an "incremental, segment-by-segment approach" to identify and evaluate impacts to Section 4(f) properties, and – just as in this case – argued that it could comply with Section 4(f) in separate evaluations for additional segments of the highway after the ROD. *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 372 (D.C. Cir. 1999). The D.C. Circuit disagreed, explaining that Section 4(f)'s "crystalline" regulatory requirements mandate that FHWA must "complete the 4(f) process *no later than in the ROD*. While deference is normally due an agency's interpretation of its own rules, that is not the case where 'an alternative reading is compelled by the regulation's plain language.'" *Id.* at 373 (internal citations omitted; quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)) (emphasis added).

Faced with a similar agency attempt at segmentation under Section 4(f), the Ninth Circuit described a fact pattern indistinguishable from this case: "The Agencies concede that they have taken a phase-by-phase approach, that they have

not completed the § 4(f) evaluation for the entire Project, and that they already have issued the ROD." *N. Idaho Cmty. Action Network v. USDOT*, 545 F.3d 1147, 1159 (9th Cir. 2008). The court held that "[t]he Agencies have accordingly violated § 4(f)" because "an agency is required to complete the § 4(f) evaluation for the entire Project *prior to issuing its ROD*." *Id.* (emphasis added). And the Second Circuit has held that compliance with Section 4(f) "is a *condition precedent to approval* for such a taking for highway purposes where federal funds are involved." *Monroe Cnty. Conservation Council v. Volpe*, 472 F.2d 693, 700-01 (2d Cir. 1972) (emphasis added).

In sum, because Defendants in this case have authorized an alternative that avoids all Section 4(f) compliance for the remainder of the Project until after issuance of the ROD, they have violated Section 4(f).

### B. The Selected Alternative Violates Section 4(f)'s "All Possible Planning" and "Least Overall Harm" Requirements.

By delaying (or failing to disclose) their decision-making for the remainder of the Project, Defendants also have failed to ensure their alternative causes the "least overall harm" to 4(f) resources, having failed to perform "all possible planning" to minimize harm to those resources. 49 U.S.C. § 303(c); 23 C.F.R. § 774.3(c)(1). This is the crucial substantive requirement of Section 4(f) that is required before issuance of the ROD.

### 1. The Selected Alternative Fails to Include "All Possible Planning to Minimize Harm."

FHWA may select an alternative that uses Section 4(f) property only if it incorporates "all possible planning to minimize harm." 49 U.S.C. § 303(c)(2). "Even if there is no feasible and prudent alternative to the taking of parkland, the Secretary still may not give his approval until there has been 'all possible planning to minimize harm to such park.'" *Monroe Cnty. Conservation Council*, 472 F.2d at 700.

The Selected Alternative violates this requirement because it avoids *any* planning beyond "Phase I." The ROD omits vital decisions about the very portions of the Project most likely to harm the Refuge, and thus altogether fails to plan for and minimize that harm. Because Defendants have not yet even identified or disclosed specifically what methods they will use in the "Later Phases," they cannot possibly have identified or minimized their impacts on the Refuge or conducted "all possible planning to minimize harm," as required by Section 4(f).

The district court erroneously found that FHWA "conducted all possible planning to minimize harm" because it specified mitigation measures for the "Phase I" bridge alone, and because it promised to consult in the future with the Merger Team and historic preservation agencies about the remainder of the Project. Order at 39-40. But Section 4(f) is not satisfied by promises of future

compliance. As discussed above, Defendants must ensure the entire Project complies with Section 4(f) *before* issuing the ROD.

Courts that have considered the "all possible planning" requirement of Section 4(f) have concluded it prohibits reliance on just such promises of future compliance with Section 4(f). The Second Circuit held that an agency cannot rely on ongoing or future studies to comply with Section 4(f), nor on promises that "'all possible planning to minimize harm has been *and will continue to be* exercised by the responsible officials.' The statutory mandate is not fulfilled by vague generalities or pious and self-serving resolutions …." *Monroe Cnty. Conservation Council*, 472 F.2d at 700 (emphasis in original).

Yet such resolutions and future studies are precisely what Defendants have attempted to rely on in this case. AR091967 (promising future studies and agency coordination). Rather than making decisions that minimize harm, the Selected Alternative merely promises to "quantif[y], minimize[], and mitigate[]" the Project's impacts in the future. *Id.* Thus, the Selected Alternative is designed to postpone all but one segment's compliance with Section 4(f) until after the ROD. Such a plan directly violates the requirement of Section 4(f) that "all possible planning to minimize harm" be completed before the ROD. *Monroe Cnty. Conservation Council*, 472 F.2d at 700 ; *accord Merritt Parkway Conservancy v. Mineta*, 424 F. Supp. 2d 396, 422, 399 (D. Conn. 2006) (FHWA must "ensure that

the promises of future steps to minimize harm … ha[ve] been kept" prior to issuing ROD; where FHWA has not done so, remand "to cure the defects in its compliance with Section 4(f).").

### 2. The Selected Alternative Fails to Ensure the Least Overall Harm to the Refuge.

Similarly, FHWA must ensure its Selected Alternative causes the "least overall harm" to the Refuge, 23 C.F.R. § 774.3(c)(1), but it has not done so here. While the regulation calls for a balancing of factors in how harm is minimized, it does not contemplate or authorize a complete failure to make the decisions necessary for any such minimization. In addition to the Selected Alternative's failure to minimize harms prior to the ROD, it also allows Defendants to draw on any of the "Parallel Bridge Corridor" alternatives, even those the Merger Team previously rejected due to their unacceptable environmental impacts, for the remainder of the Project. Indeed, Defendants have refused to rule out even the most environmentally damaging methods for maintaining access to the "Phase I" bridge. For example, when EPA asked Defendants to drop the "Phased Approach" and "Road North/Bridge South" alternatives as options for the Selected Alternative because of their "significant environmental impacts," Defendants refused, claiming "it is premature to eliminate any of the Parallel Bridge Corridor alternatives." AR092068. DOI commented that the effects of the Selected Alternative "have not

been . . . even placed within some reasonable bounds regarding impacts to the Refuge." AR083862.

The deferred (or undisclosed) decision-making built into the Selected Alternative, coupled with Defendants' insistence that impacts of the "Later Phases" of the Project on the Refuge's wildlife habitat are exempt from Section 4(f) (addressed below, II.D), would give them the discretion to select road-maintenance methods that are unnecessarily harmful to the Refuge late in the process, when it is too late to change course, thereby thwarting the statutory purpose of Section 4(f).

### C. FHWA Failed to Demonstrate that Feasible and Prudent Avoidance Alternatives Were Not Available.

An agency cannot use Section 4(f) land for a transportation project unless "there is no prudent and feasible alternative to using that land." 49 U.S.C. § 303(c). In this case, FHWA cannot legally build the Selected Alternative because there is a feasible and prudent alternative that avoids using Refuge lands. *See Citizens to Pres. Overton Park v. Brinegar*, 494 F.2d 1212, 1215-16 (6th Cir. 1974) (affirming FHWA rejection of highway route through parkland and noting "the statute is designed to require the Secretary to scrutinize proposed highways for the protection of park lands."). Defendants admit in the Revised Section 4(f) Evaluation that the Pamlico Sound Alternative entirely avoids all Section 4(f) properties, but they claim they did not select it because of funding issues. *See*

AR075563; AR058830 (FEIS stating "FHWA and NCDOT consider the Pamlico Sound Bridge Corridor alternatives to have the least harm to the Refuge").

FHWA acknowledged in the Revised Section 4(f) Evaluation that the Pamlico Sound Alternative is feasible. AR075700, 23 C.F.R. § 774.17.

The Pamlico Sound Alternative, which Defendants and all other agencies previously endorsed, is also prudent, but FHWA has chosen not to pursue options available to fund it. The *Overton Park* Court explained that, in determining whether an alternative is "prudent," the agency may not "engage in a wide-ranging balancing of competing interests." 401 U.S. 402, 411 (1971). The very existence of Section 4(f) means "protection of parkland [is] to be given paramount importance"; an alternative may not be rejected as imprudent unless "truly unusual factors [are] present." *Id.* at 412-13.

An alternative may be rejected as imprudent due to cost only if it "results in additional construction, maintenance, or operational costs of an extraordinary magnitude." 23 C.F.R. § 774.17. In other words, under Section 4(f), an alternative may not be rejected simply because it is expensive. It may be rejected only if it is extraordinarily more expensive than an alternative that uses 4(f) property. *Id.*

In this case, however, Defendants do not and cannot claim that the rejected Pamlico Sound Alternative costs more than the Selected Alternative. Indeed, Defendants estimated in their Revised 4(f) Evaluation that, depending on their later

decisions, the Pamlico Sound Alternative could *save* as much as *$581 million* compared with the Selected Alternative. *Compare* AR075581 *with* AR075700; PRM000088. Thus, the Pamlico Sound Alternative does not entail an additional cost of extraordinary magnitude.

Similarly, Defendants' analysis was arbitrary and capricious because the Selected Alternative is simply too vague to support the cost comparison required under Section 4(f). Section 4(f) requires that, for an avoidance alternative to be rejected, it must impose "*additional*" construction costs of extraordinary magnitude. This cost-weighing process recognizes that, because "there will always be a smaller outlay required from the public purse when parkland is used," the difference must be truly extraordinary to justify such use. *Citizens to Pres. Overton Park*, 401 U.S. at 412. To make the required comparison, there must be a plan for using the protected property whose cost can be compared with the cost of avoiding that property.

Here, the ROD contains no plan for most of the Selected Alternative. As a result, Defendants' cost estimates for the Selected Alternative vary wildly – by almost *$1 billion* – depending on which options Defendants may choose later. AR091971 ($615 million to $1.5 billion). In short, the cost of the Selected Alternative is an unknown quantity and is far too uncertain to support the cost

comparison required by Section 4(f). Thus, the decision to adopt the Selected Alternative violates Section 4(f) for this reason as well.

The only impediment to the Pamlico Sound Alternative cited by Defendants is not extraordinary additional cost, as would be necessary to satisfy Section 4(f), but rather state law funding restrictions that Defendants claim prevent them from funding its construction. Defendants claimed the only sources of funding available for the Pamlico Sound Alternative were State Transportation Improvement Plan ("TIP") funds distributed around the state according to a statutory Equity Formula, N.C. Gen. Stat. § 136-17.2A (2012),[9] and very limited "Grant Anticipation Revenue Vehicle" bonds, which are essentially an advance on future federal funding. AR058490.

However, the record shows that Defendants rejected other funding options for the Pamlico Sound Alternative based on nothing more than self-imposed limitations and their own preferences.

For example, NCDOT rejected the use of toll revenue for partial funding of the Pamlico Sound Alternative. When NCDOT examined the use of tolls in conjunction with FHWA's Transportation Infrastructure Finance and Innovation

[9] The Equity Formula was repealed for future projects but the apportionment for this Project remains in effect. 2013 N.C. Laws S.L. 2013-183 Sec. 1.1(a), § 189.11(b)(6).

Act ("TIFIA") program, designed to "help advance qualified, large-scale projects that otherwise might be delayed or deferred because of size, complexity, or uncertainty over the timing of revenues," NCDOT calculated that the tolls would be $11-$14 and rejected this option, claiming that that rate was "relatively high." AR075711. An untested notion that a toll seems "relatively high" cannot justify rejecting an avoidance alternative under Section 4(f)'s stringent "extraordinary magnitude" standard. Moreover, the proposed rate is comparable to tolls charged for other bridges around the country and is much *less* than the $28 tolls NCDOT planned for a similar project nearby.[10]

The Merger Team asked whether NCDOT could supplement this toll revenue by requesting "gap funding" from the Legislature, a type of funding that recently had been awarded for another bridge project. AR041312. NCDOT responded that it "would be *hesitant* to go to the Legislature for added funding," *id.* (emphasis added), and in fact did not pursue this type of funding.

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[10] NCDOT, Mid-Currituck Bridge Funding and Revenue Forecasts at 9 (weekend tolls up to $28), *available at* http://www.ncdot.gov/projects/midcurrituckbridge/download/MCBTrafficRevenueForecastsFinalJuly2011.pdf. Courts routinely take judicial notice of agency public documents and information. *E.g.*, *Denius v. Dunlap*, 330 F.3d 919, 926-27 (7th Cir. 2003).

Nor did NCDOT investigate other means of lowering its TIFIA-based $11-$14 toll calculation. It refused to investigate the availability of additional state TIP funding for the Pamlico Sound Alternative (which would have reduced the toll rate), despite having sought more state funds for a project alternative they favored. AR037873. This selective willingness to seek funding is impermissible. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (rejecting agency's "selective willingness to rely upon the availability of funding sources beyond [its] direct control").

NCDOT also dismissed the possibility of using general obligation bonds without any explanation other than noting this option would require "approval of the citizens of the state." AR083623. Nor did it apply for any competitive grants, which were exempt from the state Equity Formula. *See* N.C. Gen. Stat. § 136-17.2A(a) (2012).

These cavalier rejections of funding options were based on NCDOT's political preferences and lacked any substantive analysis justifying rejection of the Pamlico Sound Alternative. They are precisely the types of "self-imposed restrictions" that would "nullify" Congress's intent to protect parkland if allowed to stand. *Coal. for Responsible Reg'l Dev. v. Brinegar*, 518 F.2d 522, 526 (4th Cir. 1975). In *Responsible Regional Development*, this Court held that a state agency could not justify rejecting an avoidance alternative by relying on the availability of

certain financing that had already been issued – just as Defendants in this case relied upon the limited funds allocated for their preferred alternative. The Court held that just as cost is a subsidiary factor under *Overton Park*, a state's "preferred plan of financing is also subsidiary." *Id.* Accordingly, Defendants' determined refusal to pursue financing methods described above violated Section 4(f) and were arbitrary and capricious.

By rejecting these various sources of funding out of hand, on the grounds that they were "hesitant" to request funds, believed tolls were "relatively" high, or simply refused to investigate other sources like competitive grants or general obligation bonds, Defendants failed to comply with the stringent requirements of Section 4(f). As one court observed under similar circumstances,

> it remains our solemn responsibility to insure that those with technical expertise exercise it in accordance with the laws of the United States and the public welfare.… The record before us simply does not demonstrate that the stringent requirements of section 4(f), as defined in *Overton Park* and its progeny, have been satisfied. Until those requirements are satisfied, we cannot allow our Nation's sacred parklands to be taken or used.

*Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1455 (9th Cir. 1984) (citations omitted).

Finally, FHWA did not perform any independent analysis when – in a two-page memo – it superficially reviewed NCDOT's conclusions. AR082451-52. However, "[t]he legislative history indicates that the Secretary is not to limit his consideration to information supplied by state and local officials but is to go

beyond this information and reach his own independent decision." *Citizens to Pres. Overton Park*, 401 U.S. at 412 n.28 (citing 114 Cong. Rec. 24,036-37).

In this case, FHWA admitted it "did not verify the accuracy" of the key variables used to evaluate the Pamlico Sound Alternative, "the estimated construction cost … obligation limitation, [and] program funding." AR082451. Without having examined these factors, FHWA's statement that NCDOT's conclusions were "reasonable" has no foundation. Without verifying the availability of other funds for the Project, FHWA could not determine whether NCDOT's funding analysis was accurate. The same is true for FHWA's failure to examine the controversial cost estimate for the Pamlico Sound bridge, because NCDOT's toll analysis is based on the estimated project cost. By failing to act independently, FHWA violated the important Congressional requirement that the decision to use Section 4(f) property not be left in the hands of state or local officials.

Finally, the district court incorrectly asserted that a number of factors "in combination make the Pamlico Sound Bridge Corridor alternative not prudent as an alternative." Order at 39. In fact, Defendants identified only *one* factor – construction cost – that they claimed rendered the Pamlico Sound Alternative imprudent. They stated that the Pamlico Sound Alternative's estimated cost "surpasses the threshold of construction cost of extraordinary magnitude and *is*

*therefore not a prudent alternative*." AR075711 (emphasis added). In other words, cost alone formed the basis for rejecting this alternative. Similarly, cost was the only factor cited by Defendants in the FEIS when they rejected the Pamlico Sound bridge. AR058495 ("The Pamlico Sound bridge Corridor is not practicable based on cost estimates").

Other factors Defendants mentioned in their Revised Section 4(f) Evaluation to try to bolster the conclusion they already had reached were either redundant or did not actually render the Pamlico Sound Alternative imprudent. The Revised 4(f) Evaluation mentioned "unique maintenance problems" that funding a large project supposedly would cause for other state highways due to alleged funding constraints (AR075711-12). This is merely a restatement of Defendants' claim about the difficulty of funding the Pamlico Sound Alternative and adds nothing to the analysis. Similarly, the district court cites Refuge access as an impediment to the Pamlico Sound Alternative, Order at 38, but this is contrary to the record: the Revised 4(f) Evaluation states that Refuge access does *not* render the Pamlico Sound Alternative imprudent. AR075714. Moreover, FWS committed to provide access to the Refuge for any Project alternative that does not include a highway through the Refuge and explained that, in any event, access is a consideration subsidiary to fulfilling the mission and purpose of the Refuge, which is what Section 4(f) protects. AR067955.

Thus, cost is the only factor upon which Defendants based their rejection of the Pamlico Sound Alternative as imprudent. That reasoning cannot satisfy the requirements of Section 4(f).

### D. The District Court Erroneously Applied the "Joint Planning" Exception.

FHWA erroneously applied an exception to the stringent requirements of Section 4(f), ignoring both the plain language of the regulatory text and the authoritative contrary view of the federal agency that manages the Refuge.

Section 4(f) does not apply to uses of protected property "[w]hen a property is *formally reserved* for a future transportation facility *before or at the same time* a park, recreation area, or wildlife and waterfowl refuge is established and concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs." 23 C.F.R. § 774.11(i) (emphasis added). If a project satisfies this "joint planning" exception, the project is exempt from the substantive requirements of Section 4(f), including, for instance, the requirement to select the alternative that will cause the "least overall harm" to refuge habitat.

Defendants take the erroneous position that Section 4(f) does not apply to their proposed use of the Refuge "as a refuge" because of the "joint planning" exception. They further claim it makes no difference because they applied Section 4(f) to the Refuge "as a historic resource." The district court erroneously agreed. (Order at 36.)

Their argument is unavailing. The extent to which Section 4(f) applies to the Selected Alternative in the Refuge matters a great deal. By invoking the "joint planning exception," Defendants are hoping for free rein to select any options for the Later Phases, no matter how damaging the impacts on the wildlife habitat of the Refuge, on the basis that those impacts will be exempt from Section 4(f)'s requirement to minimize harm. AR075569 (Defendants claiming "the impacts resulting from relocating NC-12 from its current alignment through the Refuge would not be considered a use" and not subject to minimization requirement); AR083491 (discussing modifications to minimize harm to other historic properties but not to Refuge habitat, and promising to evaluate future uses of Refuge as historic property but not uses "as a refuge"); AR083491 (minimizing impacts to historic properties for "least overall harm" requirement, but not minimizing impacts to Refuge). Notably, the impacts to the Refuge "as a historic property" are mostly minor and visual, AR083485-86, while the impacts to the Refuge "as a refuge" are significant and include adverse impacts to federally protected species protected and loss of recreational access. AR058824-30. Indeed, Defendants would not have argued for their unfounded interpretation of the Refuge's transportation history at such length in their district court briefing if the stakes were not so high.

In fact, the "joint planning" exemption does *not* apply to the Refuge. When the Refuge was created, NC-12 was not formally reserved, nor was it planned jointly or concurrently with the Refuge. The Refuge was established in 1938. AR000074. Property for NC-12 was not "formally reserved" "before or at the same time," but rather 16 years later in 1954, when the federal government for the first time granted an easement to North Carolina, defined by metes and bounds, for a 100-foot-wide right-of-way for the State to construct and maintain a highway. AR001108; AR068658-62.

The district court acknowledged that NC-12 was not formally reserved until 1954. Order at 36. That should have ended the matter. Indeed, there is no evidence of any reservation, formal or otherwise, in the documents that created the Refuge. In their briefing below, Defendants claimed a road was somehow reserved based on boilerplate language in the Executive Order creating the Refuge ("subject to valid and existing rights") and in a single Judgment of Condemnation stating that one parcel was taken "subject only [t]o existing public highways and public utility easements, *if any*." AR000092 (emphasis added).

There were no existing rights or easements for a public highway in the Refuge area when it was created, because all the land was privately owned, and the State had no easement for any road or highway across those lands. Nor were there

any valid and existing private rights or easements encumbering those private parcels when they were taken:

> [A]ll the right, title, interest, claim and estate *of any and every character whatsoever*, in and to said lands shall be divested from and out of the parties named in this proceeding *and all other parties claiming any interest therein*, and an *unencumbered* title to said lands, and *all interest therein* shall vest in the United States of America, its successors and assigns ….

AR000071 (Judgment of Condemnation for 1,544-acre parcel occupying the north end of Pea Island) (emphasis added). The judgments of condemnation all state plainly that the lands are taken solely in furtherance of the Refuge's intended purpose of preserving migratory waterfowl. *E.g.*, AR000069, AR000081. In sum, the State of North Carolina had no interest in any of the lands that became the Refuge – before or after it was created – until 1954.

The district court incorrectly concluded that the "joint planning" exemption applied because "Federal and state governments preserved the Hatteras Island area with an understanding that vehicular passage would be accommodated, and that the vehicular passage has not been fixed to one location, but has evolved in response to the forces of nature and advances in highway construction." Order at 37. Any informal practice of driving on private land prior to the creation of the Refuge does not constitute a "formal reservation" by the federal government sufficient to invoke the exception. Without such a formal reservation, a State agency or local community's preference to use refuge property for transportation is immaterial. As

one court explained, "Congress did not intend to leave the decision whether federal funds would be used to build highways through parks of local significance up to the city councils across the nation." *San Antonio Conservation Society v. Tex. Highway Dep't*, 446 F.2d 1013, 1026 (5th Cir. 1971).

Finally, the district court's use of the phrase "preserved the Hatteras Island area" appears to conflate Pea Island National Wildlife Refuge with Cape Hatteras National Seashore. These two federal parklands were created in very different ways. The Seashore was created in the 1950s by land transfers from the State of North Carolina in which the State explicitly "retain[ed] title to and control of all public roads and highways … and the further right to lay out and establish over and upon said lands such other highways and roads as shall be deemed necessary by the State of North Carolina …." AR000758, AR000778, 1192-93. These formal reservations of transportation facilities within the Seashore, decades after the creation of the Refuge, merely emphasize by contrast the absence of any such formal reservation when the Refuge was created. Nor could there have been any possibility of doing so, since – unlike the National Seashore – the State had no title or rights to the lands that became the Refuge.

If there were any doubt whether the "joint planning" exemption applied, DOI, which manages all the 4(f) property in the Project area, including the Refuge, has confirmed definitively that no "joint planning" occurred. DOI explained to

Defendants that joint planning "did not happen" and the evidence "do[es] not support" Defendants' claims. AR078128-30. DOI clarified that "there is no history of a public transportation infrastructure or joint planning or collaboration predating the Refuge, or on the Refuge, until a right to construct and maintain a road in a specific location with a specified width was conveyed in a permanent easement in the 1950's." AR083864. In other words, the agency that has managed the Refuge since the beginning has explained definitively that there is absolutely no support for the "joint planning" claim.

There can be no question that the Refuge, created in 1938 without any reservation of any transportation facility, was not jointly planned with NC-12, which was created by easement in 1954. As a result, the exception does not apply, and the substantive requirements of Section 4(f) apply fully to the Selected Alternative.

In sum, for four independently adequate reasons, Defendants' Section 4(f) analysis is flawed and justifies reversal of the district court's decision.

## CONCLUSION

For these reasons, the Conservation Groups respectfully ask this Court to reverse the decision of the district court and remand this case with instructions to vacate the ROD or order Defendants to withdraw the ROD and enjoin Defendants

from taking any further action to construct the Project until they have complied with NEPA and Section 4(f).

## REQUEST FOR ORAL ARGUMENT

The Conservation Groups request oral argument in this case due to the complex nature of the statutory and regulatory framework.

Respectfully submitted this the 9th Day of December, 2013.

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

**No.** 13-2215 **Caption:** Defenders of Wildlife, et al. v. NC Dep't of Transp., et al.

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(s) Julia F. Youngman

Attorney for Plaintiffs-Appellants

Dated: December 9, 2013

# CERTIFICATE OF SERVICE

I certify that on December 9, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Julia F. Youngman
Signature

December 9, 2013
Date