

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

NO. _____

DEFENDERS OF WILDLIFE and)
NATIONAL WILDLIFE REFUGE)
ASSOCIATION,)

Plaintiffs,)

v.)

NORTH CAROLINA DEPARTMENT OF)
TRANSPORTATION; EUGENE A. CONTI,)
JR., SECRETARY, NORTH CAROLINA)
DEPARTMENT OF TRANSPORTATION;)
FEDERAL HIGHWAY ADMINISTRATION;)
and JOHN F. SULLIVAN III, DIVISION)
ADMINISTRATOR, FEDERAL HIGHWAY)
ADMINISTRATION,)

Defendants.)
_____)

COMPLAINT

[Fed. R. Civ. P. 7]

NATURE OF THE CASE

1. This action challenges violations of the National Environmental Policy Act of 1969 (“NEPA”), codified as 42 U.S.C. § 4321 *et seq.*, and Section 4(f) of the Department of Transportation Act of 1966 (“Section 4(f)”), codified as 49 U.S.C. § 303 and 23 U.S.C. § 138, in connection with the Defendants’ decision to authorize, fund, seek permits for, and otherwise advance construction of the replacement of the Herbert C. Bonner Bridge (NC TIP Project No. B-2500) (“the Project”) in Dare County, North Carolina. The Project consists of two primary components: (1) a new two-lane bridge across Oregon Inlet, to replace the existing Bonner Bridge; and (2) the maintenance of a transportation route from Oregon Inlet to the village of Rodanthe, North Carolina, which lies south of Pea Island National Wildlife Refuge (the

“Refuge”). Instead of preparing an adequate analysis of alternatives to the Project and the cumulative impacts of the Project as a whole, the Defendants piecemealed the Project into separate segments and issued a Record of Decision approving a selected alternative for the Project in violation of NEPA. In addition, the selected alternative for the Project will violate Section 4(f) by requiring construction through the Refuge (and “use” of Refuge lands) even though feasible and prudent alternatives exist that will not use the Refuge, and by failing to sufficiently plan to minimize harm to the Refuge. The Defendants signed their Record of Decision on December 20, 2010, and made it available to the public on or about January 5, 2011. Through this lawsuit, Plaintiffs seek to have the unlawful Record of Decision set aside and to compel the Defendants to comply with NEPA and Section 4(f).

JURISDICTION AND VENUE

2. This action arises under several federal laws, including NEPA and Section 4(f) of the Transportation Act of 1966. This Court therefore has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel a federal officer to do his duty), and it may issue a declaratory judgment and grant further relief pursuant to 28 U.S.C. §§ 2201, 2202. Plaintiffs have a right to bring this action pursuant to, *inter alia*, the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06.

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

PARTIES AND STANDING

Plaintiffs

4. Plaintiff Defenders of Wildlife (“Defenders”) is a national non-profit, public interest organization founded in 1947. It has approximately one million members and supporters worldwide, including nearly 10,000 members and 18,000 supporters in North Carolina as of

April 2011. Within North Carolina's Third Congressional District, which comprises the Outer Banks communities, Defenders has 664 members and 849 supporters as of April 2011.

5. Defenders has members who live and work in the general vicinity of Pea Island National Wildlife Refuge, as well as members from across the country who visit, recreate, observe birds and other wildlife, photograph, and otherwise use and enjoy the public lands, wetlands, and other lands in the vicinity of the Refuge.

6. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities, and the preservation of the habitat on which they depend. Defenders advocates new approaches to wildlife conservation that will help keep species from becoming endangered, and it employs education, litigation, research, legislation, and advocacy to defend wildlife and their habitat.

7. Defenders has long been active in eastern North Carolina. For instance, Defenders has been active in the protection of Cape Hatteras National Seashore from the impacts of excessive off-road driving on its beaches and the wildlife that depend on it for reproduction, migration, and wintering habitat. Pea Island National Wildlife Refuge lies within the boundaries of Cape Hatteras National Seashore, and hosts many of the same species of wildlife.

8. In addition to these recreational, aesthetic, and professional interests, Defenders, its staff, and its members also derive scientific, aesthetic, and spiritual benefit from the existence of the Refuge and from the abundant wildlife species that depend on it for habitat. Defenders' members have educational and scientific interests in the preservation of the Refuge and the wildlife of eastern North Carolina.

9. The refusal of the Defendants to develop an adequate plan for maintaining and preserving Highway NC-12 through the Refuge will lead to the further destruction and disruption

of the Refuge's natural resources. For instance, emergency road maintenance, which has been and will continue to be required under the Defendants' selected alternative, will disrupt wildlife activity in the area, including preventing federally designated endangered and threatened birds and sea turtles from successfully nesting and reproducing. The continued degradation of the Refuge's natural resources will preclude Defenders' members and staff from deriving scientific, aesthetic, and spiritual benefits from the Refuge.

10. Plaintiff National Wildlife Refuge Association ("NWRA") is an independent non-profit organization founded in 1975 by former National Wildlife Refuge System managers and employees. It has over 7000 members, and works with nearly 200 refuge "Friends" volunteer groups nationwide, including five "Friends Affiliate" groups in North Carolina.

11. NWRA's mission is to conserve America's wildlife heritage for future generations through strategic programs that protect, enhance, and expand the National Wildlife Refuge System and the landscapes beyond its boundaries that secure its ecological integrity. To achieve this mission, NWRA advocates for the Refuge System with national and local decision-makers, educates and mobilizes communities across the country in partnership with its nearly 200 refuge Friends Affiliate organizations, and engages diverse partners to conserve critical wildlife habitat in refuge landscapes.

12. NWRA has members who live and work in the general vicinity of Pea Island National Wildlife Refuge, as well as members from across the country who visit, recreate, conduct research, work, observe birds and other wildlife, conduct educational activities, photograph, and otherwise use and enjoy the public lands, wetlands, and other lands and waters of the Refuge. NWRA, its staff, and its members derive scientific, aesthetic, and spiritual benefit from the existence of Pea Island National Wildlife Refuge and from the abundant wildlife

species that depend on it for habitat, and they value the preservation of the Refuge and the wildlife of eastern North Carolina. NWRA has a Friends Affiliate group – Coastal Wildlife Refuge Society – that works specifically to protect Pea Island National Wildlife Refuge and nearby Alligator River National Wildlife Refuge.

13. As set forth above, Defenders, NWRA, and their members have interests that are directly, adversely, and irreparably injured by the actions of the Defendants. They reasonably believe that, if the Project proceeds as currently planned, it will harm their scientific, aesthetic, recreational, and spiritual interests in the Refuge, and their ability to enjoy the Refuge and its abundant wildlife. They further believe that other Project alternatives would pose fewer negative impacts to their interests. These actual and potential injuries have been and continue to be caused by the illegal decisions and actions of the Defendants regarding the Project, including their faulty analysis of, and plans for, building the selected alternative bridge and maintaining NC-12 through the Refuge. The injuries will not be redressed except by an order from this Court that: (1) vacates the Record of Decision, (2) requires Defendants to comply with NEPA, Section 4(f), and all other applicable laws, regulations and orders; (3) requires Defendants to develop and implement a selected alternative that complies with those laws and protects the Refuge from further degradation; (4) requires Defendants to prepare adequate environmental documents for the actions included in that new plan; (5) ensures that Defendants take no further actions toward constructing the Project until they have complied with those laws; and (6) orders the further relief sought in this action.

Defendants

14. Defendant North Carolina Department of Transportation (“NCDOT”) is an agency of the State of North Carolina. NCDOT is responsible for complying with NEPA and

Section 4(f) before proceeding with its projects that involve major federal action. NCDOT had the primary responsibility for preparing the inadequate environmental analysis, Section 4(f) analysis, and Record of Decision challenged in this action. NCDOT issued those documents through its office in Raleigh. NCDOT is relying on its environmental analysis, including a Final Environmental Impact Statement, a subsequent Environmental Assessment, Final Section 4(f) Evaluation, and Record of Decision, to pursue permits for this Project.

15. Defendant Eugene A. Conti, Jr. is the Secretary of Transportation, NCDOT, and is sued in his official capacity as the head of NCDOT. Secretary Conti had the final authority for NCDOT's preparation of the inadequate environmental analysis, Section 4(f) analysis, and Record of Decision challenged in this action and for the State's decision to proceed with the challenged Project despite the inadequate analysis.

16. Defendant Federal Highway Administration ("FHWA") is a subordinate federal agency within the United States Department of Transportation. FHWA was responsible for overseeing the preparation of the environmental analysis and Section 4(f) analysis challenged in this action, and for ensuring that those analyses complied with NEPA and Section 4(f). FHWA is the federal agency that took the final agency actions challenged herein and issued the inadequate environmental analysis, Section 4(f) analysis, and ROD challenged in this action. FHWA issued these documents through its North Carolina Division office in Raleigh, North Carolina.

17. Defendant John F. Sullivan, III, is the North Carolina Division Administrator for FHWA and is sued in his official capacity as the head of FHWA's North Carolina Division Office. Administrator Sullivan had the final authority for FHWA's preparation and approval of the inadequate environmental analysis, Section 4(f) analysis, and Record of Decision challenged

in this action and for FHWA's decision to proceed with the challenged Project despite the inadequate analysis.

18. Defendants NCDOT, Eugene A. Conti, Jr., FHWA, and John F. Sullivan, III, are herein referred to collectively as "Defendants."

FEDERAL STATUTORY AND REGULATORY BACKGROUND

National Environmental Policy Act ("NEPA")

19. The National Environmental Policy Act, or "NEPA," requires all federal agencies to interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies of NEPA "to the fullest extent possible." 42 U.S.C. § 4332. The purpose of NEPA "is to sensitize all federal agencies to the environment in order to foster precious resource preservation." Nat'l Audubon Society v. Dep't of the Navy, 422 F.3d 174, 184 (4th Cir. 2005) (citing Andrus v. Sierra Club, 442 U.S. 347, 350-51, 99 S. Ct. 2335, 2337 (1979)).

20. Among other things, a federal agency must prepare or adopt an Environmental Impact Statement ("EIS") as part of every recommendation or report on proposals for major Federal actions that will significantly affect the quality of the human environment. See 42 U.S.C. § 4332(2)(C). The EIS requirement serves two functions. First, it ensures that an agency takes a hard look at a proposed project's environmental effects before deciding whether to recommend the project. Second, the EIS ensures that relevant information about a proposed project is made available to members of the public so that they may play a role in both the decision-making process and the implementation of the decision.

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

1508. In addition, FHWA has promulgated regulations and adopted procedures for complying with NEPA in the processing of highway and transportation projects, 23 C.F.R. part 771, to supplement the CEQ's NEPA regulations.

22. Regulations implemented under NEPA allow the preparation of an Environmental Assessment ("EA") where a federal action may not have significant impacts or is otherwise not required to have an EIS. 40 C.F.R. §§ 1501.3, 1508.9; 23 C.F.R. § 771.119(a).

23. NEPA requires an agency to include in every EIS or EA a "detailed statement" on "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1508.9; see also 23 C.F.R. §§ 771.119, 771.125. NEPA provides that an agency must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The agency is required to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). "[A]n alternative is properly excluded from consideration in an environmental impact statement only if it would be reasonable for the agency to conclude that the alternative does not 'bring about the ends of the federal action.'" City of Alexandria v. Slater, 198 F.3d 862, 867 (D.C. Cir. 1999) (quoting Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991)). "[T]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp., 524 F. Supp. 2d 642, 667 (D. Md. 2007) (internal citation omitted).

24. In order to frame the exploration of alternatives, 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. FHWA is required to exercise independent judgment in defining the purpose and need and must reject overly restrictive statements of project purpose and need that might tend to direct or bias the outcome of the agency’s decision.

Section 4(f) of the Department of Transportation Act of 1966 (“Section 4(f)”)

25. Section 4(f) was originally codified at 49 U.S.C. § 1653(f), and a similar provision was codified at 23 U.S.C. § 138, which applies only to the Federal-Aid Highway Program. Section 1653(f) has since been recodified as 49 U.S.C. § 303. The two statutes are together referred to as “Section 4(f).” They state: “It is the policy of the United States Government 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); 23 U.S.C. § 138(a).

26. Under Section 4(f), “a transportation program or project” that requires “the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance” may be approved “only if (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); see also 23 U.S.C. § 138(a).

Administrative Procedure Act (“APA”)

27. The Administrative Procedure Act, 5 U.S.C. §§ 701-06, provides that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

28. The APA provides that a court shall set aside agency “findings, conclusions, and actions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

FACTS

29. Bodie and Hatteras Islands are two of several long, narrow, dynamic coastal barrier islands that collectively are known as the North Carolina Outer Banks. They separate the Atlantic Ocean, to the east, from Pamlico Sound, to the west. Bodie Island lies to the north of Hatteras Island, and they are currently connected by the Herbert C. Bonner Bridge, which spans Oregon Inlet between the two islands. A portion of Cape Hatteras National Seashore occupies the southern end of Bodie Island. Pea Island National Wildlife Refuge occupies the northern end of Hatteras Island, and another portion of Cape Hatteras National Seashore occupies the southern end of Hatteras Island. The town of Rodanthe, North Carolina, lies at the border between the Refuge and Cape Hatteras National Seashore approximately midway down the length of Hatteras Island.

30. The force of storms and ocean waves causes both erosion and accretion of the islands of the Outer Banks and sometimes creates new inlets. An inlet is a narrow body of water leading inland, between islands, from a larger body of water; Oregon Inlet is one such inlet. Left to nature, the islands of the Outer Banks themselves and the inlets that divide the islands from one another would change constantly. The islands would generally migrate westward, and inlets would form or close depending on natural forces. Storm events would hasten these changes. These natural processes are at odds with the hardened structures, such as roads and bridges, that have been built to improve access to the Outer Banks for local residents and visitors and that require a stable, unmoving base. Accordingly, in places, humans have attempted to slow the

natural processes of erosion, accretion, and inlet formation with such methods as reinforcing beaches and dunes with sand dredged from elsewhere, and constructing jetties and groins. These artificial mechanisms, however, degrade the natural wildlife habitat of the islands.

31. Pea Island National Wildlife Refuge is one of the last undeveloped areas on North Carolina's Outer Banks, and, as of 2008, it attracted at least 2.7 million visitors per year. The Refuge is thirteen miles long north to south and, at its widest, is one mile east to west. At its narrowest, the Refuge is only a quarter of a mile across.

32. Each year, the Refuge is used by hundreds of thousands of migratory birds, and is home to 365 bird species, 25 mammal species, 24 reptile species, and five amphibian species. According to the website for the Refuge maintained by the United States Fish & Wildlife Service ("USFWS"), which manages the Refuge, the Refuge has three objectives: (1) to "provide nesting, resting, and wintering habitat for migratory birds, including the greater snow geese and other migratory waterfowl, shorebirds, wading birds, raptors, and neotropical migrants;" (2) to "provide habitat and protection for endangered and threatened species;" and (3) to "provide opportunities for public enjoyment of wildlife and wildlands resources, with programs focused on interpretation, environmental education, wildlife observation, wildlife photography, and fishing." See <http://www.fws.gov/peaisland/>.

33. The Refuge was authorized by Congress in 1937, and then was established in 1938 by Executive Order 7864 as a wildlife refuge especially for migratory waterfowl and shorebirds. Also in 1938, the federal government acquired three tracts of private property that are now part of the Refuge.

34. The highway through Pea Island National Wildlife Refuge, NC-12, was established as follows: Congress authorized the Secretary of the Interior to grant an easement for

a road through the Refuge in 1951. In 1954, the Secretary of the Interior granted a 100-foot-wide easement to the state of North Carolina to accommodate a road through the Refuge within a specified corridor defined by metes and bounds. North Carolina constructed the road that same year, within the easement. On several occasions over the last fifty years, USFWS, which manages the Refuge, has granted a special use permit to NCDOT to allow NCDOT to maintain, repair, or relocate NC-12 during emergencies when storms and ocean erosion have threatened the road. Construction outside the metes and bounds easement requires such a permit.

35. NCDOT built Bonner Bridge in 1962, and the bridge is now approaching the end of its reasonable service life. It runs north-south for approximately two miles and spans Oregon Inlet, the waterway that separates Bodie Island to the north from Hatteras Island to the south. Before the bridge was built, residents and tourists crossed the inlet via ferries to and from Hatteras Island.

36. Highway NC-12 runs through the length of the Refuge, and connects the southern terminus of Bonner Bridge to the remainder of the island beginning at Rodanthe. According to NCDOT, storms frequently cause the ocean to overwash NC-12, and overwashing waves deposit large quantities of sand over portions of the road and sometimes damage the road itself, interrupting access to the island. The result of such storms is that, generally, NC-12 must be continually repaired and maintained to preserve the transportation route. NCDOT has identified three “hot spots” along the road inside the Refuge where NC-12 is most frequently in need of extensive maintenance. NCDOT predicts that these hot spots are the most likely locations of future erosion, road damage, repair work, and even new inlet formation, which would divide the island into even smaller sections.

37. Scientists estimate that Oregon Inlet is steadily migrating southward, and it has a history of alternately widening and narrowing as the result of accretion and erosion. The inlet is periodically dredged to maintain a navigation channel for boats. In addition, a “terminal groin” (a hardened structure that extends out into the ocean and attempts to slow erosion and sand migration) was built in 1989 at the northern end of Hatteras Island, on the south side of the inlet. The terminal groin was installed in an attempt to both slow the migration of the inlet and protect the pilings of Bonner Bridge. The terminal groin has slowed but not halted the inlet’s migration, and, at the same time, it has caused significant degradation of shorebird habitat on the Refuge’s north end. The permit for the terminal groin specifies that it must be removed within two years of the removal of the current Bonner Bridge.

38. By various estimates, Hatteras Island is steadily migrating westward at a rate of five to 22 feet per year. Already, there is at least one spot where the mean high water line has encroached into the easement for NC-12, and there are other locations where the high tide line is dangerously close to the edge of the easement.

39. Approximately twenty years ago, in 1990, NCDOT began the process of investigating alternatives for replacing the current Bonner Bridge. NCDOT and FHWA issued a Draft Environmental Impact Statement (“DEIS”) in 1993, which included an initial assessment of several alternatives. NCDOT and FHWA have continued to investigate additional alternatives for the Project and to issue supplemental environmental documents under NEPA during the intervening years.

40. NCDOT and FHWA defined the Project’s purpose and need in the Final Environmental Impact Statement (“FEIS”) issued in September 2008. The Project’s stated needs, as listed on page 1-1 of the FEIS, are:

- Continued demand for convenient daily and emergency access across the Oregon Inlet is expected.
- The natural channel or gorge through Oregon Inlet migrates. A replacement bridge needs to provide spans of sufficient height and width for navigation through the anticipated area of future natural migration, helping to reduce future dredging needs, dredging impacts, and the cost of dredging.
- The southern terminus of the Bonner Bridge is north of portions of NC 12 currently threatened by shoreline erosion and overwash. Placing the southern terminus of a replacement bridge (or incorporating a long-term NC 12 maintenance and protection project) south of these areas will reduce the frequency of maintenance of these threatened segments of NC 12.

41. The Project's stated purpose is defined on page 1-6 of the FEIS as follows:

- Provide a new means of access from Bodie Island to Hatteras Island for its residents, businesses, services, and tourists prior to the end of Bonner Bridge's service life.
- Provide a replacement crossing that takes into account natural channel migration expected through year 2050 and provides the flexibility to let the channel move.
- Provide a replacement crossing that will not be endangered by shoreline movement through year 2050.

42. Among the alternatives considered were various plans for a replacement bridge (approximately 2.5 miles long) to be built parallel to, and close to, the path of the current Bonner Bridge. These "Parallel Bridge Alternatives" included various plans for maintaining NC-12 through the Refuge and repairing the road after storms and tides inevitably erode the island and the road's easement. The alternatives included ideas to maintain and repair the road within its current easement, to nourish the sand dunes and beaches in order to buffer the road, to lift the road onto short bridges as the island erodes from underneath it, and to relocate portions of the road westward as the island disappears.

43. Also among the alternatives considered were several variations of a plan to build a longer replacement bridge (approximately 17.5 miles) that would bypass the Refuge and

erosion “hot spots” entirely, by traveling through Oregon Inlet, then passing to the west of the Refuge through Pamlico Sound, and making landfall at various proposed locations south of the Refuge at the village of Rodanthe (the “Pamlico Sound Alternatives”). The Pamlico Sound Alternatives would eliminate the need to maintain the NC-12 route through the Refuge.

44. The federal and state environmental resource and regulatory agencies that have an interest in the Project formed a “NEPA/Section 404 Merger Team” (the “Merger Team”) that has met periodically to discuss the Project and has tried to reach consensus on various facets of it. The Merger Team consists of representatives from FHWA, NCDOT, USFWS, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, North Carolina Division of Water Quality, North Carolina Department of Cultural Resources, National Marine Fisheries Service, North Carolina Division of Coastal Management, Pea Island National Wildlife Refuge, North Carolina Wildlife Resource Council, North Carolina Division of Marine Fisheries, and National Park Service.

45. As of July 23, 2003, there was a written consensus among all the Merger Team member agencies, including Defendants, that the Pamlico Sound Bridge Corridor Alternatives (referred to at that time as Alignment Alternatives A and C) were collectively the preferred alternative and were selected for detailed study. At that time, construction of a Pamlico Sound Bridge was scheduled to begin in 2006, end in 2010, and cost approximately \$260 million. At that time, then-North Carolina Secretary of Transportation Lyndo Tippet wrote that NCDOT had determined that a shorter Parallel Bridge Alternative that involved attempting to maintain NC-12 in place was “no longer viable due to recent trends in shoreline erosion, ocean overwash of NC-12, and other changes in the setting of the project.” The Supplemental DEIS (“SDEIS”)

issued in September 2005 confirmed that the Merger Team had agreed to the Pamlico Sound Bridge Corridor Alternatives, as did the 2008 FEIS.

46. Subsequently, under pressure from Dare County government officials (the county where both the Project and the Refuge are located), NCDOT agreed to delay the Project. By letter dated September 3, 2003, then-Senator Marc Basnight, who was the state Senator representing Dare County and President Pro Tem of the North Carolina Senate, demanded that Parallel Bridge Alternatives be studied. Then-Governor Michael Easley responded to Senator Basnight's demands by halting the Project to give Dare County time to propose a feasible alternative. By the time the 2005 SDEIS was issued, the Merger Team had acquiesced to Dare County's demands to study Parallel Bridge Alternatives. The 2005 SDEIS and 2008 FEIS confirm this also.

47. By the time the FEIS was issued in September 2008, cost estimates for all alternatives had increased substantially. The latest cost estimates provided by Defendants appeared in the 2009 Revised Final Section 4(f) Evaluation. That document stated that the cost for the Parallel Bridge Alternatives would range from \$602 million to \$1.524 billion (in 2006 dollars), while the cost for the Pamlico Sound Bridge Corridor Alternatives would range from \$942.9 million to \$1.441 billion (in 2006 dollars). In the FEIS, NCDOT and FHWA stated that the Pamlico Sound Bridge Corridor Alternatives, but not the similarly priced Parallel Bridge Alternatives, were no longer practicable due to cost estimates. The FEIS simultaneously acknowledged the significant legal and environmental issues posed by each of the Parallel Bridge Alternatives, especially by proposed methods for maintaining a road through the Refuge. These methods included beach nourishment, relocation of the road westward, and raising the road onto bridges. The FEIS also identified one of the Parallel Bridge Alternatives – the “Phased

Approach/Rodanthe Bridge Alternative” – as the “Preferred Alternative.” That alternative involved several phases. Phase I would require the construction of a 2.5-mile replacement bridge directly adjacent to the existing Bonner Bridge. Phases II-IV required the elevation of sections of NC-12 onto new bridges within the existing easement. These phases would proceed as storms and ocean overwash eroded the island and destroyed sections of the existing road. Exhibit 1 to this Complaint is the illustration of this Alternative from the FEIS, with each of the phases indicated. With the selection of that Preferred Alternative, NCDOT and FHWA committed to try to stay within the existing NC-12 easement, but acknowledged in the FEIS (1) the difficulty of predicting where and when storms and ocean overwash would erode the island, (2) the likelihood that it would be difficult to keep all future construction within the easement , and (3) the likelihood that any highway maintenance or relocation outside of the easement could not be found to be compatible with the Refuge, as required by the National Wildlife Refuge System Improvement Act of 1997, and therefore would not be permitted by USFWS.

48. Plaintiffs filed substantial comments during the public comment periods for the DEIS, SDEIS, and FEIS, highlighting the legal and environmental problems associated with the Parallel Bridge Alternatives and specifically the Phased Approach/Rodanthe Bridge Alternative. Among other things, Plaintiffs pointed out that raising NC-12 onto bridges through the length of the Refuge, as the ocean washes the shoreline away and Hatteras Island migrates westward, would result in a series of vulnerable bridges standing in the surf on the eastern ocean-side of the Refuge. There, the proposed bridges would be exposed to significant erosion, would be unsafe for travel during storm-related evacuations, and would destroy the ocean view of Refuge visitors. Plaintiffs also explained that construction of those bridges within the Refuge would not be compatible with the Refuge, would impermissibly use Refuge land when a prudent and feasible

alternative existed, and would violate several federal laws, including NEPA, Section 4(f), and the National Wildlife Refuge System Improvement Act of 1997. Plaintiffs also pointed out that, in contrast, the Pamlico Sound Bridge Corridor Alternatives would not be incompatible with the Refuge or use the Refuge, and therefore would not violate those laws.

49. The Defendants subsequently abandoned the Phased Approach/Rodanthe Bridge Alternative in light of its many significant problems. Unable to develop any plan for maintaining a transportation corridor through the Refuge that did not violate federal law and that satisfied all involved agencies, the Defendants identified a new preferred alternative that deferred—and indeed omitted—such difficult and controversial planning decisions until indeterminate “later phases.” They described the new alternative in two documents: first, a “Revised Final Section 4(f) Evaluation” issued in October 2009; and, second, an “Environmental Assessment” issued in May 2010. Both documents identified the new preferred alternative as the “Parallel Bridge Corridor with NC-12 Transportation Management Plan.”

50. The Merger Team did not reach consensus on the new preferred alternative.

51. The new preferred alternative involved building a replacement bridge, which was essentially the same short, parallel bridge identified as Phase I of the FEIS Preferred Alternative. The exact design and location were left to the construction contractor. More notably, however, rather than identifying a plan for maintaining a transportation route to Rodanthe, the new preferred alternative deferred until later any decisions regarding which of the flawed methods of maintaining the NC-12 corridor will be implemented. The new preferred alternative did not specify how the road through the Refuge will be maintained and repaired as the island erodes. Instead of selecting any one method for maintaining a route to Rodanthe, the new preferred alternative left open the opportunity for NCDOT and FHWA to use any of the flawed methods

identified previously – nourishing beaches and dunes, lifting the road section-by-section onto bridges, or relocating the road to the west – even those that the FEIS determined will cause the greatest adverse effects to the Refuge. The new Preferred Alternative even mentioned using methods not previously identified. As the Environmental Assessment explained, “[t]he Parallel Bridge Corridor with NC 12 Transportation Plan Alternative (Preferred) does not specify a particular action at this time on Hatteras Island beyond the limits of Phase I” In other words, the Defendants opted to ignore the problem of what to do with NC-12 and segmented the Project in order to move forward with a replacement for Bonner Bridge.

52. NCDOT and FHWA acknowledged in the 2010 Environmental Assessment that (1) “Building Phase I alone would not meet the purpose and need of the project,” and (2) “Future phases present substantial challenges to obtaining permit approvals.”

53. Plaintiffs filed comments opposing this new preferred alternative on November 13, 2009, and June 21, 2010, highlighting the legal and environmental problems associated with the new preferred alternative and pointing out that it would violate several federal laws, including NEPA, Section 4(f), and the National Wildlife Refuge System Improvement Act of 1997.

54. The National Wildlife Refuge System Improvement Act of 1997 requires that any new use, or modification or renewal of an existing use of a refuge, must be determined to be “compatible” with the refuge; in other words, the refuge management must determine that the proposed use, “in the sound professional judgment of” the refuge management, “will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” 16 U.S.C. § 668ee. The Department of the Interior has pointed out repeatedly during the NEPA review process that “it is unlikely that any of the parallel bridge

corridor alternatives,” including the new preferred alternative, “are likely to be found compatible with the purposes for which the Refuge was established.”

55. Next, on December 20, 2010, the Defendants issued a Record of Decision that selected and approved for implementation the new “Parallel Bridge Corridor with NC 12 Transportation Management Plan Alternative (Selected)” (hereinafter, the “Selected Alternative”). In fact, the illustration of the Selected Alternative from the Record of Decision indicates only Phase I. (See Exhibit 2 to this Complaint.) The Record of Decision was made available to the public on or about January 5, 2011, when published it on its website. A notice of final federal agency action was published in the Federal Register on January 11, 2011, announcing the Record of Decision and setting the deadline for instituting challenges to the Record of Decision as July 10, 2011, pursuant to 23 U.S.C. § 139(l)(1). “Notice of Final Federal Agency Actions on Proposed Highway in North Carolina,” 76 Fed. Reg. 1663-64 (Jan. 11, 2011).

56. The Record of Decision is a final agency action by FHWA and NCDOT.

57. If Defendants’ plans to implement the Selected Alternative go forward, they will result in the construction of a 2.5-mile bridge parallel to the current Bonner Bridge to the northern tip of Hatteras Island. The construction of this new bridge will, in turn, necessitate that a transportation route be constructed and/or maintained throughout the entire length of the Refuge, in order that that travelers to and from the populated portion of Hatteras Island may reach the bridge and not be stranded on the island, especially in emergency situations. The inevitable breaches and erosion of the road caused by storms and ocean overwash, particularly at the “hot spots” identified by NCDOT and discussed in the DEIS, SDEIS, and FEIS, will also

necessitate continual maintenance and repair of the road and eventual relocation of it, either westward onto Refuge property or upward onto bridges.

58. The FEIS and Record of Decision also acknowledge that implementation of the Selected Alternative cannot occur without the issuance of a new permit for the terminal groin located at the northern end of Hatteras Island. Yet the environmental impacts of the terminal groin were not addressed in the FEIS, the subsequent Environmental Assessment, or the Revised Final Section 4(f) Evaluation. Retention of the terminal groin would not be necessary for the Pamlico Sound Bridge Corridor Alternatives.

FIRST CLAIM FOR RELIEF
**(Violation of NEPA and APA – Failure to assess and disclose
environmental impacts adequately in the FEIS and EA)**

59. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

60. NEPA requires that every EIS must be prepared with objective good faith and must fully and fairly discuss the full range of foreseeable environmental impacts of the proposed action, its unavoidable adverse environmental effects, and all alternatives to the proposed action that may avoid or minimize these adverse effects. 42 U.S.C. § 4332(2)(C), (E). The “effects” that must be discussed in the EIS include the direct effects of the proposed action, the indirect effects of the proposed action, and the cumulative impacts of the proposed action. 40 C.F.R. § 1508.8.

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

b. 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.” Id.

c. The NEPA regulations define a “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 (Federal or non-Federal) 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.

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

62. In this case, the FEIS, subsequent Environmental Assessment, and Revised Final Section 4(f) Evaluation for the Project violate these dictates of NEPA in the following significant respects:

a. They fail to adequately assess or accurately disclose the direct and indirect effects of the Project, especially of the Selected Alternative and its options for maintenance of NC-12 through the Refuge, on wildlife habitat within the Refuge;

b. They fail to adequately assess or accurately disclose the direct and indirect effects of the Project, especially of the Selected Alternative and its options for maintenance of NC-12 through the Refuge, on federally threatened and endangered species, including piping plovers and other shorebirds, and loggerhead and other sea turtles;

c. They fail to adequately assess, disclose, and address the direct and indirect effects of retaining the terminal groin on the Refuge;

d. They fail to adequately assess or accurately disclose the cumulative impacts of the Project, especially of the Selected Alternative and its options for maintenance of NC-12 through the Refuge, on the foregoing list of environmental effects, combined with the future increases in those impacts caused by development, increased traffic, and construction prompted and/or necessitated by the construction of the Project;

e. They fail to adequately assess or accurately disclose the means to mitigate adverse impacts of the Project, especially of the Selected Alternative and its options for maintenance of NC-12 through the Refuge, and ignore practicable and viable mitigation alternatives; and

f. They fail to adequately assess or accurately disclose the direct and indirect effects and cumulative impacts of Project, especially of the Selected Alternative and its options for maintenance of NC-12 through the Refuge, in such other ways as may be revealed during the course of this action.

63. If incomplete or unavailable information relevant to reasonably foreseeable, significant, adverse environmental effects and impacts is essential to a reasoned choice among alternatives and the overall cost of obtaining the information is not exorbitant, an agency must include the information in an EIS. See 40 C.F.R. § 1502.22(a).

64. In the present case, the Defendants failed, at a minimum, to include accurate and complete information regarding the following subjects that is essential to a reasoned choice among alternatives:

a. Identification of the method or methods that will actually be implemented for maintaining NC-12 through the Refuge, or even the process by which that selection will be made, and the criteria that will be used;

b. An accurate economic analysis of potential alternatives, including the true cost through the life of the Project of the Selected Alternative, that includes the necessary cost of decades of maintaining NC-12, and the cost of relocating NC-12 as necessary; identification of alternative sources of funding, including tolls, federal grants, and other sources for alternatives including the Pamlico Sound Bridge Corridor Alternatives; and the cost and feasibility of non-bridge alternatives such as ferries, including high-speed ferries;

c. Accurate and complete information regarding the source of sand for beach and dune nourishment and the environmental effects of such nourishment on both the source location and Refuge lands;

d. Accurate and complete information regarding the past performance and environmental effects of the terminal groin, and/or the environmental benefits of removing the groin in favor of restored habitat;

e. Accurate and complete information regarding noise generation associated with NC-12 maintenance and its effect on the Refuge and the wildlife therein; and

f. Accurate and complete information regarding the effects of sea level rise and natural island migration on Hatteras Island, Oregon Inlet, NC-12, and the viability of the Project.

65. In failing to adequately assess and accurately disclose significant environmental effects and impacts of the proposed project and to include the information described above, NCDOT and FHWA violated their obligation under NEPA to take a hard look at the environmental impacts of the proposed Project.

66. The Defendants' failure to take a hard look at significant environmental impacts of the proposed action violates NEPA and its implementing regulations, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. §§ 701-706.

SECOND CLAIM FOR RELIEF
(Violation of NEPA and APA – Unlawful segmentation)

67. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

68. Under NEPA, “proposals which are related to each other closely enough to be, in effect, a single course of action” must “be evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a). Circumstances in which actions should be considered and evaluated together include scenarios where two or more actions are “closely related”; where one action “automatically trigger[s]” another action; where one action “cannot or will not proceed unless” another action is “taken previously or simultaneously”; where two actions “are interdependent

parts of a large action”; where two actions have “cumulatively significant impacts”; and 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. 40 C.F.R. § 1508.25(a). In addition, NEPA requires that the scope of a project considered in an EIS shall connect “logical termini and be of sufficient length to address environmental matters on a broad scope.” 23 C.F.R. § 771.111(f).

69. Segmentation of a larger project is proper only if the proposed segment (1) has logical termini, (2) has substantial independent utility, (3) does not foreclose the opportunity to consider alternatives, and (4) does not irretrievably commit federal funds for closely related projects.

70. To break a proposed action instead into small component parts to avoid reviewing them together is to engage in impermissible segmentation, which violates NEPA. The Selected Alternative in this case is the result of illegal segmentation and does not meet the requirements of the exception described above.

71. NCDOT and FHWA have engaged in illegal segmentation by their selection of the Selected Alternative. The construction of the replacement bridge and the maintenance of a transportation route from the southern bridge terminus all the way to the village of Rodanthe are related closely enough to be, in effect, a single course of action and are interdependent parts of one large project. Indeed, for most of the two decades of Project development and environmental review under NEPA, those parts were treated as a single course of action. For example, the statement of purpose and need sought a single solution to the problem of transportation across Oregon Inlet and all the way to Rodanthe and the rest of Hatteras Island. It

specifically stated the advantages of “placing the southern terminus of a replacement bridge (or incorporating a long-term NC-12 maintenance and protection project) south of” the “hot spots” identified by NCDOT, the southern-most of which is directly north of Rodanthe. Likewise, all of the alternatives studied in any detail, up through and including those studied in the 2008 FEIS, also included a specific plan for transporting people not only across Oregon Inlet, but all the way through the Refuge. In other words, all of the alternatives considered – until the Defendants chose to segment the Project illegally – were plans for transportation from the southern end of Bodie Island to the town of Rodanthe. The Pamlico Sound Bridge Corridor Alternatives involved a bridge that transported people the entire distance from Bodie Island to Rodanthe, and the Parallel Bridge Alternatives each involved specific, albeit flawed, plans for maintaining a ground route from the southern terminus of a replacement bridge to Rodanthe.

72. Yet, with the 2009 Revised Final Section 4(f) Evaluation, the 2010 Environmental Assessment, and the Record of Decision, the Defendants have segmented the overall Project into at least two, if not four or more, distinct projects. The Defendants have proceeded to evaluate and disclose the impacts of these segments in a piecemeal fashion, thereby obfuscating the true scale and nature of the Project. As the true scope of the Project has been thus obscured, so have the enormity of the Project’s impacts and the alternatives to it. The Selected Alternative only identifies a specific plan for bridging Oregon Inlet. It fails to identify a specific plan for accomplishing the future, but inevitable, phases of the Project to maintain a transportation route south to Rodanthe. Without such a plan, the replacement bridge will effectively be a bridge to nowhere – in other words, a transportation project without a logical terminus. Future phases of the Project will inevitably and necessarily occur, yet the Defendants have failed to select a method for accomplishing them, from among the many identified alternatives. By avoiding

discussion of future road maintenance – which could include beach and dune nourishment, relocation of the road outside its easement on Refuge lands, raising the road onto new bridges, or using other, yet-to-be-identified methods – the Defendants avoided identifying and addressing the significant environmental impacts of those options.

73. The maintenance of the terminal groin is also a necessary part of any project that involves construction of a short, parallel bridge as in the Selected Alternative, but not of other alternatives, such as the Pamlico Sound Bridge Corridor Alternative. Yet the Defendants fail to address the terminal groin, the impact of retaining it, or the permits required to keep it, in the 2009 Revised Final Section 4(f) Evaluation, the 2010 Environmental Assessment, and the Record of Decision.

74. By improperly segmenting the Project and their analysis, the Defendants skewed the analysis of alternatives and impacts. By deciding to build the short replacement bridge now but delaying their decision among several alternatives for maintaining the roadway (each of which has significant legal and environmental problems), Defendants have ignored the direct, indirect, and cumulative impacts of the ground transportation plan and the terminal groin for the time being, until the bridge is built and there is no longer a way to avoid them—or, in other words, until there has been an irretrievable commitment of resources. If the Defendants properly treated the Project as a whole, they would find themselves unable to build a short, parallel replacement bridge, because maintenance of the road and the terminal groin will violate the law. Instead, the Defendants have segmented the Project and delayed the ground transportation plan and the issues surrounding the terminal groin for the time being, until the bridge is built. Once the short bridge is built, the roadway will have to be maintained in some way, and the terminal groin will have to remain in place. But, by that time, the Defendants will have illegally evaded

the difficult environmental and legal analysis required by NEPA. Alternatives such as a Pamlico Sound Bridge or high-speed ferry service will no longer be viable, no matter how destructive the impacts of road maintenance or the terminal groin will be.

75. The Defendants' segmentation of the Project has also precluded a legitimate look at alternatives to the overall Project. For instance, maintenance of the terminal groin and maintenance of the NC-12 ground transportation route are not necessary for any of the Pamlico Sound Bridge Corridor Alternatives, and might not be necessary for an alternative that uses ferries, including high-speed ferries. Ignoring the costs and impacts as part of the Selected Alternative results in an incomplete and skewed comparison of alternatives.

76. In segmenting the proposed Project, the Defendants have violated NEPA by, among other things:

a. Failing to adequately disclose, analyze, consider or address the cumulative impacts of reasonably foreseeable future actions related to the Project, including the maintenance of the NC-12 route and the terminal groin.

b. Failing to consider and evaluate together all the necessary parts of the Project, where one part (construction of the bridge) automatically triggers other actions (maintenance of the NC-12 route and the re-permitting of the terminal groin);

c. Failing to consider and evaluate together all necessary parts of the Project, where some parts (maintenance of the NC-12 route and the re-permitting of the terminal groin) cannot or will not proceed unless the other parts (construction of the bridge) are taken previously or simultaneously;

d. Failing to consider and evaluate together all parts of the Project, where the segments (bridge, road, and terminal groin) are all interdependent parts of a large action;

e. Failing to consider and evaluate together all parts of the proposed Project, where the various parts have cumulatively significant impacts;

f. Failing to consider and evaluate together all the parts of the proposed Project, where the individual components have little or no independent utility (for instance, a replacement bridge will have little utility if NC-12 and the terminal groin are not maintained, or if NC-12 is not relocated as the island erodes from under it, and those later actions will have little or no independent utility if a new bridge is not constructed first);

g. Failing to consider and evaluate together all the parts of the proposed Project where one part 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 (for instance, construction of an expensive replacement bridge will force the implementation of the other necessary parts of the Project, including maintenance of the NC-12 route and the terminal groin, which may prove to be more expensive than the replacement bridge);

h. Failing to divide the Project into segments with logical termini (the landing of the bridge at the northern end of Hatteras island is not a logical terminus, because depositing a traveler at the north end of the Refuge does nothing for him without a road on which to continue, and does not help him travel

past the hot spots to the southern end of the island, or vice versa for the northbound traveler);

i. Attempting, after nearly two decades of treating the transportation route from Bodie Island over Oregon Inlet through to Rodanthe as an integrated whole, to rationalize post hoc the division of the replacement bridge into a stand-alone project for the impermissible purpose of expediting review and construction and avoiding the significant problems of the other phases; and

j. Engaging in illegal segmentation in such other ways as may be revealed during the course of this action.

77. The segmentation of the Project and failure to consider cumulative impacts violated NEPA and its implementing regulations and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, and in violation of the APA, 5 U.S.C. §§ 701-06.

THIRD CLAIM FOR RELIEF

(Violation of NEPA and APA – Failure to rigorously examine reasonable alternatives)

78. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

79. NEPA requires that every EIS fully and fairly discuss, among other things, the alternatives to the proposed action. 42 U.S.C. § 4332(2)(E). NEPA regulations require that agencies rigorously explore and objectively evaluate all reasonable alternatives to a proposed action. 40 C.F.R. § 1502.14(a). The section discussing alternatives “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14.

80. The alternatives considered by the EIS must include “reasonable alternatives not within the jurisdiction of the lead agency” and “the alternative of no action.” 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1502.14.

81. The Defendants failed to rigorously explore and objectively evaluate viable alternatives that satisfy the purpose of the Project: to provide a crossing of Oregon Inlet that provides access from Bodie Island to Hatteras Island. The Defendants only thoroughly explored mere variations of a single alternative: building a short bridge that is close to and parallel to the existing Bonner Bridge. Defendants effectively ignored, and therefore failed to rigorously explore and objectively evaluate, other alternatives, by segmenting of Project components, thus avoiding any honest examination of alternatives to the whole.

82. The Defendants failed to rigorously explore and objectively evaluate the use of tolls, high-speed ferries, and other such non-bridge options that could also fulfill the Project’s purpose.

83. The Defendants failed to rigorously explore and objectively evaluate the Pamlico Sound Bridge Corridor Alternatives. Although these alternatives received more attention in the FEIS and other environmental documents than did the non-bridge options, they were summarily dismissed as not practicable or feasible due to their estimated cost, despite being unanimously supported by all Merger Team agencies in 2003 as the preferred alternative for detailed study. Yet the costs estimates for the Pamlico Sound Bridge Corridor Alternatives and for the eventual Selected Alternative were within the same range. Both cost estimates for the Selected Alternative and the Pamlico Sound Bridge Corridor Alternatives were larger than the amount budgeted for the Project in the State Transportation Improvement Program. While the

Defendants dismissed the Pamlico Sound Bridge Corridor Alternatives for being economically impracticable, they inconsistently selected an alternative whose estimated cost range was similar.

84. The Defendants failed to rigorously explore and objectively evaluate alternative funding sources for the environmentally preferable Pamlico Sound Bridge Corridor Alternatives, including tolls, public-private partnership, federal grants, etc.

85. The Defendants also failed to rigorously explore and objectively evaluate a true no-action alternative to the Project, wherein the bridge would not be replaced. Out of over 700 pages, the FEIS devoted only one page to explaining why it would not evaluate the alternative of using existing ferry service facilities as a no-action alternative. It failed to explain why it did not consider, for instance, increased ferry trips, high-speed ferries, and/or additional traditional ferries using the same ferry facilities that currently exist on both ends of Hatteras Island, and it did not evaluate whether these alternatives could accommodate the amount of traffic the Project must consider. The FEIS failed to identify how traffic could otherwise be accommodated in a no-action alternative scenario, for instance by upgrading the current bridge or by using a combination of passenger ferries and public transportation, as is used on other popular vacation islands in America that are not accessible by bridge.

86. The Defendants' failure to rigorously explore and objectively evaluate reasonable alternatives to the proposed Project violates NEPA and its implementing regulations, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. §§ 701-06.

FOURTH CLAIM FOR RELIEF

(Violation of NEPA and APA – Failure to prepare a supplement to the FEIS after substantial changes to the proposal and in light of new information)

87. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

88. The NEPA regulations require that a federal agency prepare a supplement to the EIS if either (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information arise that are relevant to environmental concerns and bear on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1); 23 C.F.R. § 771.130(a).

89. A supplemental EIS is unnecessary only when the changes to the proposed action cause a lessening of adverse environmental impacts or where the alternative to be approved was already fully evaluated in a FEIS, but not identified as the preferred alternative. 23 C.F.R. § 771.130(b).

90. In the present case, (1) substantial changes in the proposed action that was the subject of the FEIS and (2) significant new circumstances or information since the preparation of the FEIS both require the preparation of a new or supplemental EIS.

91. The substantial changes in the proposed action that are relevant to environmental concerns that require supplementation of the FEIS include at least the following:

a. According to the Environmental Assessment, the ill-defined “later phases” of the Selected Alternative include a “coastal monitoring program” and unidentified actions to manage and maintain the ground transportation route from the bridge’s landfall to Rodanthe. These later phases also allow NCDOT to use a “mix-and-match approach” at a later date to select any, all, or none of a list of

methods to secure that route, including: beach and/or dune nourishment, maintaining the road in place, relocating the road to the west of its easement, raising the road onto bridges, and possible “new solutions” to “be identified in the future.” The impacts of these “new solutions” have not previously been identified or evaluated. In other words, the Defendants’ Selected Alternative includes components that were not identified or studied in the FEIS.

b. The Selected Alternative changes the location and approach of the bridge to Hatteras Island.

c. The Selected Alternative leaves the alignment, design, and location of the bridge to design-build contractors who were not yet identified at the time of the Record of Decision.

d. The Selected Alternative will certainly require the re-permitting of the terminal groin, which will have significant biological impacts that have never been evaluated in a NEPA document.

e. Such other changes as are discovered during the course of this action.

92. Significant new circumstances and information relevant to environmental concerns that require supplementation of the FEIS include at least the following:

a. Significant portions of the Refuge, including sections that will be impacted by the later phases of the Project, were designated as critical habitat for the federally threatened piping plover in October 2008.

b. NCDOT claimed to discover old deeds in Spring 2009; their effect on NCDOT's ability to move NC-12 out of the bounds of its easement within the Refuge and within Cape Hatteras National Seashore is disputed.

c. Significant and continuing progress has been made in the scientific study of the effects of global climate change and sea level rise on coastal landscapes, including research specific to the predicted rate of sea level rise on the North Carolina coast.

d. A cursory analysis of options for funding a Pamlico Sound Bridge was performed in 2009.

e. New sources of federal funding for transportation projects have become available since publication of the FEIS.

f. Such other new circumstances and information as are revealed during the course of this action.

93. Instead of preparing a supplemental FEIS, as required by law, the Defendants prepared an Environmental Assessment. In so doing, the Defendants avoided taking an appropriately thorough look at the new circumstances and information described above and avoided the public review and comment process that accompanies issuance of an EIS.

94. Based on the above substantial changes in the proposed action and the significant new information since the issuance of the FEIS, the Defendants' failure to prepare a Supplement to the FEIS and their issuance instead of an Environmental Assessment violate NEPA and its implementing regulations, and are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. §§ 701-06.

FIFTH CLAIM FOR RELIEF
(Violation of Section 4(f) and APA)

95. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

96. Section 4(f) of the Department of Transportation Act of 1966 prevents a federal project from using publicly owned land 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).

97. For purposes of Section 4(f), a “use” occurs when land is permanently incorporated into a transportation facility, when there is a temporary occupancy of land that is adverse in terms of the statute’s preservation purpose as determined by the criteria in 23 C.F.R. § 774.13(d), or when there is a constructive use of Section 4(f) property as determined by the criteria within 23 C.F.R. § 774.15.

98. Under Section 4(f), if there is no prudent and feasible alternative to the use, the FHWA “may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that causes the least overall harm in light of the statute's preservation purpose.” 23 C.F.R. § 774.3(c).

99. In the present case, Section 4(f) prohibits approval of the Selected Alternative, which will require the use of, and negatively impact, the Refuge, unless “there is no feasible and prudent alternative” and the project includes “all possible planning to minimize harm.” 23 U.S.C. § 138; 49 U.S.C. § 303.

100. The Defendants admit in the FEIS that all Parallel Bridge Alternatives, except the Phased Approach, would use Refuge land. They also admit in the Record of Decision that the

Selected Alternative, as well as all of the Parallel Bridge Alternatives studied previously, will use Refuge land. Indeed, these Alternatives will use Refuge land in any and all of the following ways:

- a. By permanently constructing portions of the replacement bridge and portions of NC-12 on Refuge land that is outside the easement;
- b. By constructing and nourishing dunes to protect and buffer NC-12;
- c. By temporarily occupying Refuge land during construction of the bridge and maintaining or moving NC-12 (for instance, by constructing service roads, by constructing a traffic maintenance bridge, by constructing temporary traffic maintenance roads, and/or by placing materials, vehicles, and equipment in staging areas within the Refuge);
- d. By temporarily occupying Refuge land during periods of time when NC-12 must be temporarily relocated outside of the easement due to erosion or storm events;
- e. By re-permitting and maintaining the terminal groin, which adversely impacts shorebird habitat and hastens erosion of Refuge lands;
- f. By constructively using the Refuge through the disruption to both wildlife and human visitors from the noise, vibrations, visual blight, and other commotion that will inevitably accompany the fifty years of planned construction and maintenance required by the “later phases” of the “NC-12 Transportation Management Plan”;

g. By constructively using the Refuge through the reduction in access to portions of the Refuge, including the Visitor Center, the North Pond Trail, and any portion bypassed by the possible elevation of portions of NC-12 onto bridges;

h. Such other permanent, temporary, and constructive uses as are revealed during the course of this action.

101. There are prudent and feasible alternatives to the Selected Alternative that do not use Refuge lands. The Project's purposes of "provid[ing] a new means of access from Bodie Island to Hatteras Island for its residents, businesses, services, and tourists prior to the end of Bonner Bridge's service life," "provid[ing] a replacement crossing that takes into account natural channel migration expected through year 2050 and provides the flexibility to let the channel move," and "provid[ing] a replacement crossing that will not be endangered by shoreline movement through year 2050" could be accomplished through feasible, prudent alternatives that do not involve use of the Refuge.

102. Among those feasible, prudent alternatives are the Pamlico Sound Bridge Corridor Alternatives described in the FEIS. In the FEIS, the Defendants admit that the Pamlico Sound Bridge Corridor Alternatives would fulfill the Project's purposes, but claim that they are not feasible.

103. The Defendants admit in the Revised Final Section 4(f) Analysis that the Pamlico Sound Bridge Corridor Alternatives will not use Refuge land.

104. The Defendants acknowledged in the FEIS that "in all cases, the agencies with jurisdiction over the Section 4(f) properties would prefer the Pamlico Sound Bridge Corridor alternatives over all others." (FEIS at 5-38).

105. The Defendants' cursory 2009 economic analysis, by which they conclude that the Pamlico Sound Bridge Corridor Alternatives are not feasible, amounts to reverse engineering, in violation of NEPA and Section 4(f). The economic analysis was conducted long after the Defendants first stated that the Pamlico Sound Bridge Corridor Alternatives would be too expensive. The economic analysis was designed to support that conclusion rather than fairly to evaluate the costs. Moreover, the Defendants ignore the fact that the estimated costs for the Parallel Bridge Alternatives, including the Selected Alternative, are in the same range, and also exceed the amount of money set aside in the state transportation budget for the Project.

106. Even if there were no feasible, prudent alternatives such as the Pamlico Sound Bridge Corridor Alternatives, the Defendants have not selected the alternative that will result in the least overall harm to the Refuge. Indeed, by leaving undecided the method or methods that will be used to maintain the transportation corridor through the Refuge for the next fifty or more years, the Defendants have left open the possibility that they will use the alternative that results in the most overall harm to the Refuge.

107. In addition, the Defendants have not included all possible planning to minimize harm to the Refuge. Rather than including all possible planning to minimize and mitigate harm to the Refuge, Defendants' Selected Alternative fails to include a specific plan for maintaining a transportation corridor through the Refuge or a plan for minimizing harm from that corridor. The Defendants' cursory analysis of measures to avoid harm is inadequate to satisfy Section 4(f)'s requirement that all possible planning be employed to mitigate adverse impacts to Section 4(f) properties.

108. The Defendants' claim in the Record of Decision that Section 4(f) does not apply to its proposed use of the Refuge because the Refuge and NC-12 were jointly planned is false.

The Refuge was established in 1938 and existed for at least sixteen years before the federal government granted North Carolina an easement for NC-12 and allowed the construction of that road within a defined metes and bounds corridor. The existing Bonner Bridge was constructed in 1962, 24 years after the Refuge was established. The road and bridge could not, therefore, have been jointly planned with the Refuge. Accordingly, any exception to Section 4(f) for transportation facilities that are jointly planned with a Refuge does not apply.

109. The Defendants' adoption of the Selected Alternative, which uses Refuge lands, despite the existence of prudent and feasible alternatives that do not use Refuge lands, and without including all possible planning to minimize harm to the Refuge, violates Section 4(f) and its implementing regulations, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. §§ 701-06.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment stating that the Defendants have violated NEPA, Section 4(f) of the Department of Transportation Act of 1966, and their implementing regulations in the respects set forth above;

B. Enter appropriate preliminary and permanent injunctive relief to ensure that Defendants comply with the provisions of NEPA, Section 4(f), and their implementing regulations as described above, and specifically to ensure that Defendants take no further actions towards proceeding with the Bonner Bridge Replacement Project until they have complied with those laws;

C. Order that the Record of Decision dated December 20, 2010 be vacated, set aside, and/or rescinded;

D. Award Plaintiffs the costs of this action, including their reasonable attorneys' fees; and

E. Grant Plaintiffs such further and additional relief as the Court deems just and proper.

This the 1st day of July, 2011.

/s/ Julia F. Youngman

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