

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

CLEAN AIR CAROLINA, NORTH)
CAROLINA WILDLIFE FEDERATION, and)
YADKIN RIVERKEEPER)
)
Plaintiffs,)
)
v.)
)
NORTH CAROLINA DEPARTMENT OF)
TRANSPORTATION, ANTHONY J. TATA,)
SECRETARY, NCDOT, FEDERAL)
HIGHWAY ADMINISTRATION, and JOHN)
F. SULLIVAN, DIVISION)
ADMINISTRATOR, FHWA,)
)
Defendants.)

3:14-cv-338

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action challenges violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06, in connection with the decisions by the North Carolina Department of Transportation (“NCDOT”) and the Federal Highway Administration (“FHWA”) (collectively, the “Transportation Agencies”) to construct the Monroe Bypass Toll Highway in Union and Mecklenburg Counties, North Carolina. The proposed 20-mile project (the “Toll Road”) would constitute a new location toll highway from U.S. 74, approximately one mile from I-485 in Mecklenburg County, to U.S. 74, between the towns of Wingate and Marshville in Union County. As set out more fully below, the Transportation Agencies have acted arbitrarily and capriciously in issuing the Environmental Impact Statements (“EIS”) and the Record of Decision (“ROD”) for the proposed Toll Road.

2. The proposed \$838 million Monroe Bypass would displace 95 households, 47

businesses, three churches, and 499 acres of active agricultural land, and would impact nine neighborhoods. The proposed Toll Road also would impact 12,729 linear feet of intermittent streams, 10,353 linear feet of perennial streams, 3.1 acres of ponds, and 8.1 acres of wetlands in a total of 46 wetlands. These impacts include 107 stream crossings. The proposed Toll Road would also fragment wildlife habitat and impact approximately 450 acres of forest. A number of federal and state resource and permitting agencies have raised substantial concerns about the project throughout the administrative process.

3. NEPA requires Defendants to prepare documents that thoroughly examine and disclose a proposed project's direct, indirect, and cumulative environmental and social impacts. These documents must also rigorously explore and objectively evaluate a range of reasonable alternatives that meet the project's basic purpose and need.

4. A core purpose of NEPA is to inform the public, decisionmakers, and resource agencies about the environmental impacts of different alternatives. The NEPA process must be conducted in good faith, must use up-to-date data, must be fully transparent, and must respond to concerns raised by the public. The Monroe Bypass EIS fails all of these requirements.

5. The United States Court of Appeals for the Fourth Circuit invalidated Defendants' first NEPA review for this same toll highway proposal. N.C. Wildlife Fed'n v. NCDOT, 677 F.3d 596 (4th Cir. 2012).

6. In its decision, the Fourth Circuit condemned Defendants' NEPA analysis in which Defendants compared "building the road" with "building the road" in their impacts and alternatives analyses, and were not candid with the public and state and federal resource agencies.

7. Defendants' new analysis of the proposed Monroe Bypass is infected with the same arbitrary and capricious analysis and other significant flaws.

8. First, Defendants conducted an arbitrary alternatives analysis that was rooted in fundamentally flawed traffic forecasts that fail to account for the past decade of traffic trends, fail to analyze patterns of travel in the project corridor, and fail to account for induced growth and travel. Defendants' analysis arbitrarily rejects a series of reasonable alternatives and combinations of alternatives based on this flawed, outdated review.

9. Second, the EIS fails to analyze the indirect environmental impacts that construction of the proposed Toll Road would cause. The analysis, which is supposed to look at the indirect impact of transportation infrastructure on growth and development, is rooted in data that, by design, completely ignores the impact of transportation infrastructure.

10. Third, the EIS fails to analyze the cumulative impacts of reasonably foreseeable transportation projects and other developments and their combined impact with construction of the proposed Toll Road.

11. Fourth, the EIS fails to account for all of the direct impacts that construction of the proposed Toll Road would cause, including impacts to air, water quality, endangered species, and the monetary cost of the project.

12. Fifth, Defendants misled the public, local and statewide decisionmakers, and resource agencies by regularly making, in their own capacity and through agents, false public statements regarding the proposed project's purpose and anticipated impacts, and by refusing to correct or otherwise clarify widespread and well known public misunderstanding.

13. Sixth, Defendants engaged in improper pre-determined decision-making, irreversibly and irretrievably committing to a plan of action before completing the NEPA analysis and allowing for public review of the proposed decision.

14. Seventh, Defendants improperly issued a combined Final Supplemental Final EIS (“FSFEIS”) and ROD, bypassing public comment on the significant new information presented in the Draft Supplemental Final EIS (“DSFEIS”) which was relevant to environmental concerns and which bears on the proposed action and its impacts.

15. Eighth, Defendants failed to supplement the EIS to address significant new concerns and information relevant to environmental concerns bearing on the proposed Toll Road that came to light and were relayed to Defendants subsequent to publication of the DSFEIS.

JURISDICTION AND VENUE

16. This action arises under NEPA, 42 U.S.C. § 4321 *et seq.* This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and may issue declaratory and further relief pursuant to 28 U.S.C. §§ 2201-02. Plaintiffs are entitled to bring this action pursuant to the APA, 5 U.S.C. §§ 701-06.

17. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

PARTIES AND STANDING

Plaintiffs

18. Plaintiff Clean Air Carolina is a not-for-profit corporation founded in 2002. Clean Air Carolina has 1,825 members in North Carolina. Its mission is to ensure cleaner air quality for all by educating the community about how air quality affects health, advocating for stronger clean air policies, and partnering with other organizations committed to cleaner air and sustainable practices. Its primary goal is to improve health by achieving the cleanest air possible.

19. Clean Air Carolina aims to improve North Carolina's air quality by reshaping the practice of relying almost exclusively on highways for transportation needs and supports a multi-modal system, including more passenger rail, bike and pedestrian options, and consequent development patterns that will lead to less single-occupant automobile travel.

20. Clean Air Carolina is based in Charlotte and works on regional and statewide issues. The organization has specific concerns about air quality in the Charlotte region. Clean Air Carolina has members who live in Union and Mecklenburg Counties who are impacted by poor air quality.

21. Clean Air Carolina monitors and participates in highway and transportation planning in Union and Mecklenburg Counties, has participated in the administrative processes surrounding the planning of the proposed Toll Road in these counties and has members who participated in this process, including the process leading to the approval of the ROD challenged in this case. Clean Air Carolina seeks to inform and educate its members and the public concerning highway and transportation planning and the impacts of transportation decisions on the human environment, and advocates for transportation planning and policies that will have the least long-term impact on the human environment. These organizational interests are directly and irreparably injured by Defendants' violations of law described in this complaint.

22. Clear Air Carolina was a plaintiff in the previous successful challenge to the proposed Monroe Bypass.

23. Clean Air Carolina has been active in its opposition to the proposed Toll Road. Clean Air Carolina, through its members and staff, has voiced opposition to the project at public meetings held by Defendants. Clean Air Carolina and its members have participated in the NEPA process and submitted comments on the project through counsel.

24. Plaintiff Yadkin Riverkeeper (“Riverkeeper”) is a not-for-profit corporation founded in 2008 in Winston Salem, North Carolina. The Riverkeeper has over 500 members, supporters, and affiliate constituents in North Carolina. It seeks to respect, protect, and improve the Yadkin Pee Dee River Basin through education, advocacy, and action. The Riverkeeper is a licensed member of the Waterkeeper Alliance, which connects and supports local Waterkeeper programs to provide a united voice and to champion clean water issues around the world. Waterkeeper Alliance seeks to protect fishable, swimmable, and drinkable waterways worldwide.

25. The proposed Monroe Bypass is located in the Yadkin-Pee Dee River Basin. The project will impact water quality in that river basin. The Riverkeeper has members who live in the vicinity of the proposed Toll Road and members from across the state who recreate in the vicinity of the proposed Toll Road. The Riverkeeper also has members who live in Mecklenburg and Union counties who are impacted by the effects of growth on water quality.

26. The Riverkeeper monitors and participates in highway and transportation planning in Mecklenburg and Union Counties, has participated in the administrative processes surrounding the planning of the Monroe Bypass in these counties and has members who participated in these processes, including the process leading to the approval of the ROD challenged in this case. The Riverkeeper seeks to inform and educate its members and the public concerning highway and transportation planning and the impacts of transportation decisions on the Yadkin Pee Dee River and advocates for sustainable development practices that will accommodate growth without compromising the long-term health of the River. These organizational interests are directly and irreparably injured by Defendants’ violations of law described in this complaint.

27. The Riverkeeper was a plaintiff in the previous successful challenge to the Monroe Bypass.

28. Plaintiff North Carolina Wildlife Federation (“NCWF”) is a not-for-profit corporation founded in 1945. NCWF has over 10,000 members, supporters and affiliate constituents in North Carolina. The NCWF’s mission is to educate, inspire, and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources, and to protect the environment in order to achieve a peaceful, equitable and sustainable future. Its primary goal is to raise awareness and involve people of all ages in conservation and protection of the environment. The NCWF advocates for protection and conservation of wildlife habitat, including protecting declining habitats and species on private and public land. The NCWF works to promote and protect areas for hunting, fishing, and wildlife observation for sportsmen and wildlife enthusiasts.

29. The NCWF has members who live in the vicinity of the proposed Monroe Bypass and members from across the state who visit, recreate, observe birds and other wildlife, photograph, and otherwise use and enjoy the waterways, public lands, wetlands, and other lands in the vicinity of the proposed Toll Road. The NCWF also has members who live in Mecklenburg and Union counties who are impacted by poor air quality.

30. The NCWF monitors and participates in highway and transportation planning in Mecklenburg and Union Counties, has participated in the administrative processes surrounding the planning of the Monroe Bypass in these counties, and has members who participated in these processes, including the process leading to the approval of the ROD challenged in this case.

31. The NCWF seeks to inform and educate its members and the public concerning highway and transportation planning and the impacts of transportation decisions on the human

environment, and advocates for transportation planning and policies that will have the least long-term impact on the human environment. These organizational interests are directly and irreparably injured by Defendants' violations of law described in this complaint.

32. The NCWF was a plaintiff in the previous successful challenge to the Monroe Bypass.

33. Clean Air Carolina, the Yadkin Riverkeeper, and the North Carolina Wildlife Federation are referred to herein collectively as the "Conservation Groups."

Defendants

34. Defendant North Carolina Department of Transportation ("NCDOT") is an agency of the State of North Carolina. NCDOT is responsible for complying with NEPA before proceeding with transportation projects that involve major federal action, and had the primary responsibility for preparing the arbitrary and capricious NEPA analysis challenged in this action. Defendant NCDOT is relying on the EIS and ROD to pursue permits for this project.

35. Defendant Anthony J. Tata is the Secretary of Defendant NCDOT. Defendant Tata had the final authority for the State's preparation of the arbitrary and capricious environmental analysis challenged in this action and for the State's decision to proceed with the challenged project despite this arbitrary and capricious analysis. Defendant Tata is sued in his official capacity.

36. Defendant Federal Highway Administration ("FHWA") is the lead federal agency within the United States Department of Transportation. Defendant FHWA was responsible for overseeing the preparation of the arbitrary and capricious environmental analysis challenged in this action and for ensuring that this analysis complied with NEPA.

37. Defendant John F. Sullivan is the North Carolina Division Administrator for Defendant FHWA. Defendant Sullivan had the final authority for FHWA's preparation and approval of the arbitrary and capricious EIS and ROD challenged in this action. Defendant Sullivan is sued in his official capacity.

LEGAL BACKGROUND

38. NEPA requires agencies to prepare or adopt an EIS before undertaking a major federal action that will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C).

39. The EIS serves three primary functions. First, it ensures that an agency takes a hard look at the direct, indirect, and cumulative environmental impacts of a proposed project. Second, it guarantees that the agency considers a range of reasonable alternatives to accomplish the underlying goals of the proposed project and considers options that may have fewer adverse impacts on the environment before deciding whether to undertake the project in the form proposed. Finally, the EIS presents detailed information about a proposed project, its impacts, and reasonable alternatives to the public and other agencies, so that they may participate in the decision-making process.

40. To implement the requirements of NEPA, the Council on Environmental Quality ("CEQ") has promulgated regulations applicable to all federal agencies. See 40 C.F.R. §§ 1500-1508 ("the CEQ regulations").

41. FHWA has also promulgated supplemental regulations and procedures for complying with NEPA. See 23 C.F.R. § 771.101.

42. NEPA requires that an EIS contain a statement of purpose and need for the proposed action which "shall briefly specify the underlying purpose and need to which the

agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13.

43. NEPA requires an agency to include in an EIS a “detailed statement” on “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). In this statement, the agency must rigorously explore and objectively evaluate all reasonable alternatives that could achieve the underlying project purpose. 40 C.F.R. § 1502.14(a). This alternatives analysis is “the heart of the environmental impact statement,” and should “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public.” 40 C.F.R. § 1502.14. Only those alternatives that are deemed to be unreasonable can be eliminated from the study. 40 C.F.R. § 1502.14(a).

44. NEPA further requires that every EIS be prepared with objective good faith and fully and fairly discuss, among other things, the adverse environmental effects of the proposed action and the alternatives to the proposed action which may avoid or minimize these adverse effects. 42 U.S.C. § 4332(2)(C), (E).

45. NEPA requires that any agency preparing an EIS “shall insure the professional integrity, including scientific integrity, of the discussions and analyses” in the EIS. 40 C.F.R. § 1502.24.

46. NEPA also requires that, if in the course of evaluating reasonably foreseeable significant adverse effects in an EIS there is “incomplete or unavailable information,” the agency preparing the EIS “shall always make clear that such information is lacking.” 40 C.F.R. § 1502.22. “If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it

are not exorbitant, the agency shall include the information in the environmental impact statement.” 40 C.F.R. § 1502.22(a).

47. NEPA requires that “[t]o the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies” required by other environmental review laws and executive orders. 40 C.F.R. § 1502.25.

48. The “effects” that must be discussed in the EIS include, among other considerations, the direct environmental impacts of the proposed action, the indirect effects of the proposed action, and the cumulative impacts of the proposed action. 40 C.F.R. § 1502.16(a) – (h); 40 C.F.R. § 1508.7.

49. The NEPA regulations define “indirect effects” as effects “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Further, indirect effects may include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8(b).

50. The NEPA regulations define “cumulative impact” as the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

51. The purpose of the NEPA documents is to “serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already

made.” 40 C.F.R. § 1502.2(g). To this end, NEPA requires that information be made available to “public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b).

52. The CEQ regulations provide that an agency preparing a Final EIS “shall assess and consider comments” on the Draft EIS and “shall respond” to those comments in one of several specified ways, including making requested modifications, corrections and supplementations. 40 C.F.R. § 1503.4(a). If the agency decides the comments do not warrant further agency response, it must so declare, “citing the sources, authorities or reasons which support the agency’s position.” 40 C.F.R. § 1503.4(a)(5).

53. As such, NEPA prohibits an agency from “commit[ting] resources prejudicing selection of alternatives before making a final decision.” 40 C.F.R. § 1502.2(f).

54. Federal regulations provide that an agency may not issue a combined FEIS and ROD where “there are significant new circumstances or information” that bear on the proposed action. 42 U.S.C. § 4332a(b).

55. Federal regulations require that an agency “shall” prepare a supplement to an EIS where “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” arise. 40 C.F.R. § 1502.9(c)(1).

FACTS

Project Setting and History

56. The proposed Toll Road has assumed various forms over the years, and has been referred to as the “Monroe Bypass,” the “Monroe Connector/Bypass,” and STIP numbers R-3329 and R-2559.

57. The Toll Road was originally conceived as two separate projects: the Monroe Bypass and the Monroe Connector. Defendant NCDOT began the separate NEPA processes for

the Bypass and Connector projects in the late 1990s, and issued a draft EIS (“DEIS”) for the Monroe Connector in 2003.

58. After significant concerns were raised by federal and state agencies and conservation groups, including NCWF, Defendant NCDOT rescinded the 2003 Monroe Connector DEIS, explaining that it would pursue a new project with the North Carolina Turnpike Authority (“NCTA”) that would combine the Monroe Bypass and Connector projects as a toll facility. 71 Fed. Reg. 19, 4958 (Jan. 30, 2006).

59. In 2007, the consulting company Stantec conducted a study of U.S. 74 in Union County at the behest of Defendant NCDOT. The Stantec study concluded that roughly \$3.1 million in short-term improvements could improve mobility to a higher Level of Service along the U.S. 74 study corridor. Furthermore, the study predicted that \$10.2 million in long-term improvements — such as conversion to a superstreet-type facility, implementation and optimization of closed-loop traffic signal systems, and addition of lanes to intersections — could result in an acceptable Level of Service by the year 2015 along the whole of the U.S. 74 Corridor in Union County, with the sole exception of the interchange at Rocky River Road.

60. Despite the results of the Stantec study predicting adequate service by 2015 in the study area by upgrading existing U.S. 74, the Defendant NCDOT moved forward with plans for combining the Bypass and the Connector into one limited-access toll highway.

61. In March 2009, Defendants published a DEIS for the combined highway project.

62. The Conservation Groups submitted comments on the DEIS on June 15, 2009, detailing how Defendant NCDOT failed to fully analyze project impacts or fully evaluate viable alternatives to building the proposed Toll Road, specifically including upgrades to the congested existing U.S. 74 Corridor.

63. On May 25, 2010, Defendants issued a final EIS (“FEIS”) for the project.

64. The Conservation Groups submitted comments on the FEIS on June 25, 2010, outlining concerns that the FEIS failed to cure almost all of the substantial omissions and misstatements of the DEIS, including those pointed out by the agencies, citizens, and interested groups in public comment. The groups also commented on the inadequacy of the indirect impacts analysis.

65. On August 22, 2010, Defendant FHWA completed the NEPA process by issuing the ROD approving the FEIS.

66. The Conservation Groups filed a Complaint for Declaratory and Injunctive Relief challenging the NEPA analysis in the United States District Court for the Eastern District of North Carolina on November 2, 2010.

67. Following an adverse decision in the lower court, the Conservation Groups filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on October 31, 2011.

68. The Fourth Circuit opened the case on appeal on November 4, 2011.

69. Despite the pending appeal, Defendants signed a contract with the Monroe Bypass Constructors (“MBC”), a three-member joint venture, to construct the Monroe Bypass on November 21, 2011.

70. The Fourth Circuit reversed the lower court’s decision, ruling unanimously in favor of the Conservation Groups on May 3, 2012.

71. The Fourth Circuit concluded that Defendants had compared “building the road” with “building the road” to justify the project and downplay its impacts, and then hid that fact from the public and various agencies.

72. The Fourth Circuit chastised the agencies for their misrepresentations and ordered them to reevaluate the project. NC Wildlife Fed'n, 677 F.3d at 602-05.

73. Defendant NCDOT petitioned the court for reconsideration and en banc review.

74. This petition was denied.

75. On June 8, 2012, the North Carolina Division of Water Quality withdrew its water quality certification for the proposed Toll Road pursuant to Section 401 of the Clean Water Act.

76. FHWA rescinded the ROD for the Monroe Bypass on July 17, 2012.

77. On April 17, 2013, the United States Army Corps of Engineers (“Corps”) revoked the proposed Toll Road’s permit pursuant to Section 404 of the Clean Water Act.

78. Since the Fourth Circuit’s ruling invalidating the project’s EIS, Defendant NCDOT has paid over \$46.1 million to the MBC.

79. One of the members of the MBC joint venture, Boggs Paving, was indicted for federal fraud involving highway projects on July 24, 2013 but continues to receive payment from NCDOT.

80. Over this same period, five Union County municipalities have passed resolutions calling for further study of alternatives to the proposed Toll Road.

81. Cost estimates for the proposed Toll Road have varied over time, but the latest estimate presented to the public in the ROD is approximately \$838 million.

82. Defendant NCDOT has estimated that only a quarter of this cost will be covered by toll revenue; the remainder is anticipated to be covered by an annual appropriation of \$24 million per year for up to 40 years from the State of North Carolina, so-called “gap funding.” N.C. GEN. STAT. § 136-176(b2).

83. The proposed Toll Road is the only unbuilt major transportation project to still receive statutorily earmarked funding rather than compete under North Carolina's new data-driven transportation project prioritization process, known as the Strategic Transportation Investments ("STI") program. The new prioritization process seeks to eliminate politics from project selection by funding projects based on demonstrated merit.

Administrative Background

84. Subsequent to Defendant FHWA's withdrawal of the ROD on July 18, 2012, Defendant NCDOT reinitiated the NEPA process.

85. On November 30, 2012, the Conservation Groups submitted comments suggesting issues that should be examined in the new NEPA review.

86. In July 2013, the Conservation Groups hired the engineering firm O'Connell & Lawrence, Inc., to issue a report entitled A Closer Look at US 74: Challenges and Opportunities.

87. The O'Connell & Lawrence report provided a detailed evaluation of improvements to the U.S. 74 Corridor recommended in the Stantec study. The experts recommended ways the Defendants should update the Stantec study to fully analyze improvements to the Corridor as viable long-term alternatives to the proposed Toll Road.

88. The O'Connell & Lawrence report also identified significant holes in Defendants' traffic forecasts studies, such as failure to examine the makeup of drivers in the U.S. 74 corridor, perform a proper origin-destination study, or perform a separate commercial driver origin-destination study.

89. Defendants published a DSFEIS for the proposed Toll Road on November 8, 2013.

90. Defendants hosted three public hearings on the DSFEIS in Union County in December 2013.

91. At these hearings, the Conservation Groups and many others spoke in opposition to the proposed Toll Road, expressing concern about Defendants' consideration of alternatives, impacts analysis, and forthrightness with the public, among other issues.

92. Of those who spoke at these hearings in favor of the proposed Toll Road, many articulated reasons for supporting the project that demonstrated a fundamental misunderstanding of the project's purpose and expected impacts. For example, many speakers articulated misguided beliefs that the proposed project would decrease current congestion, remove a large percentage of trucks from existing U.S. 74, and result in significant economic growth throughout Union County.

93. The Conservation Groups submitted comments on the DSFEIS on January 6, 2014, detailing that the document was fundamentally inconsistent with NEPA due to its failure to examine feasible alternatives and environmental impacts adequately.

94. The Conservation Groups also submitted a report from transportation expert Dr. David Hartgen analyzing primarily the traffic forecasts used in the DSFEIS.

95. In his report, Dr. Hartgen detailed significant flaws in Defendants' analysis, including the fact that the forecasts fail to account for over a decade of data regarding traffic and growth in the project study area. Dr. Hartgen ultimately concluded that Defendants' analysis was inadequate to support decisionmaking.

96. Numerous members of the public and local groups also submitted their concerns to Defendants. The public submitted many comments opposing the proposed Toll Road. Of

those who submitted comments in favor of the proposed Toll Road, many were based on fundamental misunderstandings of the project's intent and expected impacts.

97. Federal and State resource agencies, including the United States Environmental Protection Agency ("EPA") the United States Fish and Wildlife Service ("USFWS"), the Corps, and the North Carolina Department of Environment and Natural Resources ("NCDENR"), submitted comments on the project. Several, such as EPA and USFWS, raised significant concerns about the Defendants' study of the proposed Toll Road's impacts on air quality, water quality, and species soon to be listed as federally endangered.

98. On April 8, 2014, after learning additional information about the proposed Toll Road, the Conservation Groups submitted additional comments to Defendants and asked that a Supplemental Draft Supplemental EIS ("SDSEIS") be prepared.

99. On April 10, 2014, the Conservation Groups submitted a brief addendum to their April 8 request for a SDSEIS.

100. Despite these requests for supplementation, and despite the substantial controversy surrounding the project, Defendants signed a combined FSFEIS and ROD for the project on May 15, 2014.

101. The combined FSFEIS and ROD was made available to the public two weeks later on May 29, 2014.

102. On June 9, 2014, after review of the combined FSFEIS and ROD, the Conservation Groups submitted additional comments requesting Defendants issue a Supplemental EIS providing for transparent public review of significant new information uncovered since the issuance of the DSFEIS as well as significant new information addressed in the FSFEIS following the close of public comment.

The Environmental Impact Statement
Alternatives Analysis

103. In August 2007, Defendants published a Draft Statement of Purpose and Need for the proposed Toll Road, requiring that the project allow for “high-speed” travel, stretch from I-485 to Marshville, and maintain access to properties along existing U.S. 74.

104. The “high-speed” element, which requires a specific speed limit of at least 50 mph, is based on Defendant NCDOT’s Strategic Highway Corridor (“SHC”) Vision Plan, a planning product that was not subject to NEPA’s public participation requirements.

105. Based on this Statement of Purpose and Need, Defendants conducted the Qualitative First Screening, Qualitative Second Screening, and Quantitative Third Screening of alternatives, as detailed in the November 2007 Draft Alternatives Development and Analysis Report.

106. In this analysis, Defendants rejected several alternatives, including the Mass Transit/Multimodal Alternative concept, the Improve Existing U.S. 74 (Standard Arterial Widening) Alternative concept, the Improve Existing U.S. 74 (Superstreet) Alternative concept, the Transportation System Management Alternative concept, the Transportation Demand Management Alternative concept, and several alternatives involving upgrading existing roadways to a controlled-access toll facility.

107. At the end of this analysis, Defendants retained sixteen similar new-alignment alternatives for further study.

108. In February 2008, Defendants published a Final Statement of Purpose and Need for the project, retaining the requirements that the project allow for “high-speed” travel, stretch from I-485 to Marshville, and maintain access to properties along existing U.S. 74.

109. In April 2008, Defendants published a Final Alternatives Development and

Analysis Report, again recommending the same sixteen new-alignment alternatives as Detailed Study Alternatives (“DSAs”) for further study.

110. As required by NEPA, Defendants also retained a “No Build” Alternative to provide a baseline for comparison with the DSAs.

111. Defendants did not perform a new analysis for the Final Alternatives Development and Analysis Report, and instead relied on the evaluation documented in their 2007 draft report.

112. In December 2010, in response to questions from the Corps on the Section 404 jurisdictional resource individual permit application, Defendant NCDOT prepared a 2035 comparative planning level analysis of four alternative corridor scenarios to determine if widening U.S. 74 would provide acceptable corridor Levels of Service in the design year 2035.

113. These analyses were based on forecasts which were developed in 2007 and 2008 based on data available at that time: 2005 socio-economic data and a 2006 version of the Metrolina Regional Travel Demand Model.

114. Both “Build” and “No-Build” forecasts were based on the same set of underlying socio-economic data.

115. The traffic forecasts did not analyze patterns of travel in the Corridor, the percentage of traffic that was local versus passing through, or the percentage of truck traffic.

116. Based on these outdated and inadequate traffic forecasts, Defendant NCDOT again rejected that the alternatives improving existing U.S. 74, concluding none would provide an adequate Level of Service on U.S. 74 by 2035.

117. Despite being ordered by the Court to revisit their NEPA review, Defendants have not reevaluated alternatives since their initial analyses.

118. Since Defendants performed their initial analyses, the project study area has undergone considerable changes and Defendants early projections of rapid growth and increased congestion have not come to pass.

119. Rather than the projected rapid increase, traffic volumes in the Corridor have remained essentially flat for more than the past decade, and have in fact slightly declined throughout the Corridor since 2005, and declined at the project's eastern terminus since 2000.

120. Travel speeds along the U.S. 74 Corridor have increased by 10-15 mph in past seven years.

121. The U.S. 74 Corridor is currently operating at an average speed of 44 mph and at times average speeds have exceeded 50 mph.

122. Recent traffic data demonstrate that congestion is not prevalent throughout the entire study area, but rather is limited to a few key hotspots on U.S. 74.

123. Defendants have implemented a number of improvements to the Corridor to ease congestion. More improvements are scheduled and funded for the near future.

124. Defendant NCDOT has optimized signal timing for at least 23 intersections along the length of U.S. 74 through the study area.

125. Defendant NCDOT has added additional turn-lanes and turn-lane storage for several U.S. 74 intersections such as at Unionville-Indian Trail Road, Faith Church Road/Harris Teeter Distribution Center, Wesley Chapel-Stouts Road/Sardis Church Road, Chamber Drive, Rocky River Road, Poplin Place/Wellness Boulevard, Hanover Drive, and Dickerson Boulevard.

126. Defendant NCDOT has reconfigured lane assignments at U.S. 74's intersections with Stallings Road, Unionville-Indian Trail Road, and Poplin Place/Wellness Boulevard.

127. Defendant NCDOT has implemented signal phasing changes on U.S. 74 at Main Street in Wingate.

128. Defendant NCDOT has planned and funded five future “superstreet” upgrades for some of the more congested portions of existing U.S. 74.

129. Defendant NCDOT plans to implement several foreseeable improvements to the parallel road network, which are likely to shift more traffic off of existing U.S. 74 in some of the most congested portions of U.S. 74.

130. At the same time, socio-economic growth in Union County has slowed significantly, particularly in the Toll Road study area.

131. Recent socio-economic projections show considerably lower growth rates than forecast in 2005, and indicate that the growth that is expected will occur will concentrate close to Mecklenburg County, rather than in the eastern part of Union County that would be served by the proposed Toll Road.

132. Growth in the study area is now expected to not even reach levels of growth previously predicted for 2030 — upon which the forecasts for the proposed Toll Road are based — by 2040, a full decade later.

133. Defendants have stated that they could have updated the model they used for creating their traffic forecasts with this new socio-economic data, but chose not to.

134. There is no evidence presented in Defendants’ review of the proposed Toll Road as to why traffic volumes and socio-economic growth would be expected to increase to the dramatic levels previously forecast.

135. Defendants failed to consider, based on up-to-date data and forecasts, how a combination of alternatives might work together to improve mobility in the Corridor.

136. Despite these new trends and data, Defendants have not revisited their analysis of alternatives with up-to-date information.

Indirect Impacts

137. After publication of the initial EIS for the proposed Toll Road in 2010, the Conservation Groups questioned Defendants' conclusion that minimal growth will result from the highway, despite statements at all levels of state and local government, including from Defendant NCDOT, to the contrary.

138. The Conservation Groups explained to the Court that Defendants had compared "building the road" to "building the road," and thus failed to present a true analysis of indirect impacts to the public.

139. The Fourth Circuit agreed and sent the NEPA analysis back to Defendants to make a full disclosure of their analysis and underlying methodologies.

140. Defendants have now clarified the methodologies supporting their finding of negligible growth; however, the explanation demonstrates that Defendants' impacts analysis, which purports to analyze the impact of transportation infrastructure on growth and development, is based on data that entirely ignores the impact of such infrastructure.

141. To analyze indirect impacts, Defendants created a "Build" scenario and a "No-Build" scenario and then compared the two.

142. Defendants' "No-Build" analysis is based on an assumption that fully disregards the constraining impact a heavily congested U.S. 74 might have on future growth.

143. Defendants' new NEPA documents explain in detail how transportation infrastructure was *not* factored in at each step of the impacts analysis. For example, the document explains that the "top down" growth projections were not sensitive to factors such as

large-scale transportation projects.

144. As such, Defendants' analysis assumed that growth will continue to carry on unabated, regardless of how congested the infrastructure in Union County would get in the absence of improvements or construction of the proposed Toll Road.

145. Defendants pursue this flawed assumption, despite their own earlier assertions that by 2035, U.S. 74 will become so congested in the absence of the proposed Toll Road that traffic speeds in the Corridor would be as low as 17 mph, and travel times through the Corridor would be as high as 70 minutes.

146. Defendants' impacts analysis is thus based on a faulty assumption, dramatically understating the level of growth attributable to the increased highway capacity offered by construction of the proposed Toll Road.

147. Defendants' impacts analysis ignores statements elsewhere in the DSFEIS and public arena that the impetus for building the proposed Toll Road was the expectation that, without significant transportation investments, congestion in the Corridor will become a major barrier limiting access from Union County to the major employment centers in Mecklenburg County.

148. Defendants' impacts analysis relies on outdated, inaccurate socio-economic data used in their initial analysis of the project, which were developed before the recession, when Union County was the fastest growing county in the state.

149. Since this time, growth in the Metrolina region has slowed significantly, and Union County's growth has slowed dramatically, shifting more toward areas of Union County not served by the proposed Toll Road.

150. Defendants refused to update these socio-economic forecasts despite major changes in growth trends, and despite acknowledging that it would be more accurate to do so.

151. Defendants' impacts analysis fails to fully consider the location of new growth or how growth may be redistributed.

152. Defendants' impacts analysis fails to consider how a shift in growth away from the Charlotte metropolitan area toward more undeveloped portions of Union and Anson Counties may impact air and water quality.

153. Defendants' impacts analysis fails to reconcile its projections of negligible growth with the widespread public belief that the project will drive dramatic new economic development in Union County and across the state.

Cumulative Impacts

154. Defendants' NEPA analysis includes almost no discussion of cumulative impacts other than vague generalizations lumped into the Indirect and Cumulative Effects analysis.

155. Defendants do not adequately address the cumulative impacts of the foreseeable planned development of a system of High Occupancy Toll ("HOT") lanes in the Charlotte metropolitan region, though the system would connect to the proposed Toll Road by including sections of I-485 and a stretch of U.S. 74/Independence Blvd.

156. Defendants do not adequately address the cumulative impacts of other planned and reasonably foreseeable area transportation projects.

157. Defendants do not address the proposed Toll Road's cumulative impacts in association with the development of a South Economic Development Corridor along U.S. 74 running from I-26 in Polk County to Wilmington, which is intended to improve commerce between western North Carolina, the Charlotte metropolitan area, Charlotte-Douglas

International Airport, and the port of Wilmington, and would be an important east-west corridor across the state.

158. Defendants do not address the proposed Toll Road's cumulative impacts in association with the reasonably foreseeable planned development at the Legacy Park site, a proposed business park which would connect with the proposed Toll Road.

159. Outside of the NEPA process, Defendant NCDOT has continued to plan as if a large-scale development at the Legacy Park site is foreseeable.

Direct Impacts

160. Defendants' NEPA analysis included only a cursory review of a number of direct environmental impacts.

161. Defendants do not address the proposed Toll Road's full impacts on air quality. Because Defendants have assumed Union County will continue to experience dramatic growth without any transportation improvements along the U.S. 74 Corridor, Defendants have failed to consider the higher emissions associated with the increased traffic likely to result from construction of the proposed Toll Road and its associated development.

162. Defendants' NEPA analysis does not discuss the impacts of redistribution of growth that will be occasioned by the proposed Toll Road.

163. Defendants do not address the proposed Toll Road's full impact on water quality.

164. Defendants do not address the proposed Toll Road's full impact on endangered species.

165. Because Defendants have failed to properly account for the growth likely to be occasioned by construction of the proposed Toll Road, they have failed to adequately analyze the

likely increase in impervious surfaces and associated impacts to water quality and endangered mussels.

166. Defendants' NEPA analysis does not address the impacts of redistribution of growth on water quality and endangered species.

167. Growth shifting east will necessarily result in longer automobile trips in the Corridor, with associated increases to vehicle runoff and water pollution.

168. Defendants' water quality analysis is incomplete. The full project has not yet actually been designed, as final design is yet to be completed for many road sections by the design-build team. Even more, the design-build team is permitted to redesign even those portions of roadway that Defendants have presented to resource agencies as being fully designed. Important details about bridge crossings, dredge and fill locations, run-off, and stormwater management are all currently unknown.

169. Defendants have failed to detail a mitigation plan for the project. While it is noted that mitigation credits have been purchased from North Carolina's Ecosystem Enhancement Program, there is no explanation as to where the mitigation is located or of what it will consist.

170. The project's mitigation needs have not been revisited since 2011, though new socio-economic projections demonstrate that project impacts are likely to have changed significantly since this time.

171. Defendants failed to study the project's potential impacts on the northern long-eared bat (*Myotis septentrionalis*) and the Savannah lilliput (*Toxolasma pullus*), nor have they incorporated species-specific conservation measures into project plans.

172. USFWS has made clear that both species currently await impending listing as endangered species under the Endangered Species Act and are likely to be put at further risk by construction of the proposed Toll Road.

173. Defendants have failed to disclose the true cost of the project.

174. Project cost estimates in the NEPA documents ignore the fact that significant cost increases are expected from the project contractor and the fact that toll revenue is expected to be dramatically reduced from initial expectations.

Public Engagement

175. Defendants have actively cultivated widespread misapprehension regarding the purpose and likely impacts of constructing the proposed Toll Road.

176. Because of NCDOT's misinformation, many local residents, community leaders and politicians statewide believe the proposed Toll Road is intended and expected to improve safety by taking a significant percentage of truck traffic off of U.S. 74.

177. Because of NCDOT's misinformation, many believe that the bypass is intended and expected to reduce current rates of congestion on U.S. 74.

178. Because of NCDOT's misinformation, others believe the project is intended and expected to bring significant growth to Union County, and even to neighboring Anson County.

179. In March and April of 2013, at least eight communities and organizations — including the Mecklenburg-Union Metropolitan Planning Organization (“MUMPO”), the City of Monroe, the Union County Board of Commissioners, the Indian Trail Town Council, the Town of Stallings, the Town of Marshville, and the Town of Waxhaw — all passed versions of a resolution stating support for construction of the proposed Toll Road in part because they believe

the project will stimulate economic and commercial development and address current congestion levels.

180. Defendant NCDOT staff and consultants were present at some of the meetings at which these resolutions were passed and did nothing to clarify or address deviations from their own analysis.

181. Defendant NCDOT has refused to correct these misapprehensions even when called upon to do so.

182. The Conservation Groups sent a letter to Defendant Secretary Tata on March 6, 2013, calling on Defendant NCDOT to address these resolutions. The letter included an annotated copy of the resolution demonstrating the many ways in which it was inconsistent with Defendants' own data and analysis. The letter urged Defendant NCDOT to act swiftly to clarify the proposed Toll Road's true purpose and expected impacts so that the public and decisionmakers could work with accurate information.

183. The Conservation Groups received no response to this letter.

184. Defendants did nothing to publically address these resolutions until eight months later in November 2013, when Defendants addressed the Conservation Groups' letter in an appendix to the DSFEIS.

185. Defendant NCDOT and its agents continue to make misleading statements regarding the purpose and expected impact of the Bypass.

186. Defendant Secretary Tata has publically stated that the Bypass will bring dramatic growth to Union County and that it will improve current congestion on U.S. 74, such as in a speech at a meeting of the North Carolina Chamber of Commerce's inaugural Transportation and Infrastructure Summit in April 2013.

187. Edward Curran, Chairman of the North Carolina Board of Transportation, has stated in addresses to both the MUMPO and the Board of Transportation that the Monroe Bypass is necessary to address high unemployment rates in the eight counties through which U.S. 74 passes as it runs from Mecklenburg County to the coast.

188. Another Board of Transportation member, John Collet, published an opinion piece in the Charlotte newspaper stating that the Bypass would create jobs and relieve congestion.

189. Defendant NCDOT colluded with, and even initially paid, its contractor for the Bypass, MBC, to create bogus local support for the project focused on delivering the message that the project will bring dramatic growth and development to Union County and decrease current congestion levels, a message which runs counter to Defendants' analysis of the proposed Toll Road within the NEPA process.

190. Defendants have completely ignored the many local stakeholders asking for alternative solutions.

191. Prior to the issuance of the DSFEIS, four Union County towns passed resolutions calling for alternatives to the proposed Toll Road, and many other local elected officials voiced similar concerns. Despite this widespread call for alternatives, Defendants failed to even acknowledge the resolutions in the DSFEIS, though they have included similar resolutions in past drafts of the EIS and the resolutions were all timely sent to Defendant NCDOT.

192. Defendants removed key facts that would be pertinent to decision-makers from the final version of the DSFEIS. For example, initial drafts of the DSFEIS clearly stated the expected minimal travel time benefits from the proposed Toll Road. Such statements were

eliminated from the final version after being highlighted by the Conservation Groups at public meetings.

193. Defendants failed to disclose the true cost of the project while at the same time overstating the likely benefits from the selected alternative.

194. While the FSFEIS presents \$838 million as the expected cost of the project, internal documents from Defendant NCDOT demonstrate that the true cost of the project is likely to be much higher, acknowledging that the project cost will be adjusted up “by some unknown amount” as part of a contract escalation fee to be negotiated by Defendant NCDOT and the project contractor MBC.

195. Outside of the NEPA process, Defendant NCDOT has continued to publicly represent that the cost to build the proposed Toll Road will be much lower than the \$838 million cost presented in the May 2014 FSFEIS.

196. For example, the project cost listed in the North Carolina Turnpike Authority’s Annual Report presented to the North Carolina Joint Legislative Transportation Oversight Committee in early April 2014 listed the project cost as between \$650 and \$740 million.

197. Defendant NCDOT has also regularly asserted that there is no need to update the State Transportation Implementation Plan’s listed cost for the proposed Toll Road construction, \$789 million, though it is significantly below the cost listed in the DSFEIS.

Pre-determined Decisionmaking

198. Defendant NCDOT regularly made public comments during the NEPA process indicating the proposed Toll Road was a foreordained reality before any ROD had been signed.

199. While Defendants were undergoing the court-ordered reevaluation of their NEPA review, they continued to make “readiness” payments to the contractor MBC to ensure MBC stayed poised for the issuance of an unlimited notice to proceed.

200. While Defendants were undergoing the court-ordered reevaluation of their NEPA review, they engaged in protracted negotiations regarding the details of an escalation price with MBC.

201. While Defendants were undergoing the court-ordered reevaluation of their NEPA review, Defendant NCDOT paid at least \$1.7 million for aggregate base course (“ABC”), a building material for which Defendant NCDOT has admitted it has no use other than to build the proposed Toll Road, and engaged in negotiations with MBC regarding storage and hauling of the ABC to a prepared site adjacent to the proposed Toll Road right-of-way.

202. While Defendants were undergoing the court-ordered reevaluation of their NEPA review, local leaders were told by Defendants’ staff that the Defendants would move forward with construction of the proposed Toll Road and that debate over whether the project should be constructed was over.

203. While Defendants were undergoing the court-ordered reevaluation of their NEPA review, Defendant NCDOT has continued to assure citizens that the agency will build the proposed Toll Road, responding to citizen emails to convey the agency’s commitment to deliver the project.

Combined FSFEIS and ROD

204. Defendants issued a FSFEIS in combination with the ROD, providing no opportunity for public or agency comment on the information contained therein.

205. The FSFEIS contained significant new information relevant to environmental concerns, bearing in particular on the proposed Toll Road's impacts and Defendants' alternatives analysis.

206. Defendant NCDOT withheld its public evaluation of the new CRTPO socio-economic projections, discussed at ¶s 148-49 above, until publication of the FSFEIS, well after the close of public comment.

207. The new projections document the significant changes in observed and projected growth patterns in the proposed Toll Road study area.

208. CRTPO's data show the previous high growth in Union County has slowed significantly since Defendants' initial study.

209. In its review of these new data, Defendants recognized that the forecasts of household and employment are *substantially* lower in Year 2030, and that the household growth is expected to not even reach the levels previously predicted by 2040, a full decade later than anticipated in the projections underlying the proposed Toll Road NEPA analysis.

210. The data demonstrate that what growth Union County is still projected to undergo will concentrate in western and central Union County, rather than in the areas of eastern Union County, such as Marshville, that would be most directly served by the proposed Toll Road.

211. This newly projected shift in the expected location and extent of Union County's growth conflicts dramatically with what NCDOT has presented previously and set out for public comment.

212. This newly projected shift in the expected location and extent of Union County's growth conflicts dramatically with the basis for much of the Bypass's local and statewide support. Many Union County residents and statewide officials have long supported the Bypass

because they believe the project will spur economic development in more rural, more impoverished eastern Union County.

213. The public and resource agencies have not had the opportunity to comment on Defendants' cursory analysis of these data.

214. The public and resource agencies have not been given any information on how these changes in project impacts will affect mitigation measures associated with the project.

215. The public and resource agencies have not had the opportunity to comment on how these new data affect Defendants' alternatives analysis.

216. Defendants included their response to transportation expert Dr. David Hartgen's traffic forecast critique in the FSFEIS, after the close of public comment.

217. In this response, Defendants attempted to clarify previously unexplained methodologies and assumptions.

218. The response provided new analyses, charts, and figures regarding important factors such as traffic growth rates, road capacity, comparisons to national vehicle miles traveled ("VMT") rates, correlations between growth in traffic and population growth rates, land use forecasting, and external traffic.

219. The public, resource agencies, and Dr. Hartgen himself were not provided with the opportunity to comment on this response before Defendants reached a final decision.

Failure to Supplement

220. Since Defendants' close of public comment on the proposed Toll Road, significant new information has come to light demonstrating Defendants have not fully analyzed project alternatives or their impacts.

221. As part of the FSFEIS/ROD, Defendants included a response to transportation expert Dr. David Hartgen's critique of the Defendants traffic forecasts and NEPA analysis.

222. Defendants' response included attempts to clarify some previously unexplained assumptions and methodologies, such as model calibration, which now demonstrate additional significant underlying flaws in Defendants' analysis.

223. On June 9, 2014, Dr. Hartgen responded to Defendants' response, detailing his finding that Defendants have failed to resolve the substantial flaws in the traffic forecasts he identified in his December 2013 critique.

224. Defendants have not publically addressed Dr. Hartgen's most recent critique nor responded in any way to the significant new information this expert provided.

225. Further, significant new information demonstrates that Defendants have continued to make misleading statements regarding the proposed Toll Road's purpose and expected impacts since issuing the DSFEIS.

226. Significant new information also demonstrates Defendants have failed to address pervasive misunderstanding of the proposed Toll Road's purpose and expected impacts in the FSFEIS.

227. Significant new information demonstrates that Defendants have failed to study the project's potential impacts on the northern long-eared bat (*Myotis septentrionalis*) and the Savannah lilliput (*Toxolasma pullus*), species proposed for listing as federally endangered species within the next year, despite USFWS's advice.

228. Significant new information regarding funding of reasonably foreseeable planned area transportation projects and statewide planning efforts demonstrates Defendants' cumulative impacts analysis is incomplete.

229. Defendant NCDOT has recently stated that the planned system of High Occupancy Toll (“HOT”) lanes in the Charlotte metropolitan region is fully funded for construction within the next ten years. Defendant NCDOT studied the cumulative impacts of the I-485 HOT lanes project in 2010, but has not has not reevaluated the significant changes that have occurred in the scale of these projects since that 2010 analysis.

230. In 2012, the project was expanded from a 5-mile widening of I-485 from N.C. 16 to U.S. 74 to its current form, a more than 16-mile widening project to connect major route I-77 with U.S. 74 right before the western end of the Monroe Bypass.

231. Defendants have never analyzed the full extent of the cumulative impacts resulting from the reasonably foreseeable U.S. 74/Independence Boulevard upgrades immediately north of the proposed Toll Road. Defendant NCDOT studied the cumulative impacts of some portions of this project in its 2010 analysis, but has not reevaluated the significant changes that have occurred in the scale of these projects since that 2010 analysis.

232. Defendants’ 2010 cumulative impacts analysis considered widening Independence Boulevard from only Conference Drive to Village Lake, and then from Krefeld Drive to N.C. 51; however, this project was expanded through a series of Transportation Improvement Plan amendments since 2010, such that the project is now proposed for construction on a much larger scale.

233. Significant new information demonstrates Defendant NCDOT has recently implemented signal phasing changes on U.S. 74 at Main Street in Wingate, which is expected to reduce accidents and prevent traffic slow-downs associated with even the most minor accidents.

234. Significant new information demonstrates that a superstreet intersection upgrade at the U.S. 74/Rocky River Road intersection, one of the most congested places on existing U.S. 74, is fully funded for construction within the next ten years.

235. Significant new information demonstrates that a project to widen approximately three miles of U.S. 74 to six lanes through the length of Monroe, one of the most congested areas in the study area, is very likely to be constructed within the next ten years.

236. Significant new information demonstrates Defendant NCDOT has reasonably foreseeable plans for parallel network improvements, such as plans to extend Secret Avenue from Walkup Avenue to Olive Branch Road, with an interchange for the Bypass.

237. Significant new information demonstrates Defendant NCDOT has reasonably foreseeable plans to widen Rocky River Road from Old Charlotte Highway to U.S. 74, strengthening the connection and improving capacity between two major Union County roadways.

238. Significant new information demonstrates Defendant NCDOT has reasonably foreseeable plans to widen SR-1009, which parallels U.S. 74, from Rocky River Road to Wesley Chapel-Stouts Road, as well as from Seymour Street to N.C. 200.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF:

Defendants' Alternatives Analysis Was Arbitrary and Capricious and Deficient in Scope and Analysis

239. The Conservation Groups incorporate the allegations of paragraphs 1-238 as if set forth in full.

240. NEPA requires that an EIS contain a statement of purpose and need for the proposed action that "shall briefly specify the underlying purpose and need to which the agency

is responding in proposing the alternatives including their proposed action.” 40 C.F.R. § 1502.13.

241. NEPA requires an agency to include in an EIS a “detailed statement” of “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). In this statement, the agency must rigorously explore and objectively evaluate all reasonable alternatives that could achieve the underlying project purpose. 40 C.F.R. § 1502.14(a).

242. This alternatives analysis is “the heart of the environmental impact statement,” and should “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public.” 40 C.F.R. § 1502.14. Only those alternatives that are deemed to be unreasonable can be eliminated from the study. 40 C.F.R. § 1502.14(a).

243. Defendants failed to objectively evaluate alternatives to the proposed Toll Road in the following ways:

- a. Defendants’ alternatives analysis was based on outdated and erroneous traffic forecasts, which failed to account for a decade of transportation trends:
 - i) Defendants’ forecasts ignored the fact that growth in traffic volume has been flat for the past ten years.
 - ii) Defendants’ traffic forecasts failed to recognize recently implemented improvements to U.S. 74 as well as reasonably foreseeable planned future improvements to the U.S. 74 Corridor.
 - iii) Defendants’ traffic forecasts failed to account for recent improvements in travel speeds in the U.S. 74 Corridor.

- iv) Defendants' analysis failed to recognize that congestion is now limited to a few key hot spots.
- v) Defendants' traffic forecasts were based on outdated projections of socio-economic data that have now been determined to be significantly overstated.
- b. Defendants' alternatives analysis was based on traffic forecasts that used a single set of socio-economic data for both the "Build" and "No-Build" scenarios and thus failed to account for induced traffic and growth.
- c. Defendants' alternatives analysis failed to consider patterns of travel in the study area and the percentage of traffic that is local versus traveling from end to end.
- d. Defendants failed to analyze reasonable alternatives, including:
 - i) Upgrades to existing U.S. 74;
 - ii) Upgrades to the parallel road network;
 - iii) Multi-modal alternatives; and
 - iv) A combination of the above listed alternatives.

244. Defendants' failure to objectively analyze a reasonable range of alternatives violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law.

SECOND CLAIM FOR RELIEF:

Defendants Arbitrarily and Capriciously Failed to Adequately Assess and Disclose Indirect Environmental Impacts

245. The Conservation Groups incorporate the allegations of paragraphs 1-238 as if set forth in full.

246. NEPA requires that every EIS must fully and fairly discuss the adverse environmental impacts of the proposed action, including a proposed project's indirect impacts. 42 U.S.C. § 4332(2)(C), (E).

247. The NEPA regulations define "indirect" impacts as impacts "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Further, indirect impacts may include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b).

248. Defendants' NEPA analysis of indirect impacts is arbitrary and capricious and inadequate under NEPA in at least the following respects:

- a. Defendants' "No-Build" baseline analysis is based on the unsupported, arbitrary assumption that congested transportation infrastructure has no impact on growth.
- b. Defendants dramatically understate the level of growth attributable to the increased highway capacity offered by constructing the proposed Toll Road.
- c. Defendants based their indirect impacts analysis on outdated, inaccurate socio-economic data used in their initial analysis of the project despite dramatic changes in growth trends in the study corridor.
- d. Defendants' indirect impacts analysis fails to acknowledge statements from all levels of government that the Bypass will bring significant growth and development to Union County.
- e. Defendants' indirect impacts analysis fails to consider how growth may be redistributed.

249. NEPA regulations require that an EIS include discussion of the means to mitigate adverse environmental impacts. 40 C.F.R. § 1502.16(h).

250. Because Defendants have not adequately accounted for indirect impacts, Defendants have not satisfied NEPA's requirement to provide a full discussion of means to mitigate such impacts.

251. Defendants' failure to take a hard look at indirect environmental impacts of the proposed action violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law.

THIRD CLAIM FOR RELIEF:

Defendants Arbitrarily and Capriciously Failed to Assess and Disclose Cumulative Environmental Impacts Adequately in the FEIS

252. The Conservation Groups incorporate the allegations of paragraphs 1-238 as if set forth in full.

253. NEPA requires that every EIS must fully and fairly discuss the adverse environmental impacts of the proposed action, including a proposed project's cumulative impacts. 42 U.S.C. § 4332(2)(C), (E).

254. The NEPA regulations define "cumulative impact" as the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

255. Defendants' analysis of cumulative impacts is arbitrary and capricious and inadequate under NEPA in at least the following respects:

- a. Defendants failed entirely to disclose the cumulative impacts of the proposed Toll Road and the other reasonably foreseeable planned toll lanes in the Charlotte metropolitan region.
- b. Defendants failed to address the cumulative impacts of the Toll Road and other reasonably foreseeable area transportation projects.
- c. Defendants failed entirely to address cumulative impacts of the proposed Toll Road and the reasonably foreseeable development of a South Economic Development Corridor.
- d. Defendants failed to address the cumulative impacts of the Toll Road and the reasonably foreseeable planned development at the Legacy Park site.

256. Defendants' failure to take a hard look at reasonably foreseeable cumulative impacts of the proposed action violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law.

FOURTH CLAIM FOR RELIEF:

Defendants Arbitrarily and Capriciously Failed to Assess and Disclose Direct Environmental Impacts Adequately in the FEIS

257. The Conservation Groups incorporate the allegations of paragraphs 1-238 as if set forth in full.

258. NEPA requires that every EIS must fully and fairly discuss the adverse environmental impacts of the proposed action, including direct impacts. 42 U.S.C. § 4332(2)(C), (E).

259. The NEPA regulations define "direct" impacts as impacts "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a).

260. Defendants' analysis of direct effects is arbitrary and capricious and inadequate

under NEPA in at least the following respects:

- a. Defendants failed to analyze the direct air and water quality impacts resulting from traffic induced by construction of the proposed Toll Road.
- b. Defendants failed to analyze the direct air and water quality impacts of redistribution of growth to eastern Union County that will be occasioned by construction of the proposed Toll Road, which will result in more drivers making longer trips towards job centers in Mecklenburg County and western Union County.
- c. Defendants failed to analyze the project's direct impacts on the northern long-eared bat (*Myotis septentrionalis*) and the Savannah lilliput (*Toxolasma pullus*).
- d. Because of their failure to fully account for induced traffic and redistributed growth occasioned by the Toll Road, Defendants failed to analyze the project's direct impacts in increasing Mobile Source Air Toxics ("MSATs").
- e. Because of their failure to fully account for induced traffic and redistributed growth occasioned by the Toll Road, Defendants failed to fully analyze the project's direct impacts on water quality, including on 303(d) listed streams.
- f. Defendants failed to fully disclose the true cost of the project.

261. NEPA regulations require that an EIS include discussion of the means to mitigate adverse environmental impacts. 40 C.F.R. § 1502.16(h).

262. Because Defendants have not adequately analyzed the proposed Toll Road's direct impacts, Defendants have not satisfied NEPA's requirement to provide a full discussion of means to mitigate such impacts.

263. Defendants' failure to take a hard look at significant direct impacts of the

proposed action violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law.

FIFTH CLAIM FOR RELIEF:

Defendants Actively Mislead the Public about the Purpose and Impact of the Toll Road

264. The Conservation Groups incorporate the allegations of paragraphs 1-238 as if set forth in full.

265. A core purpose of NEPA is to inform the public, decisionmakers, and federal and state resource agencies so that they may make knowledgeable decisions about major actions. DOT v. Pub. Citizen, 541 U.S. 752, 768-69 (2004).

266. NEPA requires that every EIS must be prepared with objective good faith and professional integrity. 40 C.F.R. § 1502.24.

267. Defendants violated NEPA by failing to present a true, accurate, and transparent picture of impacts and alternatives to the public and to resource agencies in at least the following ways:

- a. Defendants actively cultivated widespread misapprehension regarding the purpose and likely impacts of constructing the proposed Toll Road.
- b. Defendants have regularly made public statements misrepresenting the purpose and likely impacts of constructing the proposed Toll Road.
- c. Defendants paid their contractor to present misleading information, such as by developing a purported citizens' group aimed at promoting the proposed Toll Road based on expected impacts in direct opposition to Defendants' own findings within the NEPA process.

- d. Defendants failed to proactively publically correct or otherwise clarify widespread public misapprehensions about the proposed Toll Road's purpose and expected impacts even when called upon to do so.
- e. Defendants failed to respond to public comments asking them to reconcile their findings within the NEPA analysis with diametrically opposed studies, statements, and general public understandings of the project's likely impacts and reasonable alternatives.
- f. Defendants have failed to disclose the true cost of the project, but have presented vastly different cost estimates in different political scenarios.

268. Defendants' failure to prepare their NEPA documents in objective good faith and respond accurately to public comments violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law.

SIXTH CLAIM FOR RELIEF:

Defendants' EIS was an Exercise in Illegal Pre-determined Decisionmaking

269. The Conservation Groups incorporate the allegations of paragraphs 1-238 as if set forth in full.

270. The purpose of the NEPA documents is to "serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.2(g). To this end, NEPA requires that information be made available to "public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

271. The CEQ regulations provide that an agency preparing a final EIS "shall assess and consider comments" on the draft EIS and "shall respond" to those comments in one of

several specified ways, including making requested modifications, corrections, and supplementations. 40 C.F.R § 1503.4(a). If the agency decides the comments do not warrant further agency response, it must so declare, “citing the sources, authorities or reasons which support the agency’s position.” 40 C.F.R. § 1503.4(a)(5).

272. NEPA requires that every EIS must be prepared with objective good faith and professional integrity. 40 C.F.R. § 1502.24.

273. Defendants engaged in illegal pre-determined decisionmaking in the following ways:

- a. Since the rescission of the ROD, Defendants have continued to make payments to the project contractor MBC to ensure MBC’s readiness to begin construction of the proposed Toll Road immediately upon finalizing the court-ordered NEPA reevaluation.
- b. While Defendants have been undergoing the court-ordered reevaluation of their NEPA review, Defendants have negotiated and made payments for building materials for the project and storage of building materials at the project site.
- c. While Defendants have been undergoing the court-ordered reevaluation of their NEPA review, Defendants have regularly made public statements that they are committed to constructing the proposed Toll Road and that debate regarding its construction is over.

274. Defendants’ pre-determined decisionmaking violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law.

SEVENTH CLAIM FOR RELIEF:

Defendants Improperly Issued a Combined FSFEIS and ROD

275. The Conservation Groups incorporate the allegations of paragraphs 1-238 as if set forth in full.

276. Federal regulations provide that a combined FEIS/ROD is not appropriate where “there are significant new circumstances or information” that bear on the proposed action. 42 U.S.C. § 4332a(b).

277. The FSFEIS contained significant new information relevant to environmental concerns, bearing in particular on the proposed Toll Road’s impacts and Defendants’ alternatives analysis.

- a. Defendants withheld public evaluation of the new socio-economic projections until publication of the FSFEIS.
- b. Defendants withheld their response to transportation expert Dr. David Hartgen’s significant traffic forecast critique until publication of the FSFEIS, well after the close of public comment. The response provided new information regarding important factors bearing on the traffic forecasts and attempted to clarify previously unexplained methodologies and assumptions, uncovering additional flaws in the analysis.

278. Defendants’ combination of the FSFEIS and ROD when the FSFEIS contained significant new information violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law.

EIGHTH CLAIM FOR RELIEF:

Defendants Failed to Prepare a Supplemental EIS in Light of New Information

279. The Conservation Groups incorporate the allegations of paragraphs 1-238 as if set forth in full.

280. Federal regulations require that an agency “shall” prepare a supplement to an EIS where “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” arise. 40 C.F.R. § 1502.9(c)(1).

281. Significant new information has arisen prompting new concerns that NCDOT should address before proceeding forward with the project, including at least the following:

- a. Recent evidence has further demonstrated Defendants’ alternatives analysis is based on significantly flawed traffic forecasts.
- b. Evidence has continued to build demonstrating Defendants have misled the public regarding the proposed Toll Road’s purpose and expected impacts.
- c. Significant new information demonstrates that Defendants have failed to study the project’s potential impacts on the species proposed for listing as federally endangered species within the next year.
- d. Recent evidence of planned area transportation projects and statewide planning efforts have demonstrated Defendants’ cumulative impacts analysis is incomplete.

282. Defendants’ failure to supplement their NEPA analysis in light of this significant new information violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Enter a declaratory judgment that Defendants violated the National Environmental Policy Act by preparing an inadequate EIS;
2. Vacate the Record of Decision for the challenged project;
3. Grant appropriate preliminary and permanent injunctive relief to ensure that Defendants comply with the National Environmental Policy Act, and specifically to ensure that Defendants take no further actions toward proceeding with the challenged Toll Road until they have complied with National Environmental Policy Act;
4. Award the Conservation Groups the costs of this action, including their reasonable attorneys' fees; and
5. Grant such other relief as the Court deems just and proper.

Respectfully submitted this 23rd day of June, 2014.

s/Kimberley Hunter
Kimberley Hunter – NC Bar No. 41333

s/Kathleen Asquith
Kathleen Asquith – NC Bar No. 54060

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