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

| | | |
|---|---|---|
| NORTH CAROLINA WILDLIFE FEDERATION, CLEAN AIR CAROLINA, and YADKIN RIVERKEEPER,<br><br>Plaintiffs,<br><br>v.<br><br>NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, EUGENE CONTI, SECRETARY, NCDOT, FEDERAL HIGHWAY ADMINISTRATION, and JOHN F. SULLIVAN, DIVISION ADMINISTRATOR, FHWA,<br><br>Defendants. | ) | 5:10-cv-00476-D |

**PLAINTIFFS' MOTION FOR A TEMORARY RESTRAINING ORDER AND FOR A PRELIMINARY INJUNCTION PURSUANT TO F.R.C.P. 65(b) and E.D.N.C. Local Rule 7.1**

Pursuant to Fed. R. Civ. P. 65, and E.D.N.C. Local Rule 7.1 Plaintiffs respectfully move for a temporary restraining order and for a preliminary injunction prohibiting Defendants, particularly Defendant North Carolina Department of Transportation and Defendant Eugene Conti, its Secretary of Transportation, from taking further action to advance certain key activities in connection with the proposed Monroe Connector/Bypass, including the issuance or sale of revenue bonds, entering into any construction contracts, acquiring additional right of way, or beginning any ground-disturbing activities, in connection with the project, pending a final ruling on the merits. In support of their Motion, Plaintiffs incorporate by reference the arguments and materials submitted in connection with their Motion for Temporary Restraining Order and for a Preliminary Injunction, ("Motion"), including the Memorandum of Law and Appendix of exhibits, and respectfully show the Court the following:

1. This action challenges violations of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 et seq., in connection with Defendants' decision to authorize, fund, seek permits for and otherwise advance construction of the Monroe Connector/Bypass. The proposed 20 mile

highway project, (the "toll highway") would constitute a new location, controlled-access toll highway from U.S. 74 near I-485 in Mecklenburg County to U.S. 74 between the towns of Wingate and Marshville in Union County. The project is expected to cost approximately $925 million. As explained below and as set out more fully in the memorandum in support of this motion, Defendants intend to issue and sell revenue bonds tied solely to this specific project in December 2010, and to begin construction of the project in January 2011.

2. The lawsuit is prompted by the deficient Final Environmental Impact Statement ("FEIS") and subsequent issuance of the Record of Decision ("ROD"), prepared as the prerequisite decision-making tool and public disclosure document to decide whether and how to move forward with the project, and if so, in what form and location. The FEIS was prepared by the North Carolina Department of Transportation ("NCDOT") and Federal Highway Administration ("FHWA"). The Record of Decision ("ROD") issued by FHWA, approving the FEIS, is a precursor under federal law to the further development of the toll highway including permitting, financing and construction of the project.

3. Plaintiffs submitted comments on the inadequacy of the FEIS on June 25, 2010 as well as on the precursor Draft Environmental Impact Statement ("DEIS") on July 15, 2009.

4. FHWA Administrator Sullivan signed the ROD on August 27, 2010. Notice of final agency action on the project was published in the Federal Register on September 27, 2010, triggering a 180 day statute of limitation. 75 Fed Reg. 59325 (Sep. 27, 2010). A claim seeking judicial review of the Federal agency actions on the highway project would be barred unless the claim is filed on or before March 28, 2011.

5. Plaintiffs filed this action on November 2, 2010, requesting injunctive relief and a declaratory judgment that Defendants violated the National Environmental Policy Act by preparing an incomplete, misleading and inaccurate FEIS that fails to analyze a range of practical project alternatives and their relative direct and indirect impacts on the environment, and that wholly fails as a decision-making or public disclosure document. In particular, the FEIS, uses an improperly narrow statement of

purpose and need, fails to consider a reasonable range of alternatives, fails to provide a rational basis upon which to compare selected alternatives, identifies a preferred alternative based on inaccurate information, fails to adequately analyze and disclose the environmental impacts of the proposed project, and, by failing in their obligation to inform the public about potential impacts of the project by intentionally or negligently presenting false and misleading information in the FEIS and the ROD.

6. NCDOT plans to finance the $925 million project through the sale of State Appropriations Bonds, supported by an annual appropriation of $24 million for up to forty years. Additional taxpayer dollars in the amount of $77 million will be used to support the project through NCDOT's State Transportation Improvement Program (STIP) fund, and an as-yet undetermined amount of funds NCDOT has pledged to support cost overruns. Only a fraction of the project - less than half - will be financed through the sale of Revenue Bonds-which have yet to be issued, supported by tolls collected from anticipated users projected to travel the corridor.

7. The first round of bonds was authorized by the Local Government Commission ("LGC"), under the chairmanship of State Treasurer Janet Cowell on October 5, 2010, despite the urging of Plaintiff's counsel that bonds not be issued prior to permit issuance and the resolution of the concerns regarding the EIS. Defendant NCDOT subsequently sold $233 million of those Appropriation bonds on October 14, 2010, stipulating in the bond documents that they may be used to finance other projects in the event that permits were not forthcoming. Plaintiffs also urged the LGC that a decision on the second round of bonds- revenue bonds which are tied specifically to the project, not be issued until all environmental issues are resolved. Despite these concerns, on November 2, 2010, LGC authorized that the revenue bonds can be issued and proffered for sale as soon as the NCDOT receives wetlands and water quality permits for the project, with early December as the target date for issuance identified by North Carolina Turnpike Authority ("NCTA")[1] to the LGC.

[1] The NCTA was absorbed into the NCDOT by statute in 2009 and is now under the authority of the North Carolina Secretary of Transportation. N.C. Gen. Stat. § 136-89.182.

8. Since publication of the ROD, NCDOT has continued to rapidly move forward with the project. Relying on the faulty analysis in the FEIS, on August 31, 2010 NCDOT submitted an application for a state water quality certification to the North Carolina Division of Water Quality ("NCDWQ") and a wetland and stream impact permit to the U. S. Army Corps of Engineers under Sections 401 and 404 of the Clean Water Act. 33 U.S.C. § 1341 et seq.; Id. § 1341 et seq. The application contained a number of errors, requiring an amended application on September 17, 2010. The documents submitted, however, only include detailed impacts analysis for about one-fifth of the proposed toll highway, and propose a segmented permitting process, despite the fact that the revenue bonds would help finance the entire project. The public comment period for the wetlands permits is now closed. The public comment period for the Section 401 water quality certification closes on November 29, 2010, and NCDWQ expects to issue a decision no later than December 29, 2010, as stated in the public notice for the permit.

9. Plaintiffs submitted comments on November 8, 2010 on the inadequacy of the application for the wetlands permits, and will submit comments by November 29, 2010 on the inadequacy of the water quality certification permit application.

10. The water quality certification can be issued, however, as soon as November 30th, and the wetlands permit, for which the water quality certification permit is a precursor, can issue immediately thereafter. Plaintiffs are informed, believe and have confirmed with NCDOT counsel, that if and when the wetlands and water quality permits are issued, Defendants intend to move forward immediately with plans to sell the second round of bonds, execute contracts and begin construction.

11. Defendant NCDOT has identified a preferred contractor for the project. Signing of contracts for construction will follow the permit issuance and bond sale, along with additional right of way acquisition. Defendants thus project that construction will begin in January of 2011.

12. Counsel for Plaintiffs contacted counsel for the NCDOT on November 22, 2010, to request that Defendant NCDOT suspend certain "milestone" activities related to the Monroe Connector/Bypass, including the pursuit of environmental permits, the sale of additional bonds, especially

those tied to the project, the purchase of additional right-of-way, the finalizing of construction contracts and the inception of construction until this Court rules on the merits of Plaintiffs' action, or at least until a preliminary injunction request can be decided. Counsel for Defendant NCDOT notified Plaintiffs' counsel, via email, that NCDOT, while agreeing to a ten day response from time of the filing of a request for injunctive relief, "do[es] not want to enter into an agreement to delay any of the milestones" related to the project.

13. Attorneys for Defendant FHWA have not yet entered a notice of appearance. Plaintiffs' counsel, however, contacted the attorney identified by counsel for NCDOT to be the counsel for Defendant FHWA, Seth Wood, with the U.S. Attorney's Office for the Eastern District, to discuss an expedited briefing and hearing schedule.[2] Plaintiffs' counsel was unable to reach FHWA counsel prior to this filing and left a detailed message regarding this filing.

14. If the Defendants are allowed to move forward with the aggressive schedule for financing and constructing the toll highway project, there is great danger that if, after an order on the merits, they are required to revisit the NEPA process, they inevitably will be biased in favor of this hugely expensive and environmentally destructive toll highway as the preferred alternative, even after a revised, objective and complete EIS is prepared. Defendants must therefore be restrained from further action pending a ruling on the merits of Plaintiffs' case.

15. The standards for issuing a temporary restraining order are identical to those for a preliminary injunction. As this Court has ruled previously, in seeking temporary relief, the primary consideration in the analysis is the relative balance of harm between the parties.

16. As explained more fully in the memorandum submitted in support of this motion, a temporary restraining order and a preliminary injunction are appropriate because immediate and

[2] FHWA is the lead federal agency for this project, and signed the ROD. It also the agency identified in the Federal Register notice as having taken final federal agency action, triggering the statute of limitation for filing this action. NCDOT, however, has primary authority over actions following the issuance of ROD that Plaintiffs seek to enjoin before a hearing on the merits.

irreparable harm will result to the Plaintiffs in the absence of injunctive relief, including (a) environmental harm resulting from the construction of the road and (b) the impermissible biasing of the Defendants in favor of construction of the Monroe Connector/Bypass in the event this Court enjoins such development after a full hearing on the merits of this action and remands this matter to the FHWA and NCDOT for further environmental investigation (i.e., the "bureaucratic steamroller" effect).

17. Further, as indicated in the supporting memorandum and exhibits, Plaintiffs have shown that Defendants will not be significantly harmed from the enjoining of further development of the Monroe Connector/Bypass for a few months while the Court considers this matter on the merits, and that, therefore, the balance of hardships tips in favor of Plaintiffs and issuance of such an injunction.

18. Also as indicated in the supporting memorandum and exhibits, Plaintiffs have shown that they have a substantial likelihood of prevailing on the merits or, at a minimum, that grave or serious questions regarding the merits of their claims have been raised, and that the public interest favors issuance of the requested injunctive relief.

19. Plaintiffs respectfully submit that, in view of the circumstances of this case, no bond should be required. If one is required, it should be nominal. See Bragg v. Robertson, 54 F.Supp.2d 635, 652 (S.D.W.Va. 1999) ("[I]t is common for courts in environmental cases brought by environmental groups or individuals with limited means, particularly in NEPA cases, to require little or no security").

20. Plaintiffs have filed this motion and supporting memorandum of law with the court, and served them on Defendants and their counsel, via CM/ECF, where a notice of appearance has been filed, or by overnight mail otherwise, as of the date noted below.

WHEREFORE, Plaintiffs respectfully request that:

1. The Court issue a temporary restraining order that enjoins Defendants from proceeding with any major step to advance the construction of the Monroe Connector/Bypass, including but not limited to, issuance or sale of revenue bonds, additional right-of-way acquisition,

execution of construction contracts, site preparation and any construction activities. Plaintiffs request that this order remain in effect pending a hearing and ruling on the motion for preliminary injunction.

2. The Court set this matter on for expediting briefing and a court hearing including oral argument at dates and times certain on Plaintiffs' request for a preliminary injunction as soon as practicable; and

3. The Court enter a preliminary injunction that enjoins Defendants from proceeding with the major activities to advance the Monroe Connector/Bypass identified in paragraph one, above, until a hearing and ruling on the merits.

4. The Court grant such other and further relief as is just and proper.

Respectfully submitted this 23rd day of November 2010.

/S/ Chandra T. Taylor
Chandra T. Taylor
NC Bar No. 28116

/S/ Kimberley Hunter
Kimberley Hunter
NC Bar No. 41333

/S/ J. David Farren
J. David Farren
NC Bar No. 12809
SOUTHERN ENVIRONMENTAL LAW CENTER
200 W. Franklin St., Suite 330
Chapel Hill, NC 27516-2520
Telephone: (919) 967-1450
ctaylor@selcnc.org
khunter@selcnc.org
dfarren@selcnc.org
*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2010, I electronically filed the foregoing Motion for Temporary Restraining Order and Preliminary Injunction with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

| | |
|---|---|
| Scott T. Slusser<br>Special Deputy Attorney General<br>NC Department of Justice<br>1 South Wilmington Street<br>Raleigh, NC 27601<br>Attorney for NCDOT and Eugene Conti,<br>Secretary of Transportation | |

I further certify that I have served counsel for FHWA, listed below by overnight delivery service, postage prepaid, addressed as follows:

| | |
|---|---|
| Scott Jones<br>Federal Highway Administration<br>Office of the Chief Counsel<br>60 Forsyth St. SW<br>Suite 8M5<br>Atlanta, GA 30303<br>Attorney for FHWA | Seth Wood<br>US Attorney's Office<br>310 New Bern Ave., Suite 800<br>Raleigh, NC 27601<br>Attorney for FHWA |

I further certify that I have served the following by placing a copy in the U.S. Mail:

| | |
|---|---|
| Federal Highway Administration<br>FHWA-NC Division<br>310 New Bern Avenue<br>Suite 410<br>Raleigh, NC 27601-1418 | Eric Holder, Jr.<br>US Attorney General<br>US Department of Justice<br>950 Pennsylvania Ave., NW<br>Washington, DC 20530-001 |

This the 23rd day of November, 2010.

/s/ Chandra T. Taylor
Chandra T. Taylor

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

| | | |
|---|---|---|
| NORTH CAROLINA WILDLIFE FEDERATION, CLEAN AIR CAROLINA, and YADKIN RIVERKEEPER,<br><br>Plaintiffs,<br><br>v.<br><br>NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, EUGENE CONTI, SECRETARY, NCDOT, FEDERAL HIGHWAY ADMINISTRATION, and JOHN F. SULLIVAN, DIVISION ADMINISTRATOR, FHWA,<br><br>Defendants. | ) | 5:10-cv-00476-D |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

## INTRODUCTION AND CASE SUMMARY

Plaintiffs, North Carolina Wildlife Federation ("NCWF"),[1] Yadkin Riverkeeper ("Riverkeeper"),[2] and Clean Air Carolina ("CAC")[3] (collectively "Plaintiffs"), submit this Memorandum in support of their Motion for Temporary Restraining Order and Preliminary Injunction. Plaintiffs seek to enjoin the North Carolina Department of Transportation ("NCDOT") and the Federal Highway Administration ("FHWA") from engaging in further activities associated with the future construction of the Monroe Connector/Bypass in Mecklenburg and Union counties pending a final decision in this case. Plaintiffs challenge the actions of NCDOT and FHWA under the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA") in connection with the preparation of the Environmental Impact Statement ("EIS") for this proposed publicly-financed major toll highway project.

[1] Standing Affidavits for North Carolina Wildlife Federation are included in the Appendix as Exhibits A and B.
[2] Standing Affidavits for Yadkin Riverkeeper are included in the Appendix as Exhibits C and D.
[3] Standing Affidavits for Clean Air Carolina are included in the Appendix as Exhibits E and F.

An EIS is the required comprehensive study for all major public works projects involving federal permits or funding that significantly impact the environment. The purpose of the EIS is to evaluate a full range of alternatives that would fully or substantially meet the project proposal's underlying purpose; and to consider, compare and disclose the direct, indirect and cumulative environmental impacts of these various alternatives. As detailed in the Complaint, Defendants failed to prepare an accurate or thorough EIS that fairly evaluates a reasonable range of alternatives or compares their impacts, including the project's effect on future development patterns in the area.

NCDOT's activities pose a real and substantial threat of irreparable harm to the environment and Plaintiffs, both from the project's footprint and growth-inducing impacts, and from the procedural harm that cannot be undone if Defendants are permitted to rush forward based on a flawed study. NCDOT, on the other hand, will suffer little, if any, demonstrable harm in the event the injunction is issued, other than speculative potential costs or savings of delay, and, accordingly, the balance of hardships favors injunctive relief. In addition, Plaintiffs raise serious claims, in fact showing a strong likelihood of success on the merits based on the facts at hand and applicable statutes and case law. Further, the public interest favors the injunction. Having met all the elements of the Fourth Circuit decision in Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977), Plaintiffs are entitled to have the injunction entered.

## FACTUAL BACKGROUND

### The Toll Highway Project

Defendant NCDOT plans to construct and operate a new location, controlled-access toll highway, the "Monroe Connector/Bypass," in Union and Mecklenburg counties, North Carolina. The highway will run from U.S. 74 near I-485 in Mecklenburg County to U.S. 74 between the towns of Wingate and Marshville in Union County, a distance of approximately 20 miles, traversing a suburban-to-rural landscape on the outer fringe of the Charlotte metro area. Defendants forecast that they hope to break ground on the project in January 2011 and open the road to traffic in December 2014. The lead federal

agency involved with NCDOT, with the primary responsibility to oversee the preparation of the EIS is Defendant FHWA.

The Monroe Connector /Bypass is expected to cost approximately $925 million including construction, financing, right-of-way and other costs. See Local Government Commission Agenda (Nov. 2, 2010), Exhibit G. The project is one of the largest and most expensive transportation infrastructure projects in the State's history, despite the fact that North Carolina struggles with a $3.2 billion projected budget shortfall for 2011.[4] NCDOT plans to finance almost half of the project through the sale of State Appropriations Bonds, supported by an annual appropriation of $24 million for up to forty years. See Local Government Commission Agenda (Nov. 2, 2010), Exhibit G. Additional taxpayer dollars will be used to support the project through NCDOT's State Transportation Improvement Program (STIP) fund, and an as-yet undetermined amount of funds NCDOT has pledged to support cost overruns. Id. Only a fraction of the project - less than half - will be financed through the sale of Revenue Bonds, supported by tolls collected from anticipated users. Id.

As its name suggests, the Monroe Connector/Bypass was originally two separate projects. Defendants first studied a Monroe Bypass that would loop north of Monroe from U.S. 74 near Marshville, westward to Rocky River Road. Later, Defendants proposed a Monroe Connector that would connect the proposed Monroe Bypass to the I-485 Charlotte outer loop. NCDOT began the NEPA process for these projects in the late 1990s, issuing a draft EIS for the Monroe Connector in 2003. Draft Environmental Impact Statement, Monroe Connector (2003). Several resource agencies and environmental groups submitted comments on that document, highlighting its deficient analysis of significant water quality impacts on the Goose Creek watershed, which would likely jeopardize the continued existence of the endangered Carolina heelsplitter mussel. However, rather than attempt to revise the DEIS and address the significant legal impediments to the project under federal and state law, Defendants rescinded the

[4] NC 2010 Legislative Session Budget and Fiscal Policy Highlights, August 20th, 2010 http://www.ncga.state.nc.us/fiscalresearch/highlights/highlights_pdfs/2010_Session_Highlights.pdf

document, explaining that they would pursue a combined Monroe Bypass and Connector project. 71 Fed Reg. 19,4958 (Jan. 30, 2006).

The two projects were then placed under the authority of the North Carolina Turnpike Authority ("NCTA"). NCTA, which was formed as an independent state agency in 2002, has the single purpose of pursuing up to nine toll projects at predetermined locations. More recently, following the substantial completion of the EIS challenged here, NCTA was absorbed into NCDOT. N.C. GEN. STAT.. § 136‑89.182. In 2007, NCDOT issued a Notice of Intent ("NOI") to prepare a Draft Environmental Impact Statement ("DEIS") for the Monroe Connector/Bypass. 72 Fed. Reg. 2582 (Jan. 19, 2007). The NOI stated that, in addition to studying a new location alignment, Defendant would also consider upgrades to the existing U.S. 74 highway corridor. Id. Contemporaneously, due to existing traffic congestion on the U.S. 74 corridor, NCDOT hired Stantec to conduct a study of potential improvements. Stantec, U.S. 74 Corridor Study (July, 2007) ("U.S. 74 Study"), Exhibit H. The U.S. 74 Study was published in July, 2007, and concluded that $13.3 million in long-term improvements—such as conversion to a "superstreet-type" facility, implementation of closed-loop traffic signal systems, and added turn lanes at intersections —could result in an acceptable level of service by the year 2015 along the whole of the corridor in Union County, with the exception of one interchange. Id. These improvements would cost a tiny fraction of the Monroe Connector/Bypass, and would dramatically reduce or avoid many of the environmental harms and human dislocations inherent in a new location major highway.

**The EIS Alternatives Review**

Despite the promising findings of the U.S. 74 Study, NCTA, adhering to its narrow focus on toll projects, proceeded to move forward expeditiously with a new location highway, and NCDOT has not scheduled the recommended improvements to the U.S. 74 corridor. A DEIS for the project was issued in

March 2009.[5] The suggestions in the U.S. 74 Study, however, were given only cursory review in the DEIS, and indeed, all but toll highway options were removed from detailed study at a very early stage. DEIS at 2-1 – 2-21. For example, the alternatives analysis either failed to consider entirely, or eliminated from serious consideration, increased investment in transit in the corridor; upgrades to the parallel rail freight corridor to reduce truck traffic; improved connectivity on the nearby road network; and other strategies that, singly or in combination, could serve to improve mobility in the corridor. Id.

Defendants limited their consideration of improvements to the U.S. 74 corridor to a dramatic, impracticable scenario upgrading on the precise current highway footprint to a massive ten-lane structure that could also incorporate toll lanes. As this "alternative" would essentially wipe out all local businesses due to the exceedingly wide right of way, it was swiftly rejected. The only "detailed study alternatives" in the DEIS were slight route variations for a new location toll highway along a single identified undeveloped corridor. Id. As such, the DEIS compares the costs and impacts associated with these various alignments for what is essentially a single alternative. DEIS at 2-34-2-47. These "Build Scenarios" were presented as the purported alternatives in the DEIS alongside a "No Build Scenario." Id.

The rejection of all alternatives, other than a new location toll highway, relied on an analysis presented in the DEIS that shows a huge growth in traffic volume on the existing U.S. 74 under the baseline "No Build" scenario. DEIS at Table 2-7. Defendants arrived at this conclusion by assuming a constant level of traffic volume for the future "Build" and "No Build" scenarios. See DEIS, "Traffic Forecasts for the No-Build Alternatives." The forecasts for all scenarios were based on a single set of socio-economic forecasts that assume the Monroe Connector/Bypass would be built. Id. Thus, the No Build" traffic forecasts portrayed a scenario in which the future traffic volumes generated by both U.S. 74 and the planned toll way must squeeze onto U.S. 74 alone.

[5] All NEPA materials for the Monroe Connector/Bypass are available at North Carolina Turnpike Authority Website, Monroe Connector/Bypass, http://www.ncturnpike.org/projects/monroe/

**The EIS Impacts Review**

In a similar vein, contrary to common sense, the EIS included an Indirect and Cumulative Impacts Effects analysis which concluded that building a toll highway in the growing largest metro area in the Carolinas would result in almost no additional development on the fringe of the rapidly growing city, therefore having virtually no impact on the environment beyond the toll road's footprint itself. DEIS at 7-1 – 7-22. Defendants' analysis suggests that by 2035 there will be 97,600 acres of developed land in the area, but attributes less than one percent of this development to the construction of the road. FEIS Appendix H at vi. To reach this conclusion, Defendants compared the various Build Scenarios to the No Build Scenario. Id. The No Build Scenario theoretically formed a baseline from which to calculate all the potential impacts from the project. However, the "No Build Scenario" was generated incorporating Traffic Analysis Zone ("TAZ") forecast data from the local Metropolitan Planning Organization ("MPO"). See FEIS, Appendix H. This forecast data assumed that the Monroe Connector/Bypass would be built.[6] Thus, the impacts assessment for all alternative scenarios, including the No-Build scenario, was based on data that assumed the construction of the highway.

Defendant NCDOT received confirmation that the base TAZ forecasts assumed the building of the Monroe Connector/Bypass on September 28, 2009, but did not correct the error and continued to assert that the impacts from the road would be negligible. This fundamental unacknowledged error in the analysis prompted the U.S. Fish & Wildlife Service to drop its longstanding concerns about impacts to endangered mussels in the Goose Creek watershed and issue a "concurrence" for the project, removing a major impediment to permitting under the Endangered Species Act. 16 U.S.C. § 1531 et seq.; See ROD at A1-A3.

Early in the project study, Plaintiffs submitted comments on the DEIS raising a number of substantive issues, including those highlighted above, which detailed how the DEIS understated the

[6] See e-mail from Anna Gallup, Charlotte Department of Transportation to Scudder Wag, NCTA Consultant (Sep. 28, 2009) ("2030 TAZ forecasts were developed with the assumption that the Monroe Connector –Bypass would be constructed."), Exhibit I.

impacts to water quality and air quality from development and increased vehicle miles traveled that would be anticipated to result from the project. Numerous state and federal agencies also submitted comments on the DEIS voicing all of these concerns, including North Carolina Natural Heritage Program, North Carolina Division of Water Quality, North Carolina Wildlife Resources Commission, U.S. Fish and Wildlife Service and U.S. Environmental Protection Agency. See FEIS, Appendix B. Virtually ignoring these fundamental problems with the DEIS, Defendants pushed ahead and issued a Final Environmental Impact Statement ("FEIS") on May 25, 2010. Again, Plaintiffs and multiple resource agencies submitted extensive comments criticizing the FEIS's failure to address the inadequacies of the DEIS. Nevertheless, Defendants again forged ahead, issuing a Record of Decision ("ROD") which was formally approved by FHWA Administrator Sullivan on August 27, 2010, a little more than a month after the official comment period closed.

Given this timeframe, the ROD, unsurprisingly, did not address the majority of the concerns laid out by Plaintiffs and the resource agencies. Among its key omissions, the ROD failed to address Plaintiffs' concern that data used to analyze Indirect and Cumulative Effects assumed the building of the Monroe Connector/Bypass in the base case. See ROD at C-11 (August, 2010). Rather than address this concern, Defendants incorrectly responded that TAZ data used in the analysis did *not* assume the construction of the project. Id.

**The Project's Current Status**

Since publication of the ROD, NCDOT has continued to rapidly move forward with the project. Relying on the faulty analysis in the FEIS, on August 31, 2010 NCDOT submitted an application for a state water quality certification to the North Carolina Division of Water Quality ("NCDWQ") and a wetland and stream impact permit to the U. S. Army Corps of Engineers ("Corps") under Sections 401 and 404 of the Clean Water Act. 33 U.S.C. § 1341 et seq.; Id. § 1341 et seq.; NCTA's § 401 and 404 application, Exhibit J. The application contained a number of additional errors, so that an amended application was submitted on September 17, 2010. The documents submitted, however, only include

detailed impacts analysis for approximately one-fifth of the proposed toll highway. Id. NCDOT plans to submit two permit "modification" requests at a later date when all the analysis has been completed, proposing to move forward with final approvals a section at a time. Plaintiffs have questioned this novel approach administratively with the Corps as contrary to its sound practice, as well as illegal under federal and state law. See Letter from Plaintiffs to Liz Hair, U.S. Army Corps of Engineers (Nov. 8, 2010), Exhibit K. The public comment period for the Section 404 permit has closed and the comment period for the Section 401 water quality certification ends on November 29, 2010. NCDWQ expects to issue a decision no later than December 29, 2010. NCDWQ, Public Notice for the Monroe Connector/Bypass (Nov. 10, 2010), Exhibit L.

Also unprecedented in North Carolina public works financing, Defendants have rapidly moved forward to obligate taxpayers to finance the project, despite the fact that permits have yet to be issued. On October 5, 2010 NCDOT petitioned the Local Government Commission ("LGC"), the entity that must approve their issuance under N. C. GEN. STAT. §159-51, to authorize $500 million in State Appropriations Bonds for the project. Despite Plaintiffs' objections including the uncertain status of the project due to the flawed EIS, and the fact that permits had yet to be issued, to ensure that the bonds were issued at that meeting, Defendants assured the LGC that the approved Appropriations Bonds could be used to finance other projects instead of the Monroe Connector/Bypass if the project did not move forward, or proceed on the anticipated schedule. See Memorandum from William H. McBride to Vance Holloman (Oct. 13 2010), Exhibit M. With this contingency, and specifying that the bonds not be used for any right-of-way acquisition associated with the project, the LGC approved the bonds. Defendant NCDOT subsequently sold $233 million of Appropriation bonds on October 14, 2010, disclosing in the bond documents that they may be used to finance other projects. Id.

Despite the restrictions on the first round of bonds and the lack of project permits, on November 2, 2010, Defendants again sought approval from the LGC for the sale of a second round of bonds, this time also including revenue bonds. Given the unprecedented nature of Defendants' request to approve the

sale of revenue bonds- which, unlike the appropriations bonds, must be tied to a particular project- prior to the issuance of environmental permits, the LGC conditioned its approval of these bonds on the issuance of a federal Clean Water Act permit and state Water Quality Certification for the project. If these permits are issued, Defendants intend to sell the bonds in early December, or very soon after permit issuance.

Meanwhile, Defendants are free to continue to pursue right-of-way acquisition for the project and have secured bids and identified a lead contractor. Defendants expect to finalize a contract with this contractor shortly and are currently planning to break ground on the project as early as January 2011. NCDOT has declined to enter into any agreement with Plaintiffs to halt or suspend any activities pending this Court's consideration of this matter. Accordingly, a temporary restraining order, followed by a preliminary injunction, is Plaintiffs' sole remedy at this point to redress their claims before hundreds of millions are obligated and construction of the toll highway makes any retroactive review a mere formality.

## ARGUMENT

**PLAINTIFFS ARE ENTITLED TO INTERIM RELIEF SUSPENDING THE MONROE CONNECTOR/BYPASS AS (1) THE BALANCE OF HARDSHIPS DECIDEDLY FAVORS INJUNCTION, (2) PLAINTIFFS HAVE SHOWN "GRAVE OR SERIOUS QUESTIONS" ON THE MERITS, AND (3) THE PUBLIC INTEREST FAVORS ISSUANCE.**

In the Fourth Circuit, the standard by which a motion for preliminary injunction is to be evaluated is set forth in Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc., 550 F.2d 189, 193 (4th Cir. 1977). First, the party seeking interim injunctive relief must show that the probability of irreparable injury in the event the injunction is not granted outweighs the potential harm to the party sought to be enjoined. Id. at 196. Once the moving party makes a showing that the balance of hardships decidedly tips in its favor, the movant must show "that grave or serious questions are presented" on the merits. Id. The final factor is the public interest in preserving the status quo until the merits of a serious controversy can be fully considered. Id. at 197.

### 1. The Balance of Hardships Favors the Issuance of the Requested Injunction.

### A. Failure to Issue the Requested Injunction will Result in Irreparable Harm to the Environment and Impermissibly Bias the Administrative Process

Immediate and irreparable harm to the environment will occur in the event the Plaintiffs' requested injunction is not issued and construction of the toll highway commences. In addition, in the absence of an injunction, there is a real and present danger that the "bureaucratic steamroller" effect of the Monroe Connector/Bypass being already underway will so completely bias any future administrative decision-making as to make it impossible to reverse course later if the EIS is ruled inadequate. Either of these harms alone would be sufficient to tip the balance of hardships Plaintiffs' way. Taken together, they overwhelmingly favor injunctive relief.

#### i. Harm to the Environment from Massive Toll Road

As the United States Supreme Court has emphasized,

> Environmental injury, *by its nature*, seldom can be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Amoco Prod. Co. v. Village of Gambell, 480 U. S. 531, 545 (1987) (emphasis added). In this case, there is no question that the environment will be adversely impacted in the event that the NCDOT is permitted to proceed with construction of a massive new highway, this is what triggers an EIS in the first place. The Monroe Connector/Bypass will destroy at least 499 acres of active agricultural lands, 450 acres of upland forest, 8 acres of wetlands, and approximately five miles of perennial and intermittent streams.[7] ROD at 5-6. 95 homes and 47 businesses will have to be relocated, with 7 neighborhoods being disturbed. Id. Three churches are also directly impacted. Id.

The approximately 20 mile long, 95 foot wide highway corridor will fragment a landscape for humans and wildlife alike. Many will lose homes, have farms or family lands divided with no easy way to get across, and numerous homeowners and school children, who will be next to an unsightly, noisy highway with noxious fumes, will have their lives forever changed. Because the preferred alternative in

[7] Total linear feet of streams impacted by selected alternative differ at pages 6 and 9 of the ROD.

the EIS is a new location highway, rather than an upgrade to an existing corridor, its impacts in fragmenting habitat, and its massive footprint further compromising water and air quality and encouraging additional driving, are especially great. Experts in the field have quantified these much higher impacts to wildlife and humans alike, which can be up to an order of magnitude greater than the environmental impacts of improving an existing highway corridor. See FORMAN SPERLING ET. AL, ROAD ECOLOGY, SCIENCE AND SOLUTIONS, p. 389 (Island Press, 2003).

Beyond these large scale environmental harms, there also are the projects' specific, incremental growth inducing impacts, so far largely ignored in this EIS. The claim that these incremental effects are only about one percent higher than the effects of the "No Build" scenario, based on the flaw of including the road in both the Build and No-Build scenarios, makes it impossible to quantify the actual impact of the project.

Contrary to conclusion in this EIS, courts have regularly recognized that roads do tend to induce additional growth by increasing access following the common sense market principles of supply and demand. Mullin v. Skinner, 756 F. Supp. 904, 921 (E.D.N.C. 1990); Sierra Club v. U.S. DOT, 962 F. Supp. 1037, 1043 (N.D. Ill. 1997); Conservation Law Found. v. FHA, 630 F.Supp. 2d 183, 209-16 (D.N.H. 2007). Sprawling development of the type likely to be facilitated by this project brings with it additional impacts to water quality, wildlife habitat, air quality and public health. Blotnick Affidavit, Exhibit E ¶¶ 11, 12, 13; Gestwicki Affidavit, Exhibit A ¶¶ 11, 12; Naujoks Affidavit, Exhibit C ¶¶ 10, 11, 12. Further, this vast addition to highway capacity is likely to bring large volumes of additional traffic, hindering efforts to address the ozone and particulate air pollution that plagues the Charlotte area and has resulted in the area being designated in nonattainment of the current health-based standard for ozone ("smog"). 69 Fed. Reg. 23857, (April 30, 2004). Air pollution in Mecklenburg and Union counties is of concern generally for those that live in the region, and particularly for those who are prone to increased respiratory distress due to compromised lung capacity. Arnason Affidavit, Exhibit F ¶¶ 7, 8, 9, 13, 14.

**ii. Harm Resulting from Bureaucratic Steamroller**

The balance of hardships would favor an injunction even if there were no indication of direct harm to the environment. An injunction may issue simply to halt bureaucratic inertia that would result from moving forward with the construction of the Monroe Connector/Bypass pending this court's full review on the merits. This project is a "design/build" project, meaning that substantial design work will follow immediately upon award of the contract and construction can begin very shortly thereafter. See Exhibit K. Thus, the requested injunction is necessary to avoid the irreparable harm that would arise from the agencies "becom[ing] entrenched in a decision uninformed by the proper NEPA process because they have made commitments or taken action to implement the uninformed decision." Conservation Law Foundation, Inc., v. Busey, 79 F.3d 1250, 1271 (1st Cir. 1996).

At this point, NCDOT has not yet issued any revenue bonds, not yet received environmental permits, has not formally engaged a contractor and has not started construction. All of that will change very quickly if the requested injunction is not granted. Allowing NCDOT to go forward will have the effect of impermissibly biasing the bureaucratic process, making it all the more difficult for any court to compel the NCDOT to reverse course, and also make it a practical impossibility for NCDOT to objectively reevaluate its decision. Maryland Conservation Council v. Gilchrist, 808 F.2d 1039 (4th Cir. 1986), controlling precedent here, illustrates the point.

Plaintiffs in Maryland Conservation Council sought to enjoin officials of Montgomery County, Maryland from authorizing further construction of the "Great Seneca Highway" through the park in order to relieve traffic congestion. Id. at 1041. Rather than allowing construction of two of three segments of the road, but not the segment actually in the park, the 4th Circuit, in a reversal of the lower court decision held:

> [C]ompliance with NEPA is required before any portion of the road is built. This conclusion effectuates the purpose of NEPA. The decision of the . . . [relevant agencies] would inevitably be influenced if the County were allowed to construct major segments of the highway before issuance of a final EIS. The completed segments would 'stand like

> gun barrels pointing into the heartland of the park' . . . . It is precisely this sort of influence on federal decision-making that NEPA is designed to prevent.

Id. at 1042 (citing San Antonio Conservation Soc'y v. Texas Highway Dept., 400 U.S. 968, 971 (1970) (Black, J., dissenting from denial of certiorari).

This logic has been applied in issuing an injunction against Defendant NCDOT in a case under NEPA involving a proposal very similar to the Monroe Connector/ Bypass. N.C. Alliance for Transp. Reform v. U.S. DOT, 312 F. Supp. 2d 765 (M.D.N.C. 2001). There the Middle District Court refused to allow a major bypass highway to proceed to construction based on a flawed EIS that failed to assess the cumulative environmental consequences of the project, along with others that were clearly foreseeable. The court ruled that without an injunction, the consideration of environmental impacts will be a mere formality and NEPA's goal of actions informed by full consideration of the environmental impacts would be defeated.

Similar is Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989), in which the state of Maine wanted to build a dry cargo terminal on Sears Island, and FHWA the funder of the project, completed an EIS. Id. at 498. Plaintiffs alleged that the FEIS failed to "adequately address the environmental effects" and "explore other alternatives . . . less harmful to the environment." Id. The district court denied preliminary injunctive relief, holding that the plaintiffs had not shown irreparable environmental damage because the agency's actions could always be undone after a trial on the merits. The First Circuit. vacated and remanded, holding that:

> [T]he harm at stake in a NEPA violation is a harm to the environment, not merely to a legalistic "procedure," nor, for that matter, merely to psychological well-being. . . . The way the harm arises may well have to do with the psychology of decisionmakers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built. *But the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. The difficulty of stopping a bureaucratic steamroller, once started, . . . seems to us . . . a perfectly proper factor for the district court to take into account in assessing that risk, on a motion for preliminary injunction.*

Id. at 504 (emphasis added).

Because the construction of the project in this case would be backed by the issuance of hundreds of millions of dollars in additional bonds that can only be used for this project, the "bureaucratic steamroller" effect would be even greater for the toll highway.

**B. The NCDOT and the FHWA Will Suffer No Significant Harm in the Event Injunctive Relief is Granted**.

In contrast to the magnitude and certainty of Plaintiffs' irreparable injury, NCDOT and FHWA will suffer little, if any, harm from halting their attempts to implement their hurried plans for a few additional months while the court reaches a final decision on the merits, and certainly will suffer no harm that is irreparable. Defendants are likely to claim harm in the form of potential increased costs or other economic factors as weighing against an injunction. But increased cost associated with the additional time needed to prepare an adequate EIS is not irreparable harm, as NEPA contemplates that proper environmental study will take further time. Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 780 (9th Cir. 1980). (environmental group's challenge of a road project 10 years after first proposals for it and six weeks after first alteration of environment did not justify a holding of laches, as costs of delay should not have been considered, since a proper environmental study under NEPA contemplates such delay).

Further investments should not be made in the challenged project until the issue of adequate NEPA compliance is resolved. Future bond prices, construction costs and all other potential cost savings of continuing to rush forward with this project without an adequate environmental study are both speculative and minor relative to the certain harm of building a billion dollar toll road that might not otherwise be constructed. After all, costs may go up or down over the next few months while this case is decided, depending on unpredictable market forces. Meanwhile, the proceeds from the appropriation bonds already issued can be used for another project. The only financial certainty will be the positive one of avoiding, at least temporarily, the expenditure of $24 million a year for up to 40 years to support more massive debt in the form of appropriations bonds, borrowing power that might be used for other,

potentially more cost-effective transportation investments. Against this backdrop is NCDOT's own study, which it ignores, showing that the existing highway corridor could be significantly improved to an acceptable level at a tiny fraction of the cost taxpayers are being asked to saddle in a time of huge budget shortfalls.

These murky financial considerations must be balanced against the certainty of human and environmental harm that the project, if it proceeds, will cause, displacing families, adversely impacting water and air quality, and fragmenting an entire landscape. In fact, the project may not be delayed at all by a preliminary injunction if permits are not forthcoming immediately, especially where the applications are incomplete and based on the novel approach of piecemeal approvals. A relatively short pause will allow NCDOT to at least submit a proper permit application detailing impacts for the entire project. Defendants have yet to commit irretrievable financing or to commence work on the project. It is better to preserve the status quo than halt construction later, or find out that the revenue bonds tied solely to this project are worthless a few months from now.

The danger of immediate and irreparable harm in the event the Court declines to issue an injunction is great – environmental damage and public health concerns; and the ever-present danger that the bureaucratic steamroller will simply flatten the opportunity to reverse course. Conversely, injunctive relief pending trial poses no meaningful hardship to the NCDOT. Plaintiffs have met the first of the Blackwelder tests.

**2. Plaintiffs have Demonstrated Likelihood of Success on the Merits, and Easily Meet the Standard of "Grave or Serious Questions" Presented.**

The second prong of the Blackwelder test requires the Court to assess the merits of the moving party's claims. The test is a sliding scale. Thus, where the balance of hardships favors the plaintiff, "it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success." 550 F.2d at 196. In this case, Plaintiffs claims present more than "grave or serious questions," their probability of success is high.

NEPA established "a national policy of protecting and promoting environmental quality." Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996). Specifically, NEPA and its implementing regulations require the preparation of an EIS in connection with any proposal for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (C). The EIS has a dual purpose. First, it serves "to sensitize all federal agencies to the environment in order to foster precious resource preservation." National Audubon Society v. Dept. of the Navy, 422 F.3d 174, 184 (4th Cir. 2005). Second, it "ensures that the public and government agencies will be able to analyze and comment on the action's environmental implications." Id.

The Fourth Circuit has made clear that, although a degree of deference is owed to agency discretionary decisions, a court reviewing a NEPA inquiry cannot merely "rubber-stamp" the review. Id. at 185. Rather, the court must "make a searching and careful inquiry into the facts and review whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment." Alexandria v. Federal Highway Admin., 756 F.2d 1014, 1017 (4th Cir. 1985).

In this case the Court's inquiry will show that Defendants failed to consider a number of relevant factors and made several critical errors. Defendants' FEIS is woefully inadequate under NEPA in that, *inter alia*, it (1) includes an alternatives analysis that is deficient in scope and analysis; (2) fails to include a coherent analysis of indirect growth inducing impacts, and (3) contains false and misleading information that violates Defendants' duty to inform the public. In all three ways, Defendants have again, in the words of Judge Boyle, taken a "perfunctory approach to satisfying NEPA" by "simply excluding consideration of information which might slow the process." W.N.C. Alliance v. NC DOT, 312 F.Supp. 2d 765, 769 (E.D.N.C. 2003) (injunction based on NCDOT's rushed, incomplete and inaccurate NEPA analysis of development impacts of a proposed highway expansion project biased by an immediate funding opportunity).

### A. The Alternatives Analysis Is Deficient in Scope and Analysis

NEPA requires an agency to include in an EIS a "detailed statement" on "alternatives to the proposed action." 42 U.S.C. § 4332(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). Only those alternatives that are deemed to be unreasonable can be eliminated from the study. Id. This "[e]valuation of alternatives to a proposed project is the 'heart of the environmental impact statement'" City of South Pasadena v. Slater, 56 F. Supp .2d 1106, 1121 (C.D. Cal. 1999) (quoting 40 C.F.R. § 1502.14) (preliminarily enjoining construction of a highway due to incomplete alternatives analysis).

Defendants' alternatives analysis is flawed in three major ways. First, Defendants failed to provide a rational basis upon which to compare alternatives. Second, Defendants used an impermissibly narrow statement of purpose and need to frame the analysis. Third, Defendants failed to conduct a detailed analysis of a reasonable range of alternatives.

#### i. Defendants lacked a reasonable basis to compare alternatives.

Defendants used the same socio-economic forecasts to generate traffic forecasts for all the alternatives they considered, including the "No Build" scenario. FEIS Appendix A; ROD at C-7. This led to the presentation in the EIS of an implausibly dire situation, in which future traffic volumes of both U.S. 74 and those projected for the planned highway would be required to both squeeze onto U.S. 74, a false scenario which vastly overstates the apparent need for a new location highway. By constructing a fundamentally flawed unrealistic 'No Build' baseline, Defendants' analysis failed to account for the growth inducing impacts of the road and, as a result, the FEIS "fail[ed] to provide a reasonable basis for comparison of . . . alternatives." See N.C. Alliance for Transp. Reform v. U.S. Dep't of Transp., 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001) (explaining that use of the same statistical data to compare scenarios in the EIS for a highway project failed to account for its growth-inducing impacts).

Defendants' failure to account for the growth-inducing impact of the road in the traffic forecasts was raised by Plaintiffs and agencies in their comments on both the draft and final EIS. Rather than address this fundamental concern, Defendants simply stated that the use of the same socio-economic forecasts to construct Build and No Build scenarios for an alternatives analysis "is a standard industry practice."[8] ROD at C-7. This denial of the well established need to take into account the growth inducing potential of new highway capacity during the EIS process is counter to the common sense recognition by courts in NEPA cases that "[h]ighways often create demands for travel and expansion by their very existence." Swain v. Brinegar, 517 F.2d 766, 777 (7th Cir. 1975).

Whether or not it is "standard industry practice" to use the same socio-economic forecasts to develop Build and No Build scenarios, such an approach is certainly not reasonable for this project on the fringe of Charlotte. Indeed, the understanding that highways influence growth patterns, and that, therefore, agencies need to account for that growth, is not new to this Court. Almost twenty years ago, NCDOT's failure to consider the growth-inducing impact of a proposed bridge replacement at Sunset Beach was ruled arbitrary and capricious, explaining that "[i]t is an irrefutable reality that the easier it is to get to somewhere, the more people will be inspired to do so." Mulllin v. Skinner, 756 F. Supp. 904, 921 (E.D.N.C. 1990). The facts here are even more compelling since Mullin involved a replacement of existing bridge - akin to a road widening - while this matter involves a twenty mile long new location highway radiating from the suburban fringe of a major, growing metro area.

Other jurisdictions have also required agencies to assess growth-inducing impacts in EIS reviews of major highway expansions. For example, a district court in New Hampshire recently held that the state highway department's failure to consider traffic-generating effects associated with population growth forecasts was arbitrary and capricious. This biased the alternatives analysis for a proposed road widening and defendants were required to restart the EIS process. Conservation Law Found. v. FHA, 630 F. Supp.

[8] Defendants were clear that the "standard industry practice" of using the same socio economic forecasts for Build and No Build scenarios was limited to the alternatives analysis, and stated, incorrectly, that this practice has not been employed in the analysis of indirect and cumulative effects. ROD at C-7.

2d 183, 209-16 (D.N.H. 2007). In reaching its decision, the court explained that "[t]he idea that highway improvement can produce additional traffic . . . is based on the basic economic theory of supply and demand: if highway improvement significantly reduces the cost of travel by making it more efficient, and the demand for travel is elastic, the improvement can be expected to produce more traffic." Id. at 210.

Even more similar to the case at hand, the use of a single set of socio-economic forecasts to analyze alternatives for a new toll road in Chicago was held arbitrary and capricious because it failed to take account of its growth inducing impacts. Sierra Club v. U.S. DOT, 962 F. Supp. 1037, 1043-44 (N.D. Ill. 1997). Just like Defendants here, the defendant in Sierra Club prepared an EIS for a toll road project through reliance on a single, unvarying socio-economic forecast to analyze all alternatives, including the No Build alternative. The court held that the EIS was flawed for its failure to account for the growth-inducing impacts of the proposed toll road and explained that, the result of using the same forecasts for both the Build and No Build scenarios was "a forecast of future needs that only the proposed tollroad [could] satisfy." Id. at 1043. The court went on to conclude that "[a]s a result, the final impact statement create[d] a self-fulfilling prophecy that makes a reasoned analysis of how different alternatives satisfy future needs impossible." Id.

While a small number of cases have held that an EIS need not always consider development inducing impacts from new roads, this exception is limited to instances where the project "relies on existing needs or explains why an alternative study is not possible." Id. at 1043; See, e.g., Laguna Greenbelt v. U.S. DOT., 42 F.3d 517, 526-27 (9th Cir. 1994). Defendants' EIS, which predicts the addition of 65,000 households to the project area, and which offers no indication that alternative study would not be possible, meets neither of these exceptions. Defendants' failure to account for the growth-inducing impact of the road thus placed an insurmountable bias on the alternatives analysis and meant that the EIS did little more than "justify[] decisions already made" in clear violation of NEPA. 40 C.F.R. § 1502.12(g).

**ii. Defendants' alternatives analysis was framed by an impermissibly narrow statement of purpose and need.**

NEPA requires an agency preparing an EIS to 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 (emphasis added). "The stated goal of a project necessarily dictates the range of 'reasonable' alternatives." Carmel-by-the-Sea v. U.S. DOT, 123 F.3d 1142, 1155 (9th Cir. 1997). Agencies must look hard at the factors relevant to the defined purpose and then define goals for its action that fall somewhere within the range of reasonable choices. New York v. U.S. DOT, 715 F.2d 732, 743 (2d Cir. 1983).

Defendants, however, used their statement of purpose and need to restrict the consideration of alternatives to toll highways and reach a pre-ordained conclusion. In doing so, Defendants directly rejected the input of federal and state resource agencies that questioned the clever, overly detailed crafting of the proposed statement of purpose and need. Defendants articulated the following two purpose and needs in the FEIS that pre-ordained their desired new location, toll road outcome:

> 1) To construct a facility that allows for safe, reliable, high-speed regional travel in the U.S. 74 Corridor between I-485 in Mecklenburg County and the Town of Marshville in Union County, in a manner consistent with the North Carolina Strategic Highway Corridors Vision Plan for U.S. 74 and the designation of U.S. 74 on the North Carolina Intrastate System.
>
> 2) Improve mobility in the U.S. 74 corridor within the project study area, while maintaining access to properties along existing U.S. 74.

Consistent with NCTA's linear focus on toll roads, the first part of the statement does little more than restate the project design, thus essentially limiting options to building the pre-ordained toll highway project in the location it already appears on the NCDOT state planning map. The statement, in fact, fails to identify any underlying purposes and needs for the project, such as congestion relief or economic development, and instead "narrow[s] the objective of [the] action artificially and thereby circumvent[s] the requirement that relevant alternatives be considered." New York, 715 F.2d at 743. The second part of the statement, which did not appear as a stand-alone statement in the DEIS, appears to be little more than

an afterthought given by Defendants to preclude the massive ten lane toll upgrade option on the U.S. 74 footprint, in an attempt to "justify[] decisions already made." 40 C.F.R. § 1502.5.

Throughout the NEPA process, Plaintiffs and several state and federal resource agencies raised concerns about Defendants' use of the term "high-speed" in the statement of purpose and need. USFWS stated that the use of the phrase biased the alternatives analysis. FEIS B1-30. USEPA agreed, stating that "the narrowly defined purpose and need essentially presents decision makers and the public with either a new location, multi-lane, toll facility or no action." FEIS B1-39. In response to these and other comments, Defendants simply stated that "[t]he term "high speed" on its own, as used in the [EIS] . . . does not unduly narrow alternatives nor preordain any one particular alternative," but then promptly concluded that only a new location toll facility could meet the purpose and need rendering the EIS a "foreordained formality." Citizens Against Burlington v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991).

Similarly, Plaintiffs raised concerns about the use of the Strategic Highway Corridors ("SHC") Vision Plan[9] in the purpose and need statement. The SHC Vision Plan identifies not only a location but also a freeway as the minimum preferred type of roadway for the corridor, and so, by invoking the plan, Defendants ensured that there was no true ability to consider alternatives other than a foreordained new location highway project. Defendants freely admit that the statement thus "use[s] the SHC Concept as a tool to influence and affect ongoing planning and project related decisions in order to realize the facility type vision." DEIS at 1-5. As such, Defendants appear to advance the notion that the SHC concept and other "tools to influence" planning should displace the objective analysis of alternatives required under NEPA. Because no NEPA analysis takes place prior to the development of the SHC Vision Plan,

[9] The North Carolina Strategic Highway Corridors Vision Map recognizes a series of highway corridors to be set aside for future development in North Carolina. N.C.DOT, Strategic Highway Corridors Policy Statement, (2004) *available at* http://www.ncdot.org/doh/preconstruct/tpb/SHC/pdf/SHC_Policy_ Statement.pdf. The SHC map is incorporated North Carolina's Long Range Transportation plan and is "expected to influence key decisions related to funding, project planning, design, access, and local land use decisions." N.C.DOT, North Carolina's Long Range Statewide Multimodal Transportation Plan, at 23 (2004), *available at* http://www.ncdot.org/doh/PRECONSTRUCT/tpb/statewideplan/pdf/NCStatewideTransportationPlan.pdf

Defendants' attempt to invoke the Plan to do an 'end run' around the NEPA process, sets a dangerous precedent for future projects on other highway corridors throughout North Carolina.

**iii. Defendants failed to fully consider a number of reasonable alternatives in their analysis.**

Defendants failed to comply with their "duty under NEPA to study all alternatives that appear reasonable and appropriate for study at the time of drafting the EIS, as well as significant alternatives suggested by other agencies or the public during the comment period." Roosevelt Campobello Int'l Park Comm'n. v. U.S. EPA, 684 F.2d 1041, 1047 (1st Cir. 1982) (internal quotation marks omitted). In particular, Defendants chose not to comply with FHWA's own Guidance on NEPA Implementation which specifically calls for consideration of certain functional alternatives to highways such as transportation system management, mass transit, and build alternatives that address traffic flow on existing highways. FHWA, Guidance for Preparing and Processing Environmental and Section 4(f) Evaluations (FHWA Technical Advisory 6640.8A).

Defendants instead made only a brief list that included a variety of functional alternatives and then summarily rejected each one. While Defendants' action was hardly surprising, given NCTA's narrow focus, the treatment of functional alternatives was a direct violation of this court's holding that "NEPA requires an EIS to do more than merely list alternative courses of action to the one recommended by the agency. . . . Alternative courses of action must be affirmatively studied." Rankin v. Coleman, 394 F. Supp. 647, 657-58 (E.D.N.C 1975).

Not only did Defendants fail to properly consider functional alternatives to a new location highway *standing alone*, but they also failed to consider how such alternatives may work *in combination* with each other. While it may be true that standing alone, a mass transit or transportation system management approach would not satisfy a reasonably articulated rationale for improvements in the corridor, a combination of these and other alternatives may well be satisfactory, especially when considered on a cost-benefit basis. Defendant's failure to consider combinations of these suggested

alternatives was an "egregious shortfall" that makes the alternatives analysis inadequate. Davis v. Mineta, 302 F.3d 1104, 1122 (10th Cir. 2002) (holding that transportation agencies' failure to consider combinations of alternatives to a highway project such as transportation system management and improvements to the existing highway system rendered the alternatives analysis inadequate).

The only alternative project given any modicum of consideration by Defendants was the conversion of U.S. 74 into a massive ten-lane toll way and frontage road system. DEIS at 2.4.4.3. It is unclear why Defendants chose to give consideration to this particular alternative, however, because widening U.S. 74 to ten lanes would destroy most of the businesses throughout the corridor, and, thus, this "alternative" was also dismissed from detailed consideration. Thus, the only so called "alternatives" presented for detailed study were slight route variations for a new location toll road along the same general corridor,[10] along with the No Build scenario required by law. DEIS at 2.5. Defendants' failure to take a detailed look any alternative other than the new location toll road in a single location violates this court's admonition that "each alternative [must] be presented as thoroughly as the one proposed by the agency, each given the same weight so as to allow a reasonable reviewer a fair opportunity to choose between the alternatives." Rankin, 394 F. Supp. at 659 (NCDOT's failure to adequately consider alternatives to the relocation of a highway project through sand dunes rendered the EIS inadequate under NEPA.)

Perhaps the greatest deficiency, however, is Defendants' failure in the DEIS to expressly state the findings of the U.S. 74 Corridor Study that NCDOT itself had recently commissioned. The central finding of the study was that a mere $13.3 million in improvements-less than 2% of the cost of the Monroe Connector/Bypass- could bring all but one interchange along U.S. 74 in the project area to an acceptable level of service. U.S. 74 Corridor Study, Exhibit H. Subsequent to comments by both Plaintiffs and several resource agencies, Defendants briefly referenced the Study in the FEIS only to dismiss it in less than two pages of analysis, without any consideration of how the solutions it presents

[10] See Illustrative Map, Monroe Bypass/Connector: Alternatives Considered and Population Density, Exhibit N.

could work on their own or in conjunction with other alternatives or refinements to provide a reasonable and cost-effective congestion solution. See FEIS at 3-13 - 3-15. See Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 784 (9th Cir. 1980) (EIS for proposed new highway construction insufficient for failing to consider the functional alternative of upgrading existing highways).

### B. NCDOT Failed to Analyze the Indirect Environmental Impacts of the Monroe Connector/Bypass

Defendants' failure to account for the growth-inducing impact of the new highway was not limited the flawed traffic forecasts used in the alternatives analysis. Defendants employed a similar method to bias the analysis of environmental impacts and thus failed to consider the project's indirect impacts in violation of NEPA. 40 C.F.R. § 1508.25(c). In the NEPA context, indirect effects 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." N.C. Alliance for Transp. Reform, 151 F. Supp. 2d at 695 (citing 40 C.F.R. § 1508.8(b)).

Much like the fundamentally flawed traffic forecasts discussed above for the alternatives analysis, Defendants used data that assumed the building of the toll highway to construct a "No Build" baseline scenario in its "analysis" of the incremental indirect impacts. Defendants reached the bizarre conclusion in which construction of a twenty mile long new location toll highway would have almost no incremental impact on water quality and air quality from changes in development patterns. Despite confirmation from the local Metropolitan Planning Organization that the assumptions used to create the No Build scenario, in fact, presumed the construction of the Monroe Connector Bypass,[11] Defendants continued to rely on these unlikely conclusions. This allowed them to understate the apparent need for avoidance, minimization and mitigation of environmental impacts in selecting a preferred alternative, to persuade the U.S. Fish and Wildlife Service to drop its longstanding concerns about an endangered mussel species in

[11] See e-mail from Anna Gallup, Charlotte Department of Transportation to Scudder Wag, NCTA Consultant (Sep. 28, 2009), Exhibit I.

the project's vicinity, and to present a more rosy picture to the agencies now reviewing the federal and state permit requests for the project.

Not only did this flawed analysis violate Defendants duty to take a "hard look" at the environmental impacts of the project, but it also served to further skew the alternatives analysis and preclude a reasoned choice among alternatives. N.C. Alliance for Transp. Reform, 151 F. Supp. 2d at 661 (holding that defendant's failure to consider the growth-inducing impacts of a proposed major highway in the alternatives analysis was a such a significant shortcoming that challenging plaintiffs were entitled to recover attorneys fees). As discussed above, courts have long recognized that the growth-inducing impacts of highway projects must be considered, underscoring the "necessity of a complete analysis of the projects' indirect impacts." Id. at 697. By making a decision "without proper consideration of the environmental impacts of the proposed project," Defendants thus eradicated "the very purpose and protection afforded by NEPA." W.N.C. Alliance v. NC DOT, 312 F.Supp. 2d 765, 769 (E.D.N.C. 2003).

### C. NCDOT Presented False and Misleading Information in the NEPA Documents, Violating its Duty to Inform the Public.

Even worse than the flawed indirect and cumulative impacts analysis itself was Defendants' failure to address this core flaw once it was brought to their attention. Both Plaintiffs and resource agencies raised concerns about the analysis in their comments on the draft and final EIS. Defendants then had a duty to fully investigate their analysis to insure its viability and provide a candid disclosure as to any inadequacies. See Lands Council v. U.S. Forest Serv., 395 F.3d 1019, 1032 (9th Cir. 2004). Rather than engage in such an analysis, however, Defendants did nothing more than ask a few individuals involved in the EIS process whether they believed it was a reasonable one. See Memorandum from Michael Baker Jr., to file (July 26, 2010), Exhibit O.

Defendants were apparently untroubled by the unlikely conclusion they reached. In addressing comments about the issue in the ROD, they were clear in their refusal to address Plaintiff's underlying concern. ROD at C-11. Instead, Defendants simply stated that "TAZ socioeconomic forecasts for the No

Build Scenario did not include the Monroe Connector." This statement, directly contradicts an e-mail addressed to the agency almost a year prior to the ROD from Charlotte Department of Transportation itself, the generator of the data in question. Compare ROD at C-11 with e-mail from Anna Gallup, Charlotte Department of Transportation to Scudder Wag, NCTA Consultant (Sep. 28, 2009) ("2030 TAZ forecasts were developed with the assumption that the Monroe Connector –Bypass would be constructed.") Thus, not only did Defendants refuse to address and correct the accuracy of their analysis, they directly mislead the public, failing in their duty to fully and fairly present environmental impacts to the public with objective good faith. 42 U.S.C. § 4332.

**3. The Public Policy Embodied by NEPA Demands Injunctive Relief.**

The final consideration for preliminary injunctive relief is the public interest. *See* Blackwelder, 550 F.2d at 196. In a case such as this one, which involves the expenditure of almost a billion dollars, the loss and degradation of homes, farms and other property, impacts to water quality, air quality and future growth patterns, and the quality of life in the impacted region, the public interest is well served by a temporary injunction lasting a few months until the merits are decided. The public will be served by a thorough study of the impacts of, and alternatives to, the toll highway, including potential improvements on U.S. 74, which is not slated to receive any upgrades despite its serious congestion. The public interest will be well served by not committing the public purse to issuing project-specific bonds, by a prompt review of the EIS before permits are issued and irrevocable decisions are made on the applicability of the Endangered Species Act.

In 2007 NCDOT estimated that it had a $65 billion dollar shortfall for transportation project funding needs over the next twenty-five years.[12] The public deserves to know whether limited transportation funds are being spent in a wise, eyes wide-open, cost-effective manner, with as little impact to the environment as possible. NCTA, while now part of NCDOT, has several other toll highway

[12] See 21st Century Transportation Committee, Final Report to the 2009 General Assembly of North Carolina, at 6, *available at* http://www.ncga.state.nc.us/documentsites/committees/21stCenturyTransportation/Final%20Report/Final%20Report.pdf

projects in the pipeline including the billion dollar plus proposed new highway mirroring the Monroe Connector/Bypass to the west of Charlotte, known as the Garden Parkway. See N.C. GEN. STAT. § 136-89.183 (a)(2). Plaintiffs and resource agencies are raising identical issues regarding the narrow scope of analysis of alternatives and impacts in the pending EIS process for the Garden Parkway and these other proposed toll roads.[13] It is important that Defendants be held to a minimum standard of NEPA compliance for these and other major highway projects across the state. Compliance with our bedrock federal environmental law-which is intended to be a decision-making document-should not be trumped by simply listing a particular project in State law for construction or financing, or by specifying an alignment in the SHC Vision Plan map, and then studying essentially only one alternative in the EIS.

Finally, the "public interest" includes "preserving the status quo ante litem until the merits of a serious controversy can be fully considered by a trial court." Id. at 197. NEPA expresses the public policy of the United States, and requires federal agencies, such as the FHWA, to rigorously study the environmental and socio-economic impacts of their actions. Sierra Club v. Marsh, (872 F. 2d at 497). "[T]he public interest expressed by Congress was frustrated by the [Defendants] not complying with NEPA" and "the public has a general interest in the meticulous compliance with the law by public officials." Fund for Animals v. Clark, 27 F.Supp.2d 8, 15 (D.D.C. 1998) (internal citation omitted). In this case, FHWA's and NCDOT's attempt to comply with NEPA falls well short of "meticulous" and by acting as it has, FHWA and NCDOT has violated the public trust, including the misstatement in the ROD, on a billion dollar project. The public interest favors entry of an injunction until disposition on the merits of Plaintiffs' claims.

**4. No Bond Should Be Required.**

It is common in environmental cases for courts to grant injunctions either with no bond or with a nominal bond. E.g., People ex. rel. Van de Kamp v. Tahoe Regional Plan, 766 F.2d 1319 (9th Cir. 1985)

[13] See North Carolina Turnpike Authority Website, Garden Parkway Draft EIS and Information, http://www.ncturnpike.org/projects/gaston/deis.asp

(no bond); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) ($100 bond); Bragg v. Robertson, 54 F.Supp.2d 635, 652 (S.D.W.Va. 1999) ("[I]t is common for courts in environmental cases brought by environmental groups or individuals with limited means, particularly in NEPA cases, to require little or no security"). The primary reasons for waiving bonds in these cases are the plaintiffs' lack of a financial interest in the outcome, lack of financial resources, and the chilling effect on litigation undertaken to serve the public interest. Tahoe Regional Plan, 766 F.2d at 1325. Plaintiffs respectfully request that the court follow this common approach and grant the requested injunctive relief without a bond pursuant to Fed. R. Civ. P. 65.

## CONCLUSION

Application of the Blackwelder test to Plaintiffs' Motion establishes that a Temporary Restraining Order followed by a Preliminary Injunction is appropriate in this case.

Respectfully submitted this 23rd day of November, 2010.

/S/ Chandra T. Taylor
Chandra T. Taylor
NC Bar No. 28116

/S/ Kimberley Hunter
Kimberley Hunter
NC Bar No. 41333

/S/ J. David Farren
J. David Farren
NC Bar No. 12809

SOUTHERN ENVIRONMENTAL LAW CENTER
200 W. Franklin St., Suite 330
Chapel Hill, NC 27516-2520
Telephone: (919) 967-1450
ctaylor@selcnc.org
khunter@selcnc.org
dfarren@selcnc.org
*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2010, I electronically filed the foregoing Memorandum of Law in Support of the Motion for Temporary Restraining Order and Preliminary Injunction with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

| | |
|---|---|
| Scott T. Slusser<br>Special Deputy Attorney General<br>NC Department of Justice<br>1 South Wilmington Street<br>Raleigh, NC 27601<br>Attorney for NCDOT and Eugene Conti,<br>Secretary of Transportation | |

I further certify that I have served counsel for FHWA, listed below by overnight delivery service, postage prepaid, addressed as follows:

| | |
|---|---|
| Scott Jones<br>Federal Highway Administration<br>Office of the Chief Counsel<br>60 Forsyth St. SW<br>Suite 8M5<br>Atlanta, GA 30303<br>Attorney for FHWA | Seth Wood<br>US Attorney's Office<br>310 New Bern Ave., Suite 800<br>Raleigh, NC 27601<br>Attorney for FHWA |

I further certify that I have served the following by placing a copy in the U.S. Mail:

| | |
|---|---|
| Federal Highway Administration<br>FHWA-NC Division<br>310 New Bern Avenue<br>Suite 410<br>Raleigh, NC 27601-1418 | Eric Holder, Jr.<br>US Attorney General<br>US Department of Justice<br>950 Pennsylvania Ave., NW<br>Washington, DC 20530-001 |

This the 23rd day of November, 2010.

/s/ Chandra T. Taylor
Chandra T. Taylor