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VIA E-MAIL AND FEDEX

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Mr. John F. Sullivan III, P.E.
Federal Highway Administration
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RE: Mid-Currituck Bridge NEPA Review

Dear Mr. Roberts and Mr. Sullivan:

On behalf of No MCB-Concerned Citizens and Visitors Opposed to the Mid-Currituck Bridge and the North Carolina Wildlife Federation, the Southern Environmental Law Center (“SELC”) submits the attached comments requesting that the North Carolina Department of Transportation (“NCDOT”) and the Federal Highway Administration (“FHWA”), collectively the “Transportation Agencies,” prepare a Supplemental Environmental Impact Statement (“EIS”) pursuant to the National Environmental Policy Act (“NEPA”) for the Mid-Currituck Bridge (“Bridge”).

Recent funding changes in North Carolina call into question the financial viability of the Bridge, while new traffic forecasts suggest that the \$600 million project is a poor use of limited taxpayer resources. In addition, the comments below identify serious deficiencies in the environmental review that has been performed by the Transportation Agencies to date. These factors combine to make NCDOT’s forecasted decision to conduct a mere “reevaluation”¹ of its outdated public disclosure documents not only illegal, but bad public policy.

In light of the diminished funding picture, the shifting demographics on the Outer Banks, changing vacation patterns, and reduced forecasts of traffic and growth, the below comments also offer a new, lower-cost alternative solution that has been carefully designed to alleviate congestion without the expense or environmental harm associated with the \$600 million, seven-mile Bridge. The Currituck Sound is one of North Carolina’s treasures. As such, we intend this

¹ FHWA & NCDOT, Mid-Currituck Bridge Study, Reevaluation of the Final Environmental Impact Statement, DRAFT (Sept. 2016) (Exhibit 1) [*hereinafter*, Draft Reevaluation].

solution as a means to improve the mobility of both tourists and local residents without destroying the very beauty and unique experience that so many travel from so far to enjoy.

Both the critique of the Transportation Agencies' review and the new proposed set of alternative solutions are supported by a report from Transportation Expert, Walter Kulash, P.E. attached.² Mr. Kulash has over 45 years in transportation engineering expertise. Since the 1990s, Mr. Kulash has focused on bringing balance to the design of roads, improving not just their vehicular traffic capacity but also their accommodation of non-motorized travel and their value for local businesses. He has applied this approach, "context sensitive" design, to roads throughout the United States. Mr. Kulash is a licensed engineer in Alabama and Florida and his license is pending in North Carolina.

To ensure good, reasoned decisionmaking, and to comply with NEPA, it is imperative that the Transportation Agencies address the concerns raised in these comments in a Supplemental EIS that is made available for public review and comment. As noted below, there have been significant changes since the last opportunity for public scrutiny when the Final Environmental Impact Statement ("FEIS") was published almost five years ago in early 2012. The many changes that have occurred since deserve a thorough look by both the Transportation Agencies and the public. Moreover, the time is ripe for all stakeholders to coalesce around a cost-effective solution that can be swiftly set in place to ease summer-time traffic woes in the Northern Outer Banks.

These comments address the following key issues:

- A long history of pushback from environmental resource agencies that have consistently found non-bridge alternatives to be less environmentally damaging.
- The limited funding available for the Bridge and new increased flexibility to fund alternative solutions.
- The new expectation that traffic in the study area will be significantly lighter than previously anticipated and the Transportation Agencies' failure to incorporate this fact into their analysis.
- Reliance on an arbitrary 18 hour hurricane evacuation standard to support the project's Purpose and Need that is impossible to satisfy even with the proposed \$600 million Bridge.
- The Transportation Agencies' failure to consider in earnest a full range of alternatives, including upgrades to existing roads, ferries, staggered check out times, and small-scale transportation solutions.

² Walter Kulash, REVIEW OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT AND DRAFT REEVALUATION OF FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE MID-CURRITUCK BRIDGE, CURRITUCK COUNTY, NC (Dec. 20, 2016) (Exhibit 2) [*hereinafter*, Kulash Report].

- The Transportation Agencies' failure to transparently present the indirect environmental effect of the Bridge on induced development, despite repeated statements from the Transportation Agencies and the local community that the Bridge will cause increased development pressure.

I. HISTORY OF THE BRIDGE

The concept for the Mid-Currituck Bridge (also known as the “Mid-County” Bridge, “MCB” or “the Bridge”) first arose in 1975, when NCDOT, at the request of Currituck County, adopted a resolution identifying a bridge crossing the Currituck Sound as the most desirable access route to the Currituck Outer Banks. Over the past forty years, developers have continually pushed for the Bridge project to move forward, but state and federal resource agencies have recognized the Bridge as an unnecessary and environmentally harmful waste of resources.³ These agencies have consistently noted that the Bridge would lead to increased development in an area that does not have the natural resources to support a larger population and that this added human population would worsen the traffic conditions the Bridge is meant to solve. They have also expressed concern about the direct environmental harm the Bridge and its construction would cause to the Currituck Sound. The arguments against the Bridge, and the key facts underlying them, have only grown stronger with time. The Bridge project has remained alive only because of pressure from elected officials who have sought to manipulate environmental agencies and have the state ignore more reasonable and feasible alternatives.

The state first considered the Bridge as a project alternative to address traffic concerns in the Northern Outer Banks in the 1980s. The state, however, recognized the Bridge as more costly and environmentally harmful than other alternative transportation solutions and ultimately chose to extend NC 12 and widen the Wright Memorial Bridge rather than build a new bridge.⁴ In 1989, the North Carolina General Assembly, at the behest of NC Senator Marc Basnight, whose district contained portions of Currituck and Dare Counties, passed legislation adding the Bridge to the North Carolina Intrastate Highway System.⁵ NCDOT identified a potential terminus for the Bridge on the Outer Banks in 1991,⁶ and local officials began meeting with the Congressional delegation to discuss ways to secure the necessary federal funding.⁷ In these early discussions, local officials discussed promoting hurricane evacuation as a way to justify the project.⁸

³ See Howard, Needles, Tammen, and Bergendoff for the North Carolina Department of Transportation, Currituck Sound Transportation Improvement Feasibility Study at 31-32 (Feb. 1989) (Exhibit 3).

⁴ See Letter from Terry Ruggles, Vice-President, Whalehead Property Owners Association to Roger Schecter, Director, DCM (Feb. 20, 1991) (Exhibit 4).

⁵ See Letter from Senator Marc Basnight to Gene Gregory, Board of Commissioners (Oct. 3, 2001) (Exhibit 5).

⁶ See North Carolina Department of Transportation, Environmental Screening For the Eastern Terminus of the Mid-Currituck Sound Bridge, Currituck County, at 2 (Dec. 1991) (Exhibit 6).

⁷ See Memorandum to Local Elected Officials re Meeting with Congressman Martin Lancaster (Dec. 4, 1992) (Exhibit 7).

⁸ *Id.* at 2.

Initial DEIS

In March 1994, NCDOT retained the engineering firm of Parsons, Brinckerhoff, Quade, & Douglas, Inc. to assist with the NEPA process.⁹ Shortly thereafter, NCDOT began drafting the formal NEPA Scoping document and holding interagency meetings.¹⁰ The Bridge would be the longest, most expensive bridge ever built in North Carolina.¹¹

The Division of Coastal Management (“DCM”) commented on the Scoping document in May 1994.¹² In those comments, DCM noted that “the projected need is being pushed by the rapid resort development along the Currituck Outer Banks.”¹³ DCM expressed skepticism about the project, stating:

Traffic traveling along NC 12 could be speeded up by adding additional lanes from Southern Shores up to Corolla. During a hurricane evacuation, these additional lanes could be used to get people off the banks faster. Because of the wealth of natural resources in Currituck Sound and the secondary impacts of increasing development pressures in the area, *the bridge option should be the last alternative considered.*¹⁴

DCM concluded that the secondary impacts of increased development “need to be carefully considered,” and also expressed concerns about the Bridge’s impact on Maple Swamp, submerged aquatic vegetation (“SAV”), possible archeological sites along the mainland, and waterfowl wintering area.¹⁵ Finally, DCM noted that the bridge could increase off-road vehicle use in the refuge areas north of Corolla, known as Carova.¹⁶ Other agencies concurred with DCM’s assessment, including the United States Fish and Wildlife Service (“USFWS”), which also issued extensive comments on the Scoping document.¹⁷

⁹ See E-mail from Jennifer Harrison, TIP No. R-2576, NEPA/404 Merger Meeting, Prepared by Parsons Brinckerhoff Quade & Douglas, Inc., Aug. 16, 2001, at 1 (Jul. 31, 2001) (Exhibit 8); see also Terry Martin, *Planners, Environmentalists Battle Over Bridge*, WINSTON-SALEM JOURNAL, at E1, E9 (Feb. 20, 1994) (Exhibit 9).

¹⁰ See E-mail from Jennifer Harrison, TIP No. R-2576, NEPA/404 Merger Meeting, Prepared by Parsons Brinckerhoff Quade & Douglas, Inc., Aug. 16, 2001, at 1 (Jul. 31, 2001) (Exhibit 8); see also Letter from H. Franklin Vick, P.E., Manager, Planning and Environmental Branch, NCDOT, to Terry Wheeler, Manager, Dare County (Apr. 26, 1994) (Exhibit 10).

¹¹ See Terry Martin, *Planners, Environmentalists Battle Over Bridge*, WINSTON-SALEM JOURNAL, at E1, E9 (Feb. 20, 1994) (Exhibit 9).

¹² See Memorandum from Pete Colwell to Steve Benton, at 1 (May 27, 1994) (Exhibit 11).

¹³ *Id.*

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Letter from David Horning, Acting Field Supervisor, USFWS, to H. Franklin Vick, P.E., Manager, Planning and Environmental Branch, NCDOT (Jun. 13, 1994) (Exhibit 12).

NCDOT held a series of project team meetings to discuss traffic, purpose and need, and preliminary alternatives during late 1994 and early 1995.¹⁸ During this time, federal and state agencies continued to express concerns about the construction of the Bridge and its secondary impacts. For example, USFWS stated that “[c]onstruction of a new bridge between mainland Currituck County and the Outer Banks will adversely affect wetlands and shallow estuarine waters in the project vicinity.”¹⁹ USFWS also informed NCDOT and FHWA of the need for a Biological Assessment and included a list of federally-listed endangered, threatened, and candidate species that are known to occur in Currituck County.²⁰ The North Carolina Wildlife Resources Commission (“WRC”) also opposed the Bridge alternatives, stating: “We strongly support the upgrade alternative as a viable option for this project.”²¹ The upgrade alternatives would make improvements to existing highways, particularly through widening existing highways, in lieu of constructing a bridge.²²

In response to a request from NCDOT for comments regarding the selection of preliminary alternatives, the United States Army Corps of Engineers (“Corps”) expressed concern that “the ‘No-Bridge Alternative’ is not being evaluated at the same level of review as the bridge alternatives.”²³ The Corps, in a position that would remain consistent for years to come, expressed doubt about hurricane evacuation as a purpose of the project. The Corps noted that the Bridge would cause increased human presence on the Currituck Outer Banks, thus vitiating the Bridge’s purported ability to decrease hurricane evacuation times.²⁴ Based in part on conclusions from the 1989 Feasibility Study, the Corps also questioned NCDOT’s conclusion that the Bridge would impact the natural and social environments far less than the upgrade alternatives.²⁵

The Transportation Agencies completed an initial Draft Environmental Impact Statement (“DEIS”) in March 1996 and cited four purposes for the proposed project: (1) to reduce travel times between the Currituck mainland and Outer Banks; (2) to provide better public services on the Outer Banks; (3) to reduce traffic congestion on US 158 and NC 12; and (4) to improve hurricane evacuation.²⁶ The 1996 DEIS included the following alternatives: no-build; nine

¹⁸ See TIP No. R-2576, NEPA/404 Merger Meeting Aug. 16, 2001, Proposed Work Plan Assumptions, prepared by Parsons Brinckerhoff Quade & Douglas, Inc., at 1 (Exhibit 13).

¹⁹ Letter from L.K. Mike Gantt, Supervisor, USFWS, to Roy C. Shelton, Operations Engineer, FHWA, at 1 (Aug. 15, 1995) (Exhibit 14).

²⁰ *Id.* at 2.

²¹ Memorandum from Franklin McBride, Manager, WRC, to Melba McGee, Office of Legislative and Intergovernmental Affairs, at 1 (Feb. 20, 1995) (Exhibit 15).

²² *Id.* at 2.

²³ Letter from Michael D. Smith, Chief, North Section, Regulatory Branch, USACOE, to H. Franklin Vick, P.E., Manager, Planning and Environmental Branch, NCDOT, at 1 (Feb. 1, 1996) (Exhibit 16).

²⁴ *Id.*

²⁵ *Id.* at 2.

²⁶ Letter from David McCoy, NCDOT, to Walter B. Jones, United States Congress, at 1 (Feb. 14, 2001) (Exhibit 17).

bridge alternatives; and five no-bridge alternatives including widening existing US 158 and NC 12, providing additional public services on the Outer Banks, ferry use, transit, and travel demand management.²⁷

In response to the 1996 DEIS, the Corps stated that it “remained [the Corps’] contention that the ‘Bridge Alternative’ is being presented as the preferred alternative, without ample justification, over the ‘No-Bridge Alternatives.’”²⁸ NCDOT then prepared a revised Purpose and Need Statement, in which the project’s primary purpose was to reduce travel time and distance between the Currituck mainland and the Outer Banks. A secondary purpose was to reduce traffic congestion on NC 12 and US 158, providing access to public services, and increasing hurricane evacuation capacity. The revised Purpose and Need Statement did not, however, address the Corps’ “concerns regarding the hurricane evacuation and traffic congestion reduction as a valid purpose and need for the project.”²⁹ The Corps continued to express its contention that the Bridge would, “significantly increase hurricane evacuation times and increase normal traffic congestion on NC-12 and US-158.”³⁰

In a project meeting on May 6, 1997, representatives of the Corps stated that they would concur with the Purpose and Need Statement if it were revised to (1) remove all references to hurricane evacuation, (2) remove all reference to traffic congestion relief on NC 12, and (3) instead discuss hurricane evacuation and congestion relief on portions of NC 12 as beneficial indirect impacts.³¹ Subsequently, FHWA and NCDOT staff agreed that the proposed bridge, without further improvements to NC 12, would further congest NC 12 and subsequently hinder hurricane evacuation by allowing more traffic on the Currituck Outer Banks.³² NCDOT staff agreed to remove hurricane evacuation and potential for traffic congestion from the Purpose and Need Statement. As a result, the Corps finally concurred with the Purpose and Need Statement on August 29, 1997.³³ In the concurrence letter, the Corps reminded the Transportation Agencies: “As your planning process continues, please be reminded that avoidance and minimization of impacts to waters and wetlands must be undertaken to the maximum extent practicable.”³⁴

²⁷ *Id.*

²⁸ Letter from Michael D. Smith, Chief, North Section, Regulatory Branch, USACOE, to H. Franklin Vick, P.E., Manager, Planning and Environmental Branch, NCDOT, at 1 (Mar. 27, 1996) (Exhibit 18).

²⁹ Letter from David McCoy, NCDOT, to Walter B. Jones, United States Congress, at 1 (Feb. 14, 2001) (Exhibit 17); Letter from Michael D. Smith, Chief, North Section, Regulatory Branch, USACOE, to H. Franklin Vick, P.E., Manager, Planning and Environmental Branch, NCDOT, at 1 (May 13, 1997) (Exhibit 19).

³⁰ *Id.*

³¹ Letter from David McCoy, NCDOT, to Walter B. Jones, United States Congress, at 1 (Feb. 14, 2001) (Exhibit 17).

³² See Storm Evacuation Time, Mid-Currituck Sound Bridge Study, Excerpt from the Jan. 18, 1998, DEIS (Exhibit 20).

³³ Letter from Michael D. Smith, Chief, North Section, Regulatory Branch of USACOE, to H. Franklin Vick, P.E., Manager, Planning and Environmental Branch, Division of Highways, NCDOT (Aug. 29, 1997) (Exhibit 21).

³⁴ *Id.*

Also in May 1997, the project was placed under North Carolina's Merger process.³⁵ As a result, a project team of federal and state agencies was assembled to reach concurrence on the project's purpose and need, reasonable and feasible alternatives, preferred alternative, and avoidance and minimization of environmental impacts.³⁶ The project team consisted of FHWA, USACE, USFWS, U.S. Environmental Protection Agency ("EPA"), National Marine Fisheries ("NMF"), NCDOT, and the North Carolina Department of Environment and Natural Resources ("DENR"), in particular, the Division of Water Quality ("DWQ"), the Division of Coastal Management ("DCM"), WRC, and the Division of Marine Fisheries ("DMF").³⁷

In July 1997, NCDOT asked the Merger Team agencies to express in writing whether they concurred with the project's Purpose and Need Statement.³⁸ In an October 1997 letter, DWQ refused to concur with the Purpose and Need and stated it was not "ready to endorse alternatives to carry forward for public review."³⁹ DWQ expressed skepticism about the true purpose of the project, stating, "We believe that this new bridge is instead being constructed primarily with future development in mind, to address the desires of those who wish to get onto the Outer Banks more rapidly, or into areas that are currently inaccessible. In other words, we do not believe that a public need has been demonstrated for this bridge." After noting the extensive environmental harm the Bridge would cause, DWQ concluded by stating, "In our opinion, a new bridge across Currituck Sound would easily cause more problems than it could solve." USFWS also expressed doubt about the underlying need for the Bridge, and listed extensive concerns about direct and indirect environmental effects of the project.⁴⁰

Additionally, the National Oceanic and Atmospheric Administration ("NOAA") refused to grant concurrence regarding the selection of the five bridge alternatives as the only feasible and practical alternative for the project, noting, in addition to other concerns, that "cumulative adverse impacts to water quality and fishery resources in Currituck Sound are likely under the bridge construction scenario" and that "construction of a bridge over the sound is not the least environmentally damaging alternative."⁴¹

³⁵ FHWA, the Corps, and NCDOT signed a Memorandum of Agreement on May 14, 1997, to provide a Merger Process for transportation projects requiring a Section 404 permit. Memorandum of Understanding, *available at* <https://connect.ncdot.gov/resources/Environmental/Compliance%20Guides%20and%20Procedures/Memorandum%20of%20Understanding.pdf> (Exhibit 22).

³⁶ *See* Letter from Lyndo Tippet to Walter B. Jones, United State Congress, at 2-3 (Feb. 14, 2001) (Exhibit 23).

³⁷ *See id.*

³⁸ *See* Letter from Michael D. Smith, Chief, North Section, Regulatory Branch of USACOE, to H. Franklin Vick, P.E., Manager, Planning and Environmental Branch, Division of Highways, NCDOT (Aug. 29, 1997) (Exhibit 21).

³⁹ Letter from Cyndi Bell, NCDWQ, to Mike Bell, USACOE (Oct. 29, 1997) (Exhibit 24).

⁴⁰ Letter from John Hefner, USFWS, to Mike Bell, USACOE (Oct. 10, 1997) (Exhibit 25).

⁴¹ *See* Letter from Andreas Mager, Jr., to Colonel Terry R. Youngbluth (Nov. 6, 1997) (Exhibit 26). Additionally, an Apr. 1997 Natural Resources Report prepared for NCDOT by CZR Incorporated notes that the project would have significant impacts on the natural environment on both the Currituck mainland and the Currituck Outer Banks (Exhibit 27).

In its comments, EPA refused to concur with the DEIS' Purpose and Need Statement and noted numerous concerns with the proposed project.⁴² EPA's comments focused on the effect of the bridge on the development of the Currituck Outer Banks and flawed logic within the DEIS, stating that "[t]he basic issue that must be addressed is whether it is appropriate for NCDOT/FHWA to consider any alternative that would support levels of Outer Banks development incompatible with long-term environmental quality."⁴³ With regard to the Bridge's effect on induced growth, EPA stated the Bridge would "promote greater development in a high hazard, storm prone barrier island area," and that this "voids the otherwise justified project purpose."⁴⁴ EPA believed that a "shortcut to beach property is likely to create more permanent residents" commuting to nearby metropolitan areas and that this "new commuter market could drive a higher demand and faster development."⁴⁵

EPA also noted that it was inconsistent for the DEIS to include reduced travel costs as a purpose of the project while also intending to fund the project with tolls, as the per-vehicle toll amount would be greater than any fuel cost savings realized from shortened travel distance. EPA further expressed doubt about hurricane evacuation as a valid purpose of the Bridge, stating: "It is likely that the bridge would promote increased day visitations as storms approach, thus complicating evacuation traffic situations."⁴⁶ EPA also challenged the DEIS' dismissal of alternatives, questioning why the conclusion from the 1989 Feasibility Study that the Bridge is more expensive and harmful than expansion of Wright Memorial to six lanes is not still valid. With regard to ferries as an alternative, the comments stated: "If very shallow draft ferries are available, they should be investigated."⁴⁷

Finally, EPA expressed concern about direct effects from the Bridge, commenting that it did not believe that "a bridge could be constructed across the sound without causing episodic organic sediment resuspension in excess of water quality turbidity standards." EPA noted that "waters would quickly and negatively respond to pollutant loadings" and that "[l]ong-term pollutant delivery by roadway runoff would likewise be injurious to aquatic life in the sound." In conclusion, EPA urged "NCDOT and FHWA to consider and select more environmentally sound options to serve the transportation needs of the public"

The USFWS also strongly attacked the project's stated purpose, noting the inconsistency between the DEIS' purpose of reducing travel cost and charging a toll.⁴⁸ The comments focused

⁴² Letter from Heinz Mueller, Chief, Office of Environmental Assessment, EPA, to Richard Davis, Manager, Planning and Environmental Branch, North Carolina Division of Highways (Apr. 30, 1998) (Exhibit 28).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Letter from Willie R. Taylor, Director, Office of Environmental Policy and Compliance, Department of Interior, to Nicholas L. Graf, P.E., Division Administrator, Federal Highway Administration, at 2 (May 28, 1998) (Exhibit 29). *See also* Memorandum from USFWS Supervisor to FWS Assistant Regional Director (Mar. 31, 1998) (Exhibit 30).

on the DEIS' failure to discuss the "needs that form a compelling foundation" for the Bridge's purposes, noting that the Bridge "would produce a greater influx of day visitors and seasonal residents, but there is no discussion of the *need* of more people on the Outer Banks,"⁴⁹ and that the FEIS should present clear and compelling needs for a new bridge which are distinct from the effects of its construction."⁵⁰

Much like EPA, USFWS questioned the DEIS' analysis of alternatives, noting that the DEIS dismissed the five no-bridge alternatives because they were considered in isolation and the document failed to consider a combination of non-bridge alternatives, for example, "initiating a new ferry service and developing local delivery options for services."⁵¹ USFWS also expressed concerns about potential harm to Maple Swamp, as well as the Bridge's overall effect on water quality and SAV in the Currituck Sound.⁵²

USFWS also listed as a "major area of concern" secondary impacts in the form of increased rate and level of development in the Currituck Outer Banks. In particular, USFWS noted that "additional human presence on the Currituck Outer Banks poses serious concerns about the quantity and quality of the freshwater supply."⁵³ USFWS concluded by expressing concern about secondary effects on federally protected species from increased human presence on the Currituck Outer Banks, including the loggerhead sea turtle, the piping plover, the leatherback sea turtle, and the seabeach amaranth.⁵⁴

Finally, the National Marine Fisheries Service ("NMFS") stated its concern "that all of the Build Alternatives described in the DEIS will adversely impact fishery resources found in Currituck Sound" and noted that the "DEIS should include a more detailed analysis of the No-Build Alternative."⁵⁵

State Opposition to the Initial DEIS

State agencies were also uniformly concerned about the project. In its comments, DCM concluded that the Bridge would reduce traffic in the short-term only,⁵⁶ stating that "[f]uture development that will be allowed by the bridge will result in congestion on NC-12 returning or exceeding current levels by the year 2020." DCM also posed questions about the effects of cumulative impacts associated with increased development, including effects on the freshwater supply in the Currituck Outer Banks. With regard to direct effects, like the federal agencies,

⁴⁹ *Id.* at 2 (emphasis added).

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 3.

⁵² *Id.*

⁵³ *Id.* at 4.

⁵⁴ *Id.*

⁵⁵ Letter from Andreas Mager, Jr., Assistant Regional Administrator, Habitat Conservation Division, to H. Franklin Vick, P.E., Manager, Planning and Environmental Branch, N.C. Division of Highways (Apr. 16, 1998) (Exhibit 31).

⁵⁶ Letter from Lynn Mathis to Melba McGee (Apr. 28, 1998) (Exhibit 32).

DCM expressed concern about effects of the Bridge on Maple Swamp and overall water quality in the Currituck Sound.

The Division of Parks and Recreation's comments noted concerns about both direct and indirect impacts, stating that the environmental costs continue to "far outweigh" the primary benefits of the project and that the Division "strongly support[s] either the No-Build or No-Bridge Alternative."⁵⁷ Likewise, DMF stated that it "continues to be concerned with the secondary and cumulative impacts associated with the bridge alternatives."⁵⁸

DWQ raised strong objections to the Bridge alternative, refusing to concur with the Purpose and Need Statement or the Reasonable and Feasible Alternatives.⁵⁹ DWQ stated that the No-Build Alternatives were not given adequate consideration and that the costs of the Bridge alternative outweigh its anticipated benefits. Like other agencies, DWQ discussed the direct environmental impacts of the Bridge as well as the secondary and cumulative impacts in the form of increased development and its effect on water supply. DWQ concluded by stating that the "[d]raft EIS provides insufficient information to proceed directly to a Final EIS" and that "a Supplemental Draft Environmental Impact Statement should be prepared in order to address our very serious concerns with the Purpose and Need statement, the Alternatives Analysis, and the lack of tangible proposals to mitigate impacts to aquatic and terrestrial wetland communities."

WRC in its comments focused on the inadequacy of the DEIS' discussion of the environmental consequences of the Bridge alternatives.⁶⁰ With regard to secondary impacts, WRC noted that induced development will significantly threaten sensitive estuarine communities and also diminish traditional recreational hunting opportunities. WRC also criticized the DEIS for failing to discuss noise impacts from the Bridge or impacts of increased human activity on wintering waterfowl in Currituck Sound. The comments concluded by requesting that the Transportation Agencies revise the DEIS to address WRC's concerns.

In addition to agency comments, the North Carolina Coastal Federation, a nonprofit organization working to protect and restore the water quality and critically important natural habitats of the North Carolina coast, submitted comments on the DEIS opposing the Bridge. Among other concerns, the Coastal Federation noted that the Bridge would harm a particularly sensitive area, as there are two tributaries of the Currituck Sound designated Inland Primary Nursery Areas by WRC. Additionally, Maple Swamp has a priority ranking from the Natural Heritage Program.⁶¹

Despite the overwhelming objections from the project team agencies, the Transportation Agencies approved the DEIS without agency concurrence on reasonable and feasible

⁵⁷ Letter from Stephen Hall to Melba McGee (Apr. 17, 1998) (Exhibit 33).

⁵⁸ Memorandum from P.A. Wojciechowski to Melba McGee (Mar. 9, 1998) (Exhibit 34).

⁵⁹ Letter from John Dorney to Mary Kiesau (Apr. 21, 1998) (Exhibit 35).

⁶⁰ Memorandum from Franklin McBride, Manager, Habitat Conservation Program with WRC, to Melba McGee (Apr. 27, 1998) (Exhibit 36).

⁶¹ Letter from Coastal Federation to H. Franklin Vick and Cindy Sharer (Jul. 1, 1998) (Exhibit 37).

alternatives. This is despite the fact that the NEPA/404 merger agreement requires agency concurrence at each strategic point in order for the project to move forward.⁶²

Two days of public hearings on the proposed project were held on May 26 and May 27, 1998. An overwhelming majority of citizens—61 of the 66 speakers—opposed the project. At a post-hearing meeting in August 1998, NCDOT, FHWA, and the Corps decided to put the project on hold.⁶³

Political Pressure and Project Reactivation

The Bridge project should have remained tabled permanently for all of the reasons identified by the project agencies, as none of the key factors underpinning the agencies' objections had changed since the initial DEIS. After languishing for two years, however, federal and state politicians began pushing the project forward once more. In initial conversations, Bridge proponents sought to determine which agencies were responsible for the project not being pursued. According to DCM officials, Congressman Walter B. Jones, whose district included the Currituck Outer Banks, "was telling folks that the main problems were with the state and not the federal agencies."⁶⁴ Around the same time, NC Senator Basnight sent a letter to Congressman Jones, asking Congressman Jones to assist with the project at the federal level.⁶⁵ Congressman Jones responded to Basnight, stating he would assist with the regulatory process.⁶⁶ In particular, Congressman Jones volunteered to "engage" with federal agencies "to ensure that the state is being treated fairly." David McCoy, NC Secretary of Transportation at the time, also received Congressman Jones' correspondence, and responded to Congressman Jones by listing the federal agencies that had expressed concern about the Bridge project.⁶⁷ NCDOT stated that it would "appreciate the Congressman's help in advancing this study and helping to persuade the Corps of Engineers to agree with our reasonable and feasible alternatives so that the project can move forward."⁶⁸

In early 2001, Congressman Jones contacted the Corps regarding the status of the project.⁶⁹ NCDOT reached out to the Congressman again in February 2001,⁷⁰ noting that

⁶² See Letter from Lyndo Tippett to Walter B. Jones, at 2-3 (Feb. 14, 2001) (Exhibit 23).

⁶³ At the time of the 1998 DEIS, the estimated cost of the project ranged from \$70.5 to \$85.9 million. See Currituck Sound Area Transportation Study General History and Status (Exhibit 38).

⁶⁴ See Email from Charles Jones to Donna Moffitt (Aug. 29, 2000) (Exhibit 39).

⁶⁵ Letter from Senator Marc Basnight to Congressman Walter B. Jones (Oct. 31, 2000) (Exhibit 40).

⁶⁶ Letter from Congressman Walter B. Jones to Senator Marc Basnight (Nov. 14, 2000) (Exhibit 41).

⁶⁷ Letter from David McCoy "NCDOT" to Congressman Walter B. Jones (Undated) (Exhibit 17).

⁶⁸ E-mail from Rolf Blizzard to Paul Sutherland and Congressman Walter B. Jones (Nov. 22, 2000) (Exhibit 42).

⁶⁹ Letter from Congressman Walter B. Jones to Colonel James W. DeLony (Jan. 3, 2001) (Exhibit 43); see also Letter from Congressman Walter B. Jones to Governor Mike Easley ("I will anticipate hearing which specific federal agencies are improperly holding up which specific reviews, permits or processes.") (Jan. 26, 2001) (Exhibit 44). The Corps responded by noting that USDOT needed to reinitiate the NEPA process in order to move the project forward (Exhibit 45).

⁷⁰ Letter from Lyndo Tippett to Congressman Walter B. Jones (Feb. 14, 2001) (Exhibit 23).

“[s]everal articles have appeared in the local newspaper indicating that [NCDOT] has not followed appropriate planning processes, which have resulted in project delays.” NCDOT disputed those claims and provided a history of its efforts to move the project forward. NCDOT noted the Corps’ opposition to aspects of the Bridge project, including the Corps’ conclusion that “the bridge alternative would attract a greater volume of people and reduce the travel time to the Outer Banks, which would lead to additional land development and greater environmental degradation.” NCDOT stated it intended to revise the Purpose and Need Statement once again, this time to list hurricane evacuation as the primary purpose of, and need for, the project.

In response to a request from NC Senator Basnight’s office about the project’s status, Melba McGee with DCM explained in an internal communication that the project had stalled as a result of agency opposition and because the agencies had “recognize[d] the sound as one of the most valuable estuaries on the coast.”⁷¹ Ms. McGee concluded that, for the project to move forward, “DOT needs to be willing to investigate an alternative with less impacts.”

Local political pressure for the project increased throughout this time period.⁷² For example, Bill Richardson, the Currituck County Manager at the time, sent correspondence to the Chiefs of Staff for Congressman Jones and NC Senator Basnight stating: “a key to moving forward in the future is strong liaison [sic] between Congressman Jones’ and other federal offices and NCDOT to expedite the review and permitting process and response to concerns.” Mr. Richardson also stated the importance of having the project agencies recognize hurricane evacuation as a need for the project. Mr. Richardson proposed “setting up a meeting with US Senators and the entire NC delegation to mobilize our congressional delegation as advocates and advance the project.”⁷³

When communicating with agencies, local officials continued to stress the importance of the Corps’ hurricane evacuation model demonstrating a need for the bridge project.⁷⁴ In a September 2001 letter to the Secretary of NCDENR, the Currituck County Economic Development Director stated: “We look forward to having additional information for the DEIS including new data for hurricane evacuations from Corps of Engineers modeling. While we do not know what the results of the modeling will show when projected for future years, we know that the Corps has increased evacuation time by over 50%.”⁷⁵

⁷¹ Email from Melba McGee to Donna Moffitt (Aug. 29, 2000) (Exhibit 46).

⁷² Email from Bill Richardson, County Manager, to Rolf Blizzard, Chief of Staff for Senator Marc Basnight, and Glenn Downs, Chief of Staff for Congressman Walter B. Jones (Feb. 1, 2001) (Exhibit 47). *See also* Letter from Colonel James W. DeLony, USACOE, to Congressman Walter B. Jones (Oct. 12, 2001) (Exhibit 48).

⁷³ Email from Bill Richardson, County Manager, to Rolf Blizzard, Chief of Staff for Senator Marc Basnight, and Glenn Downs, Chief of Staff for Congressman Walter Jones (Feb. 1, 2001) (Exhibit 47). *See also* Letter from Colonel James W. DeLony, USACOE, to Congressman Walter B. Jones (Oct. 12, 2001) (Exhibit 48).

⁷⁴ Letter from Wayne Leary, Economic Development Director for Town of Currituck, to William G. Ross, Jr., Secretary of NCDENR (Sep. 26, 2001) (Exhibit 49).

⁷⁵ *Id.*

In the fall of 2001, NC Senator Basnight increased his efforts to move the project forward. Basnight revealed NCDOT's new strategy for the project in an email to a Currituck County Commissioner, stating:⁷⁶

Because of the agency concerns, NCDOT believes that the only way this project has a chance of ever being permitted, is to show the agencies that instead of trying to justify building a bridge across Currituck Sound, we are trying to solve a serious transportation problem and that the bridge could be an integral part of that solution. If the agencies however would agree with our position on the bridge and not continue to oppose its construction, such studies would not be necessary.

Basnight also noted that he had been "working with our federal partners in Congress to convince [] federal agencies to approve the project as quickly as possible."⁷⁷

In addition to federal and elected officials, local officials in Currituck and Dare Counties increased their advocacy efforts.⁷⁸ A group of business leaders in Duck, known as the Duck Community and Business Alliance, hired the national law firm of Akin, Gump, Strauss, Hauer, and Feld, LLP, to create a strategy for supporting the Mid-Currituck Sound Bridge.⁷⁹

The merits of the Bridge project did not change during the two years it lay dormant. The political strength of the development community, however, ensured that the state would revive the project.

Revision of Purpose and Need and Concurrence

On August 16, 2001, NCDOT announced that it was reactivating the Bridge project.⁸⁰ NCDOT noted that it would restart the NEPA process with Scoping and would work toward preparing a Supplemental EIS. At a project team meeting, NCDOT presented a Purpose and Need Statement that included hurricane evacuation. Project team agencies noted that their concerns about the project had not changed, and the Corps noted that it had been contacted by Congressman Jones regarding the project.⁸¹

The merger team engaged in a protracted debate regarding hurricane evacuation as a valid purpose and need throughout 2002 and 2003. The Transportation Agencies insisted that

⁷⁶ Letter from Senator Marc Basnight to Gene Gregory, Currituck County Board of Commissioners (Oct. 3, 2001) (Exhibit 5).

⁷⁷ *Id.*

⁷⁸ Meeting Summary from Reginald Scales (Oct. 31, 2001) (Exhibit 50). This was the last of three meetings local officials held to discuss the status of the project and the proposed work plan. *See* Meeting Agenda, Prepared September 13, 2001 (Exhibit 51).

⁷⁹ Memorandum from Akin, Gump, Strauss, Hauer, and Feld, LLP to the Duck Community and Business Alliance (Jan. 23, 2002) (Exhibit 52).

⁸⁰ Mid-Currituck Sound Bridge Study, Proposed New Work Plan Assumptions (Aug. 16, 2001) (Exhibit 53).

⁸¹ *See* Memorandum from Reginald Scales to Meeting Participants (Sep. 24, 2001) (Exhibit 54).

hurricane evacuation remain part of the Purpose and Need Statement, while other agencies continued to object, arguing, as before, that the Bridge would increase human presence on the Northern Outer Banks and would not have a net positive effect on hurricane evacuation time.⁸² At a meeting in August 2002, the Corps stated that it was “against hurricane evacuation as part of the purpose and need because it was only included to obtain public acceptance for the project.”⁸³ Local officials also acknowledged that they viewed the Bridge as an “economic boon” for the Northern Outer Banks.⁸⁴

As a result of several project team meetings ending in an impasse, and in an attempt to assuage agency concerns about including hurricane evacuation in the Purpose and Need Statement, the Transportation Agencies promised to provide more information about the Corps’ hurricane evacuation model at future meetings.⁸⁵ Despite there being no new information regarding the legitimacy of hurricane evacuation as a project purpose, the Corps stated at a September 2003 meeting that it was “prepared to sign the concurrence form presented by the NCDOT with hurricane evacuation as a part of the Purpose and Need Statement.” Other agencies, however, stated that they would not concur with the Purpose and Need Statement including hurricane evacuation as a purpose until the modeling study was completed. Some agencies suggested that the Statement be revised to note that “if the hurricane evacuation model does not support system improvement(s), then hurricane evacuation will be removed from the Purpose and Need Statement.” In response, NCDOT stated that it was “very reluctant” to revise the language. USFWS was unwilling to sign off on the Purpose and Need Statement as written,⁸⁶ noting that increased development, and thus increased human presence, as a result of the Bridge would offset any theoretical improvements in hurricane evacuation time the Bridge may provide.⁸⁷ The agencies concluded the meeting without concurrence.⁸⁸

In November 2003 the project team agencies, NCDOT, and FHWA finally reached a tentative agreement on a new Purpose and Need Statement for the project, which read:

⁸² Letter from John Page, Project Manager, to Dan Scanlon, County Manager (Jun. 25, 2002) (Exhibit 55); Meeting Minutes of May 8, 2002 from Reginald Scales, Parsons Brinckerhoff (Jun. 3, 2002) (Exhibit 56); *see also* Revised Draft Summary of the Purpose of the Proposed Action (Jun. 25, 2002) (Exhibit 57); Currituck Sound Area Transportation Study, Southern Shores Meeting (Jul. 18, 2002) (Exhibit 58).

⁸³ *Id.*

⁸⁴ Memorandum for the Record by Paul Sutherland (Feb. 27, 2003) (Exhibit 59).

⁸⁵ *See* Email from Cathy Brittingham to Jennifer Harris (Aug. 14, 2003) (Exhibit 60); Memorandum from Reginald Scales to Meeting Participants, Drafted Sep. 16, 2003, Revised Dec. 8, 2003 (Exhibit 61).

⁸⁶ *See* Email from Gary Jordan, USFWS, to John Page (Nov. 12, 2003) (noting that USFWS position had not been accurately reflected in meeting minutes) (Exhibit 62).

⁸⁷ USFWS also explained its concerns about including hurricane evacuation in subsequent communications after the meeting, stating, “improved transportation could be self-defeating with regard to hurricane evacuation times. If the study could reasonably demonstrate that there would be a net reduction in evacuation times with improved transportation and the accompanying development, then I would not oppose including hurricane evacuation as a purpose and need statement.” Email from Gary Jordan, USFWS, to Tonya Caddle (Sep. 29, 2003) (Exhibit 63).

⁸⁸ Email from Cathy Brittingham to Merger Team (Aug. 21, 2003) (Exhibit 64); Email from Jennifer Harris, NCDOT, to Merger Team (Sep. 5, 2003) (Exhibit 65).

Develop a range of alternatives which improves the Currituck Sound Area Transportation System and addressed the following needs:⁸⁹

- Need to improve traffic flow on the project area's thoroughfares during the summer weekday peak travel periods.
- Need to reduce travel time for persons traveling between the Currituck County mainland and the Currituck County Outer Banks.
- Need to facilitate coastal evacuation of the northern Outer Banks provided this need is supported by empirical data from the [CORPS] hurricane evacuation model prior to Concurrence Point Number 2. If the modeling indicates that hurricane evacuation is not a need of the transportation system, then it will be removed from the Purpose and Need.⁹⁰

In addition to the revised language regarding hurricane evacuation, some agencies changed their position regarding the Purpose and Need statement due to staff turnover.⁹¹

The Congressional delegation continued to exert influence as the project moved through the NEPA process, and in August 2005 Congress passed a federal highways bill that included a provision "To perform a study to be performed by East Carolina University to find the feasibility of constructing a mid-Currituck Sound Bridge." The bill appropriated \$2,000,000 for the project.⁹²

Transition to Turnpike Authority and Second DEIS

Agency jurisdiction for the project changed in 2006, when the North Carolina Turnpike Authority took over the project.⁹³ NC Senator Basnight said that the state assigned the project to

⁸⁹ Memorandum from Reginald Scales to Meeting Participants, Drafted Sep. 16, 2003, Revised Dec. 8, 2003 (Exhibit 61).

⁹⁰ EPA added the following statement at the bottom of their concurrence form: "Concurrence with P&N 1&2; conditional concurrence on 3 to allow the study to proceed with the understanding that the modeling input issues will be resolved and it will be removed if not supported prior to concur. Pt.2." Memorandum from Reginald Scales to Meeting Participants, Drafted Sep. 16, 2003, Revised Dec. 8, 2003 (Exhibit 61).

⁹¹ Email from County Manager to Board of Commissioners:

[T]he Army Corp has developed a new hurricane model that will project for the Eastern part of the state clearance rates for the next 30-40 years for hurricane evacuations. If the model demonstrates that this is a major issue for transportation, then there is concurrence to amend the purpose and need statement to include hurricane evacuation. This is a major point. There has been a major turnover in Merger Team members and I am being told that their replacements [sic] members should be an advantage for moving the project forward.

(Jun. 3, 2005) (Exhibit 66).

⁹² See Email from George Mannina to Gwenn Cruickshanks and John Wander (Jul. 29, 2005) (Exhibit 67).

⁹³ The General Assembly created the North Carolina Turnpike Authority in 2002 (S.L. 2002-133). The Turnpike authority was directed to plan and construct three toll projects at its inception. In 2005, the General Assembly increased the number of projects the Turnpike Authority was authorized to construct and added the Mid-Currituck Bridge as one of its authorized projects (S.L. 2005-275, enacting G.S. 136-89.183A).

the Turnpike Authority in “an attempt to remove the obstacles that have delayed the bridge for far too long” because the Authority “has the ability work with the private sector to expedite the project.”⁹⁴ Basnight also announced that project was estimated to cost \$460 million, down from an estimate of over \$800 million only one month earlier.⁹⁵

In April 2009, the Turnpike Authority signed a Pre-Development Agreement with the Currituck Development Group, LLC, to design, build, help finance, operate, and maintain the bridge. Senator Basnight passed legislation which assured an annual earmark of \$35 million per year to support the “gap” in funding that would not be covered by toll revenue needed to support construction of the Bridge.⁹⁶ The Turnpike Authority then issued the second DEIS in March 2010 and the Final Environmental Impact Statement in January 2012.

On July 26, 2012, the chairs of the Joint Legislative Transportation Oversight Committee sent a letter to David Joyner, Executive Director of the Turnpike Authority, regarding financing for the bridge and the “Public Private Partnership,” or “P3,” agreement. The chairs stated their “concerns about the terms of the agreement for the project, the financial feasibility of the project, and the financial liability the State may be incurring”⁹⁷ The chairs requested a presentation to the committee on these issues and asked the Turnpike Authority not to finalize a deal with Currituck Development Group before the presentation.

In 2013, the North Carolina General Assembly passed the Strategic Mobility Formula, which stripped the Mid-Currituck Bridge of its earmark and demanded that the Bridge be placed in a data-driven scoring process to compete for funding. This process is described in more detail in Section II, below.

Newly Organized Opposition to the Bridge

In 2010, a group of local citizens opposed to the Bridge began meeting to discuss their concerns about the Bridge and what they could do to prevent it from being built. In 2015, the group formalized as an unincorporated nonprofit association under the name NoMCB, Concerned Citizens and Visitors Opposed to the Mid-Currituck Bridge. The group has members from both the Currituck mainland and the Outer Banks. NoMCB maintains a website that provides regular updates to its members⁹⁸ and held meetings during the summer and fall of 2016 to organize support against the Bridge. Those meetings took place on both the mainland and in Corolla and were attended by both members and non-members. SELC now represents NoMCB with respect to its opposition to the Bridge.

⁹⁴ Letter from Marc Basnight to Gwenn Cruickshanks (Mar. 1, 2007) (Exhibit 68).

⁹⁵ “Basnight: Span to cost \$460M, begin in 2010,” DAILYADVANCE (Mar. 30, 2007) (Exhibit 69).

⁹⁶ N.C. GEN. STAT. § 136-178-79, *repealed by* 2013 N.C. Sess. Laws 183, § 4.9.

⁹⁷ Letter from the Chairs of the Joint Legislative Transportation Oversight Committee to David Joyner (Jul. 26, 2012) (Exhibit 70).

⁹⁸ NoMCB Website (last visited Dec. 19, 2016), *available at* <http://www.nomcb.com/> (Exhibit 71).

II. NEW FUNDING REALITIES RENDER THE BRIDGE UNAFFORDABLE AND DEMAND CONSIDERATION OF LESS COSTLY ALTERNATIVES

Even after forty years of planning, NCDOT still has no clear path forward to pay for the overpriced Mid-Currituck Bridge. Instead, NCDOT continues to obfuscate the true cost of the project and has failed to provide any realistic financial path to construction. At the same time, the Department has failed to consider how other less costly alternatives could be funded under the State's new data-driven funding process.

Project Cost

The cost for the Mid-Currituck Bridge has vacillated widely over the past twenty-five years, with costs ranging up to as high as \$808 million.⁹⁹ The latest estimate in the Draft Reevaluation places the cost at \$568.7–\$678.6 million.

In recent years it has been almost impossible for the public to determine the true cost of the Bridge and the extent to which that cost will be borne by taxpayers. The 2012 FEIS put the cost of the Bridge at \$500–595 million.¹⁰⁰ Months later, however, in a presentation to the North Carolina General Assembly, former North Carolina Turnpike Authority Executive Director David Joyner estimated the cost at \$650 million.¹⁰¹ At that time, NCDOT expected a relatively small portion of the project cost, \$40 million, would be borne by a private partner in the form of a P3 agreement.¹⁰² NCDOT also expected tolls to finance the project. NCDOT's traffic and revenue studies projected toll rates that would vary over time, with rates rising as high as \$28 for a one-way trip during peak season. Mr. Joyner told the North Carolina General Assembly that the toll revenue bonds would account for roughly \$132 million of the project's cost, while the state would be responsible for appropriation bonds of approximately \$464 million. At the time, this nearly half-billion dollar "gap" in toll funding was to be supported by an annual earmark appropriation from the legislature in the amount of \$35 million per year for forty years.¹⁰³

In 2013, however, North Carolina decided to move toward an objective, data-driven approach for selecting road projects instead of allowing politicians to choose highways that please special interests. The legislation, known as the Strategic Transportation Investments law ("STI"), eliminated the earmark for the Mid-Currituck Bridge and subjected the project to the

⁹⁹ NCDOT, *Financial Feasibility Assessment of the Mid-Currituck Bridge Project*, Handout 24, Aug. 10, 2010 (Exhibit 72). In 2011, internal estimates placed the cost of the Bridge as high as \$750 million when bridging Maple Swamp was included into the design.

¹⁰⁰ *FEIS* at xvi.

¹⁰¹ David Joyner, NCDOT, *The Mid-Currituck Bridge Project*, presentation to the Joint Legislative Transportation Oversight Committee, at slide 7 (Oct. 5, 2012), available at http://www.ncleg.net/documentsites/committees/JLTOC/2011-12_Biennium/2012-10-05/MidCurrituckDOT.pdf (Exhibit 73).

¹⁰² *Id.* at slide 43.

¹⁰³ N.C. GEN. STAT. § 136-178–79, *repealed by* 2013 N.C. Sess. Laws 183, § 4.9.

state's new data-driven scoring system.¹⁰⁴ Under this system, projects compete for funding at three different levels: a "Statewide" level that is composed primarily of large highway projects deemed to be of statewide significance; a "Regional" level that includes highways, as well as some other modal options; and a "Division" level which includes all transportation modes and is limited to the funding allocated to each of NCDOT's fourteen transportation divisions.

The Bridge scored exceptionally poorly when compared objectively to other projects. It garnered just 23.34 points out of a possible 100 in the Statewide Mobility tier,¹⁰⁵ and over 250 other "Statewide" projects achieved a higher score.¹⁰⁶ As a result, the Bridge failed to qualify for funding at either the Statewide or Regional tiers. Despite also achieving a low score at the Division level, Division One and the local RPO prioritized the project by awarding the Bridge the maximum number of local input points.¹⁰⁷

When the project was submitted to the STI process for scoring, it was assigned an overall project cost of just \$440 million—a significantly lower price tag than the \$650 million estimate from two years earlier. NCDOT staff noted internally the large discrepancy between the cost figure used in the STI and other estimates for the project,¹⁰⁸ but these significantly different estimates continued to be presented to the public. For example, despite rounding down the cost to just \$440 million for purposes of the STI, a 2015 fact sheet published by NCDOT estimated the cost of the project to be \$567–\$676 million.¹⁰⁹

Importantly, for purposes of prioritization, NCDOT included a cost to the state of just \$173 million, therefore assuming the remaining 60% of the project cost would be covered by toll revenue.¹¹⁰ This \$173 million figure formed the basis of key scoring metrics in the STI, such as the "cost benefit" calculation. The end result of the STI process was that \$173 million in state money would be allocated for the Bridge project. This is the *only* NCDOT funding that is available to the Bridge. All the remaining funds necessary to construct the Bridge must come from private contributions, a local match, or toll revenue.

¹⁰⁴ Strategic Transportation Investments Act, N.C. GEN. STAT. § 136-189 (2016).

¹⁰⁵ NCDOT, P3.0 Total Scores (last updated Oct. 12, 2015), *available at* <https://connect.ncdot.gov/projects/planning/Prioritization%20Data/Forms/AllItems.aspx?RootFolder=%2Fprojects%2Fplanning%2FPrioritization%20Data%2FPrioritization%203%2E0%20Archive%2FP3%2E0%20Scores&FolderCTID=0x0120001FD46DF9A3ECD549A6C58B29B660DAA2&View=%7BAE55D1B2-A3A0-493D-93D3-E689D98ADDF%7D>, at "All Projects" tab, row 2201 (Exhibit 74) [hereinafter STI scores].

¹⁰⁶ *Id.*

¹⁰⁷ Strangely, although the Bridge only scored well enough to receive division level funds, NCDOT correspondence suggest that Statewide funds were used to purchase right-of-way for the Bridge. *See* Memo from Calvin Legget, NCDOT, to Majed-AI Ghandour, NCDOT (Mar. 17, 2015) (Exhibit 75).

¹⁰⁸ Email from Derrick Lewis, NCDOT, to Spencer Franklin and Seth Fisher (Apr. 27 2015). (Exhibit 76).

¹⁰⁹ NCDOT, *Mid-Currituck Bridge Fact Sheet* (Jul. 2015) (Exhibit 77); *See also* NCDOT, Status Report on R-2576, Mid-Currituck Bridge (Jul. 2015) (Exhibit 78).

¹¹⁰ STI scores at row 2201 (Exhibit 74).

In contrast to both the STI and the NEPA document, the current STIP reflects a project cost for the Mid-Currituck Bridge of \$482.8 million, with \$245 million coming from NCDOT, (more than the \$173 million allocated by the STI).¹¹¹ Because the project only qualified for funding at the “Division” level, all of this funding would be required to come from Division One’s already over-stretched budget. In fact, even if NCDOT kept within the STI allocation of \$173 million, the project would eat up approximately 67% of the entire Division Budget for the next ten years. Using the \$245 million figure noted in the STIP, that percentage would increase to over 90%. The amount of funding between the years of 2016-2025 for Division One is set at \$257,718,000.¹¹²

NCDOT’s Draft Reevaluation now sets the overall project cost at \$568.7–678.6 million.¹¹³ The document provides no justification for this reversion to an earlier cost figure that is quite out of line with the STI’s project cost. Moreover, no explanation is given as to why the cost in the NEPA document differs so greatly from that listed in the STIP. Federal regulations require that a project receiving federal funding must be part of a fiscally constrained STIP.¹¹⁴ And FHWA requires highways undergoing NEPA review to have at least one section funded through the STIP.¹¹⁵ FHWA guidance also requires that the cost estimate in the STIP mirror the estimate in the NEPA documents.¹¹⁶ Therefore, unless the STIP is updated to match the project cost listed in the NEPA document, FHWA cannot approve the project as planned.

Central to the discussion surrounding the merits of the Mid-Currituck Bridge has always been the issue of project cost and the affordability of alternative solutions, especially in comparison to the cost of the proposed Bridge. NCDOT must use the NEPA process to transparently present one figure—the true cost of the project—to the public and local decision-makers and cease using different cost estimates for different purposes. Only then can the democratic decision-making process be fully informed.

¹¹¹ NCDOT, Nov. 2016 STIP, *available at* <https://connect.ncdot.gov/projects/planning/STIPDocuments1/2016%20November%20STIP%20Board%20of%20Trans%20Amendments%20Item%20I.pdf> (Exhibit 79).

¹¹² Email from Jason Soper, NCDOT, to Rep. Paul Tine (Dec 12, 2014) (Exhibit 80). “By year it is: 19 - \$27,429,000; 20 - \$25,482,000; 21 - \$22,283,000; 22 - \$22,283,000; 23 - \$13,173,000; 24 - \$13,173,000; 25 - \$13,173,000. We will continue to have GARVEE payments in the amount of \$13,173,000 for years 26 through 30.” The total per year figures “include[] the STIP dollars, federal and state but does not include items such as toll bond revenue or emergency federal funding for Pea Island or Rodanthe. This is all funding in all 3 categories plus transition dollars for Division 1. Includes bridges, safety, widenings, etc.” *See also* Email from Representative Tine to Peter Bishop (May 26, 2015) (Exhibit 81).

¹¹³ Draft Reevaluation at 8 (Exhibit 1).

¹¹⁴ 23 C.F.R. §450.222.

¹¹⁵ TRANSPORTATION PLANNING REQUIREMENTS AND THEIR RELATIONSHIP TO NEPA APPROVALS, FHWA (Feb. 9, 2011), *available at* http://www.fhwa.dot.gov/planning/tpr_and_nepa/tprandnepasupplement.cfm (Exhibit 82).

¹¹⁶ *Id.*

Plan of Finance

Not only has NCDOT failed to present a clear estimate of the project cost, but the agency has also failed to articulate a workable plan of finance to pay for the project. It is still unclear how much of the project cost can be covered by toll revenue and what financing mechanisms can and will be used.

Despite FHWA requirements, it seems unlikely that the STIP *can* be updated to match the new, high project cost noted in the NEPA document. The plan of finance laid out in the Draft Reevaluation is significantly flawed, making it clear that there is no feasible way to pay for the full Bridge with the small amount—\$173 million—that has been assigned to the project from the STI.

The amount of funding that must come from public coffers has also varied dramatically over time. In 2012, internal NCDOT documents assumed that with an overall project cost of \$637 million, approximately \$460 million would need to be covered by public funds, i.e., 72% of the total project.¹¹⁷ These figures were based on a 2012 traffic and revenue study which, despite including toll rates of up to \$28 for a one-way trip, concluded that ultimately the toll revenue generated by the Bridge would be quite minimal.¹¹⁸ Assumptions behind this study are detailed in the lenders report and are largely outdated.¹¹⁹

As noted above, however, the STI assigns just \$173 million to the project, a far cry from the \$460 million of public funds assumed in 2012. As such, NCDOT has been forced to explore plans of finance with significantly higher percentages of revenue being provided from toll revenue and other sources.¹²⁰

In August 2015, NCDOT set out a preliminary plan of finance that included a \$188.5 million TIFIA Loan, \$117.5 million in Toll Revenue Bonds, and \$130.0 million in STIP Funds.¹²¹ This plan also included a \$133.4 million “Toll Match” from NCDOT.¹²² It is unclear exactly what is meant by the “Toll Match” from NCDOT. Beyond the \$173 million apportioned from the STI there are no other NCDOT funds available to be spent on the project, yet each plan of finance that has been explored by NCDOT to date requires the use of much more than \$173 million in public funding.¹²³ These various plans have included the idea of a “loan” from

¹¹⁷ ACS Infrastructure, COMMENTS WITH RESPECT TO COMPREHENSIVE AGREEMENT (“AGREEMENT”) TO BE ENTERED WITH THE NORTH CAROLINA TRANSPORTATION AUTHORITY (“NCTA”) (Sep. 28, 2012) (Exhibit 83).

¹¹⁸ Currituck Development Group, MID CURRITUCK BRIDGE, FINAL REPORT TRAFFIC AND REVENUE FORECASTS (Jul. 2011) (Exhibit 84).

¹¹⁹ Steer Davies Gleave, MID-CURRITUCK BRIDGE LENDERS TRAFFIC CONSULTANT REPORT, DRAFT REPORT (Oct. 2011) (Exhibit 85).

¹²⁰ Email from Donna Keener to David Miller, PFM (Apr. 23, 2015) (Exhibit 86).

¹²¹ NCTA, Preliminary Plan of Finance, Mid-Currituck Bridge (Aug. 21, 2015) (Exhibit 87).

¹²² *Id.*

¹²³ Email from David Miller, PFM, to Beau Memory and David Tyeryar, NCDOT (Mar. 14, 2016) (Exhibit 88).

NCDOT to the project.¹²⁴ The concept of this loan, which would amount to at least \$100 million, flies in the face of the STI process. The entire purpose of the STI is to prioritize which highway projects get NCDOT's limited transportation funds, with those decisions being made through a data-driven formula. The Mid-Currituck Bridge did not secure funding from Statewide or Regional funding sources and was only successful in securing funding at the Division level based on the understanding that the cost to NCDOT was \$173 million. To provide additional financial support to the project at this juncture would necessarily take financial resources away from other, higher scoring projects in the STI and fatally undermine the entire process.

In the Draft Reevaluation, NCDOT also explores the idea of using the STI toll bonus allocation to pay for the Bridge itself.¹²⁵ The bonus allocation is a provision of the STI that provides a dollar award equal to 50% of expected toll revenues, capped at \$100 million, to be made available to the RPO for programming on another project in the same county.¹²⁶ There was an attempt during the 2015 legislative session to alter this legislation slightly with regard to the Mid-Currituck Bridge so that the bonus could be spent anywhere in Division 1, not just in Currituck County.¹²⁷ The attempt, however, was ultimately unsuccessful.

The fact that NCDOT has considered using the bonus allocation to pay for the Bridge itself is both surprising and troubling. The STI legislation makes very clear that any bonus allocation associated with a project must be spent on an "additional" project, not to pay for the toll project itself.¹²⁸ Moreover, Currituck County and the Albemarle Rural Planning Organization has already determined that any bonus allocation associated with the Bridge will be spent on R-2574, the widening of US 158 from NC 34 at Belcross to NC 168 at Barco."¹²⁹ The use of the bonus allocation to fund the Bridge is therefore a non-starter.

Going forward, NCDOT will need to create a financial plan to pay for the \$568–678 million Bridge using just \$173 million from public funds—all of which must come from Division One's funding share. The rest of the project's cost must be covered by toll revenue. Financing mechanisms could include a range of options such as TIFIA loans, GARVEE bonds,¹³⁰ Toll Revenue Bonds or private capital, but repayments to any of those programs would

¹²⁴ *Id.*

¹²⁵ Email from David Miller, PFM, to Donna Keener, NCDOT (Apr. 23, 2015) (Exhibit 86); Email from David Miller, PFM, to Beau Memory and David Tyeryar, NCDOT (Apr. 13, 2015) (Exhibit 89); Draft Reevaluation at 8 (Exhibit 1).

¹²⁶ N.C. GEN. STAT. § 136-189.11 (f); *see also* Email from Malcolm Fearing, NC Board of Transportation, to Rep. Paul Tine (Jun. 9, 2015) (Exhibit 90).

¹²⁷ Email from Peter Bishop to Rep. Paul Tine (May 26, 2015) (Exhibit 81).

¹²⁸ N.C. GEN. STAT. § 136-189.11 (f).

¹²⁹ Memorandum from Dan Scanlon, Currituck County Manager, to the Currituck Board of County Commissioners, (Aug. 12, 2016) (Exhibit 91).

¹³⁰ GARVEE financing, a "Grant anticipation revenue vehicle," allows NCDOT to issue bonds based on anticipated future federal revenue. *See*, http://www.fhwa.dot.gov/ipd/finance/tools_programs/federal_debt_financing/garvees/ (Exhibit 92). As Ray McIntyre, a Unit Head in NCDOT's STIP, Feasibility Studies, and Strategic Prioritization Office explained in a 2014 deposition, "it does not increase funding, but allows you to bring funding forward." Deposition of Ray McIntyre by Kym Hunter, in *Defenders of Wildlife v. NCDENR*, 13 HER 16087 (Aug. 18, 2014)

all necessarily come from toll revenue generated by the Bridge. The STI process has made clear that public funds for the Bridge must be capped at \$173 million and no more. As noted below, declining traffic forecasts make it likely that toll revenue will be much lower than previously expected, rendering full funding of the Bridge an impossibility.

If NCDOT can ever create a realistic plan of finance, the agency will need to take a number of steps to gain approval of their plan, including consulting with the Joint Legislative Commission on Governmental Operations. N.C. GEN. STAT. § 136-89.183(a)(2)(f). Only once these steps have been taken can NCDOT move forward with the project as a toll road. If NCDOT wishes to issue bonds for the project, further coordination and approval by the Local Government Commission will be required. N.C. GEN. STAT. §159-85.

Cost of Alternative Solutions

Under NEPA, the Transportation Agencies must also present a fair and realistic cost of alternatives, including ER2 and the Improved ER2. The cost of alternatives and the ability to fund and finance them has long been central to NCDOT's analysis of transportation solutions for the Currituck Outer Banks.

For example, in 2012, NCDOT asserted in the FEIS that if ER2 were to be chosen, it could only be built by NCDOT and would therefore be subject to the State's Equity Formula.¹³¹ The FEIS suggested that, as the project is in the same Division as the Bonner Bridge, that project would likely commandeer available resources and that, accordingly, ER2 could not be constructed.¹³² The FEIS used this funding situation to discount ER2 as a reasonable scenario.

As noted above, the state's equity formula is no longer in place. Division One does not suffer from the exact restraints as in the past. Under the new STI, any Division may secure funding at the "Statewide" level as well as funding from "Regional" and "Division" levels. There is therefore more flexibility under the new funding system. NCDOT has failed to assess, however, how the ER2 alternative, or any alternative to the Bridge, might score under the STI formula. Until that step is taken there is no reason to believe that funding and financing the Bridge will be any more feasible than other alternatives.

In addition, even were the STI to still impose the same restraints as the equity formula once did, the Corps has been clear that state law limitations cannot trump the federal requirements that practicable alternatives be considered pursuant to the 404(b)(1) guidelines.¹³³

(Exhibit 93). Mr. McIntyre explained that where NCDOT previously had a cap on the amount of GARVEE funding that could be used on a particular project, that cap was no longer in place. *Id.* The only limit now is the limit for the overall GARVEE bond program for the state. *Id.* Because, however, GARVEE financing does not increase funding in the long term, GARVEE bonds can only properly be used to help finance the Bridge project if NCDOT could show that future toll revenues would be sufficient to pay back the anticipated future anticipated federal payments.

¹³¹ FEIS at 2-3, 2-37-38.

¹³² *Id.*; see also, NCDOT, *Draft Preferred Alternative Report* (Nov. 2010) (Exhibit 94).

¹³³ Letter from Kenneth Jolly, USACE, to Jennifer Harris, NCDOT (Oct. 29, 2010) (Exhibit 95).

As noted by Ken Jolly in his 2010 comments to NCTA, the Corps “determined that State Legislation/Law is not an adequate reason to consider ER2 an alternative that is not practicable.” Moreover, the Corps noted that “[u]nder NEPA and Section 404 requirements, alternatives may still be considered practicable even though current funding is not available for a specific project. Therefore, we recommend not all the conceptual alternatives be dropped at this point in the process”.¹³⁴

As set out above, there are a number of mechanisms including the use of GARVEE bonds, public-private financing, tolling, local contributions, and other funding and financing solutions that could be creatively used to explore an alternative to the Bridge. NCDOT should consider a less expensive, refined alternative such as Improved ER2 and make a full analysis of how such an alternative could be funded. With only \$173 million currently available to fund the more than \$600 million Bridge it is almost certain that such an alternative would be more practicable than the toll-funded Bridge.

III. THE NEPA DOCUMENTS ARE BASED ON FLAWED TRAFFIC FORECASTS

As noted in the attached report from transportation expert Walter Kulash, the NEPA documents continue to contain significant traffic forecasting errors. While the Draft Reevaluation contains dramatically changed traffic forecasts, NCDOT’s underlying statement of purpose and need and screening of alternatives remains based on the old, incorrect data. Similarly, the screening remains based on inaccurate baseline data. The new traffic forecasts also have substantial implications for the practicability of different project alternatives. With the Bridge so reliant on toll revenue, a dramatic down-shift in likely drivers casts serious doubt on the financial feasibility of the project. Finally, as discussed in Mr. Kulash’s report, the current NEPA documents are based on an inapt methodology which overstates the problems on NC 12 and understates the effectiveness of reasonable alternative solutions. These questions are central to the analysis of reasonable alternatives to the Bridge that NEPA requires.

NCDOT Must Revisit Its Analysis of Alternatives Based On Up-To-Date Traffic Data

The most striking information in the Draft Reevaluation is the new set of traffic forecasts that are *significantly* lower than previous estimates. Forecasts have dropped under both the “No Build”/ ER 2 scenario as well as the MCB4 “Build” scenario.¹³⁵ For example, where the FEIS anticipated Annual Average Daily Traffic (“AADT”) of 48,700 under a “no-build” scenario for the Wright Memorial Bridge, the reevaluation has revised that number down to 30,600.¹³⁶ This figure is actually lower than the previous estimate presented as the “build” scenario in the FEIS—which was 37,400.¹³⁷ In other words, the FEIS endorsed an alternative that would have included 37,400 cars travelling across the Wright Memorial Bridge but new figures show that a

¹³⁴ Letter from William Biddlecome, USACE, to Jennifer Harris, NCDOT (Sep. 12, 2007) (Exhibit 96).

¹³⁵ Draft Reevaluation at 25 (Exhibit 1).

¹³⁶ *Id.*

¹³⁷ *Id.*

much lower level of traffic can be achieved without the Bridge being built at all. The same is true for forecasts from NC 12 Albacore Street to the Mid-Currituck Bridge and from US 158 Barco to the Mid-Currituck Bridge.¹³⁸

Despite these dramatic changes, the Draft Reevaluation fails to revisit meaningfully the NEPA process as the law requires. 23 C.F.R. §§ 771.129; 771.130(a)(2). Rather than setting out to reevaluate the purpose and need for the project and revisit the various project alternatives, the Draft Reevaluation simply states that “the needs the project is trying to meet remain needs”¹³⁹ and that “the Preferred Alternative identified in the FEIS will continue to meet the project purpose and need and provide greater travel benefits than ER2”¹⁴⁰

These conclusory statements do not satisfy NEPA. The assertion that “the needs the project is trying to meet remain needs,” assumes that the *level* of need is irrelevant. This is not the case. By design, NEPA requires an agency to clearly define, with a reasonable amount of specificity, the needs that a proposed project is designed to address. Agencies may not “define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action,” rendering the EIS a “foreordained formality.” *Id.*; *Webster v. U.S. Dep’t of Agric.*, 685 F.3d 411, 422 (4th Cir. 2012). Nor is it acceptable for an agency to “frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals.” *Citizens Against Burlington*, 938 F.2d at 196. Rather, the agency must set out the needs that a proposed project is designed to meet and then evaluate how a range of alternative solutions can meet those needs. Vague statements that there is a need for some traffic improvement are insufficient to support construction of a \$600 million bridge, or to disregard other less expensive and less damaging alternatives.

Purpose and Need

The EIS defines the following needs for the project: “substantially improve traffic flow,” “to substantially reduce travel time,” and to “reduce substantially hurricane clearance time.”¹⁴¹ If these nebulous statements were left without more support they would necessarily run afoul of the stricture that an agency not frame its goals such that an infinite number of alternatives could meet them.

The FEIS, however, goes on to further define the needs in terms of the 2035 traffic forecasts. For example, the document notes that by 2035 “travel demand will exceed the capacity of the road to handle that demand on almost all project area segments of NC 12 and US 158 east of the Wright Memorial Bridge during summer weekday and summer weekend conditions (approximately 29 miles).”¹⁴² Similarly, the document states that “[in] 2035, on the

¹³⁸ *Id.*

¹³⁹ *Id.* at 15.

¹⁴⁰ *Id.*

¹⁴¹ FEIS at 1-3.

¹⁴² FEIS at 1-4.

summer weekday, on US 158 east of the Wright Memorial Bridge and NC 12 in Southern Shores and parts of Duck, travel demand is expected to be notably greater than the capacity of these roads for 6 to 7 hours per day.”¹⁴³ The document further explains that “[in] 2035, on the summer weekend, US 158 in Currituck County between NC 168 and the Wright Memorial Bridge will be congested for 10 to 11 hours a day, with demand 16 to 19 percent above the capacity of US 158,” and that “[i]n 2035, on the summer weekend, US 158 east of the Wright Memorial Bridge and NC 12 in Dare County will be congested for 15 to 18 hours per day, with demand 117 percent of the capacity of US 158 and as much as 162 percent of the capacity of NC 12.”¹⁴⁴

The FEIS thus defines the “need” for a project in fairly specific detail with reference to the 2035 traffic forecasts. New traffic forecasts, however, have shown that every single one of these predictions is no longer true. Travel demand will no longer exceed road capacity on 29 miles of the road network by 2035, or even 2040.¹⁴⁵ Travel demand on 158 and NC 12 is no longer expected to exceed the capacity of those roads for 6 to 7 hours per day during the weekday.¹⁴⁶ US 158 between 168 and the Wright Memorial Bridge will no longer be congested for 10 to 11 hours a day.¹⁴⁷ And US 158 east of the Wright Memorial Bridge and NC 12 in Dare County will no longer be congested for 15 to 18 hours per day.¹⁴⁸

In short, the needs established in the EIS no longer exist. Different, diminished needs exist and the purpose and need for the project must be updated. The statement that “the needs the project is trying to meet remain needs”¹⁴⁹ is simply false. NCDOT must prepare a Supplemental EIS that takes into account the new information about the level of future need and redefine the statement of purpose and need in those terms.

Alternatives Screening and Analysis

Equally important, the EIS used the 2035 forecasts to screen between various project alternatives. The ability of alternatives to achieve the purpose and need of the project was measured in terms of: “The percent reduction in annual millions of vehicle-miles traveled under congested condition (at LOS E and F, at LOS F, and at a poor LOS F) on the project area’s thoroughfares in 2035 (LOS E and F are considered congested),” “The percent reduction in miles of NC 12 and US 158 operating at LOS F on the summer weekday and summer weekend in 2035,” and “the percent reduction in miles of NC 12 and US 158 operating at a poor LOS F on the summer weekday and summer weekend in 2035.” In other words, alternatives were scored based on their ability to achieve a percentage reduction in traffic congestion when compared to the 2035 “no build” forecasts.

¹⁴³ FEIS at 1-4.

¹⁴⁴ *Id.*

¹⁴⁵ Draft Reevaluation at 31-38 (Exhibit 1).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

For example, the FEIS states that ER2 would reduce LOS F conditions by 44% compared to the 2035 “no build” scenario, but “leave extensive periods of severe congestion.” Further, ER2 was found to reduce travel times by 19% compared to the 2035 “no build” projections, and provide hurricane evacuation benefits. While the DEIS thus acknowledged that ER2 met all elements of the statement of purpose and need, it concluded that it “offered a low level of benefit in terms of reducing congestion and travel time.” The FEIS similarly presents the alternatives in comparative form, noting that while ER2 meets the project purpose and need it would have fewer benefits than Bridge alternatives.¹⁵⁰ Again, however, these 2035 forecasts are now deemed invalid in the Draft Reevaluation and thus the previous screening and analysis of alternatives is invalid. As noted above, non-Bridge alternatives are now shown to meet the same level of benefit that Bridge alternatives would have produced.

Accurate, Up-to-Date Information

“Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). Such accuracy ensures that agencies take a “hard look” at environmental effects of proposed projects and that relevant information is available to the public. *Glickman*, 81 F.3d at 445-46 (holding that the economic assumptions underlying an EIS are subject to “narrowly focused review” to determine whether they “impair[ed] fair consideration of a project’s adverse environmental effects”).

Moreover, agencies have a duty to “insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24. Continued reliance on outdated traffic forecasts that have now been shown to be overstated to an alarming degree fails to “satisfy the requirements of NEPA,” and the EIS “cannot provide the basis for an informed evaluation or a reasoned decision.” *Sierra Club v. US Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983); *see also, Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085-86 (9th Cir. 2011) (ten-year old survey data for wildlife “too stale” thus reliance on it in EIS was arbitrary and capricious); *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (six year-old survey data for cutthroat trout was “too outdated to carry the weight assigned to it” and reliance on that data violated NEPA); *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (reliance on “stale scientific evidence” regarding owl population data without adequate discussion of scientific uncertainty violated NEPA).

Courts have been clear that the quality of data must be proportional to the weight the agency assigns to it in its analysis. Here, the accuracy of the traffic forecast data underlies both the purpose and need for the project and the entire analysis of alternatives. The Transportation Agencies have gathered new traffic forecast information but have then failed to incorporate that more accurate, up-to-date information into the analysis in the reevaluation. Instead, the reevaluation continues to blindly defer to the reasoning in the FEIS despite acknowledging that the projections upon which it was based have been shown to be wrong.

¹⁵⁰ FEIS at 2-44.

The Transportation Agencies' bare assertion that "the Preferred Alternative identified in the FEIS will continue to meet the project purpose and need and provide greater travel benefits than ER2 . . ." is wholly insufficient. NEPA requires that the efficacy of different alternative solutions be laid out fully for public review and drive the democratic decision-making process.¹⁵¹ *North Carolina Wildlife Federation v. North Carolina Dep't of Transp.*, 677 F.3d 596, 602 (4th Cir. 2012). The new forecasts create a "seriously different picture" of the project and alternative solutions and a Supplemental EIS is now required. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

The Transportation Agencies Must Establish a Reasonable Baseline for Comparing Alternatives

A Supplemental EIS is also essential because the Transportation Agencies have a duty to present the public with a clear and accurate "No Build" baseline, which the Fourth Circuit has found to be a "critical aspect of the NEPA process." *NC Wildlife*, 677 F.3d at 603. Indeed, the Court noted that "[w]ithout [accurate baseline] data, an agency cannot carefully consider information about significant environment impacts . . . resulting in an arbitrary and capricious decision." *Id.* (quoting *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011)). In the EIS for the Mid-Currituck Bridge, the Transportation Agencies used the 2035 traffic forecasts as its "No Build" baseline. The updated "No Build" numbers for 2040 showing dramatically lower levels of congestion and traffic must now be presented to the public in a Supplemental EIS as the baseline.

Moreover, the Transportation Agencies must present the efficacy of various project alternatives in absolute terms, not simply as percentage differences from the "No Build" baseline. As noted above, the Transportation Agencies' previous analysis of project alternatives was based on the percentage improvement they would have over a "No Build" condition. In the Draft Reevaluation, the Transportation Agencies attempt to do the same with the updated traffic forecasts, presenting the different project alternatives based on how they will improve on the updated 2040 "No Build" forecast.¹⁵² This trick, however, illegally obscures the absolute impact that different project alternatives would have. New forecasts show that the less damaging ER2 alternative will now, on many segments of road, achieve a level of traffic that was previously determined to be acceptable under the preferred alternative in the FEIS.¹⁵³ This fact makes clear that ER2 is not only fully capable of meeting the project purpose and need, but it can achieve a result that NCDOT was previously prepared to invest \$600 million on a new Bridge to accomplish. The Improved ER2 presented by the local community and attached to these comments should similarly be examined with regard to this updated baseline condition. The new, more realistic, projections of future traffic will be a key consideration in the determination

¹⁵¹ As the Fourth Circuit noted in *NC Wildlife*, "the very purpose of public issuance of an environmental impact statement is to 'provid[e] a springboard for public comment,'" (citing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004)), 677 F.3d at 603. Indeed, "the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time." *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

¹⁵² Draft Reevaluation at 38-39 (Exhibit 1).

¹⁵³ *Id.* at 25.

as to what is the Least Environmentally Damaging Practicable Alternative (“LEDPA”) for the project and must be transparently presented to the public in a Supplemental EIS.

New Traffic Forecasts Affect the Practicability of the Project

The new, much lower forecasts of traffic also have significant implications for the practicability of project alternatives. The Draft Reevaluation anticipates significantly lower numbers of traffic using the Bridge than previously expected. As a result there will be correspondingly less toll revenue than thought. As Mr. Kulash lays out in his report, this reduction results from two factors compounded: (1) the reduction in all traffic (toll as well as non-toll) within the study area and (2) a further reduction in the “capture” rate (percentage of all bridge traffic choosing to use a toll bridge) due to the reduced congestion in the year 2040 forecast.¹⁵⁴

Using the new forecasts, Mr. Kulash notes that toll collection costs (20 percent of toll revenue or \$4 million annually) and annual bridge maintenance/rehabilitation reserve costs (3 percent of bridge costs of \$450 million or \$14 million annually) would leave annual net revenue of only around \$4 million available for debt service.¹⁵⁵ In the early years of the project, during “ramp-up” of toll revenue, total revenue would be insufficient to cover operations and maintenance costs, and would therefore leave nothing for debt service.¹⁵⁶ Even in year 2040, the available net revenue (\$4 million) would service only around \$70–80 million in loans.

This level of revenue is completely insufficient to meet the preliminary plan of finance laid out in the Draft Reevaluation. Rather than deal with this issue head on, the Draft Reevaluation states that “the effects of changes in development and traffic growth trends on bridge volumes as they relate to toll revenue and toll bridge financing will be addressed in a new investment grade traffic and revenue forecasts being prepared independent of this reevaluation.”¹⁵⁷ This information, however, is central to any analysis of the Bridge and must be included in a Supplemental EIS and presented to the public for review and comment. The Final EIS discussed at length how a Bridge alternative was preferred over ER2 due to the fact that it could be funded by toll revenue.¹⁵⁸ If the Bridge will not be able to generate the level of revenue previously anticipated, that is a “significant new circumstance” that must be fully evaluated in a Supplemental EIS.

The Transportation Agencies Should Reevaluate Traffic and Accurately Compute the Capacity of NC 12

In addition to the new forecasts that undermine the continued validity of the Transportation Agencies’ analysis, the NEPA document also contains other errors that have been

¹⁵⁴ Kulash Report at 10-14 (Exhibit 2).

¹⁵⁵ Kulash Report at 13-14 (Exhibit 2).

¹⁵⁶ *Id.*

¹⁵⁷ Draft Reevaluation at 24 (Exhibit 1).

¹⁵⁸ FEIS at 2-44- 2-49.

present throughout. One fundamental error is the Transportation Agencies' use of an inapt methodology to assess the capacity of NC 12. As explained by Mr. Kulash in his report, the traffic capacity analysis used in the FEIS is for a rural two-lane highway—this is inappropriate for the area through which NC 12 passes.¹⁵⁹ The effect of this misuse is to understate the capacity of NC 12, thereby undermining the legitimacy of the project purpose and need and the screening and analysis of alternative solutions.

As Mr. Kulash explains, the EIS computes the vehicular capacity of NC 12 using a proprietary software package (HCS 2000) that follows the method for the “Class II Two-Lane Highway” in both the 2000 Highway Capacity Manual (“HCM”) and the current 2010 Highway Capacity Manual.¹⁶⁰ In the Class II Two-Lane Highway method (unlike the method used in the FEIS for US 158), “capacity” is not defined as the maximum possible hourly flow of vehicles, but rather by the ability of a motorist to freely overtake (“pass”) any slower-moving vehicle.

Under the Class II Two-Lane Highway method, maximum “capacity” occurs when the motorist’s “percent time spent following” (i.e. time spent desiring to, but unable to pass a slower vehicle) reaches 85 percent. The “collective opinion and judgment” of the Transportation Research Board’s “committee of experts” determined that this level of inability to pass is unacceptable to the typical motorist, and is therefore identified as Level of Service (“LOS”) F, the “worst” LOS possible, creating the misleading impression that no further increase in traffic flow is possible. Unlike other methodologies used in the FEIS (for example on US 158) where LOS F is based on a computation of hourly vehicle flow, LOS F in the Class II Two-Lane Highway method, occurring at levels well below (around 60 percent of) the possible maximum vehicle flow, simply indicates that a subjectively-determined marker of motorist convenience has been reached.

The HCM identifies the Class II Two-Lane Highway method as appropriate for highways in rural area.¹⁶¹ The Class II Two-Lane Highway method is intended for highways carrying long-distance travelers, with a preponderance of “through” trips (i.e., with neither origin nor destination immediately along the subject road. The Class II highway is assumed to be “rural” in character, with few driveways, even fewer intersecting roads, and no intrusion by pedestrian crosswalks or bicycle travel. In these “rural” conditions, drivers *expect* to maintain consistently high speed with ability to freely overtake slower vehicles, with this ability limited only by sight distance and opposing traffic flow and not by regulatory limitations (speed limits, “no passing” zones, etc.) due to roadside development.

NC 12 in Dare and Currituck counties, however, has none of these “rural” characteristics. The overwhelming majority of traffic is making short local trips (i.e., with origin, destination, or both along the road), not long-distance “through” travel. Drivers, most of them non-resident visitors are focused on identifying their destinations rather than covering long distances without

¹⁵⁹ Kulash report at 3 (Exhibit 2).

¹⁶⁰ Kulash Report at 3 (Exhibit 2).

¹⁶¹ *Id.*

hindrance.¹⁶² Moreover, NC 12 is replete with driveways, commercial entrances fronting residential and commercial properties, and bicycle side path and pedestrian crosswalks that all signal to the driver that NC 12 is more urban than rural, and thus not the high-speed driving environment envisioned by the Class II Two-Lane Highway method.

Traffic engineers regularly apply the Class II Two-Lane Highway method to inappropriate locations (such as NC 12) because proprietary software packages for applying HCM methods do not yet offer an appropriate method for two-lane roads in low-speed town or developed environments. Until such methods are offered by proprietary software products, the correct procedure is to adapt, to two-lane roads in developed areas, a two-lane version of the “multilane” (four- or more lane) method given in the HCM. This approach establishes: (1) a capacity based on vehicle flow, rather than on the convenience of passing at will and (2) LOS based on consumption of the road’s vehicular capacity, rather than on “percent of time spent following.”

As Mr. Kulash details in his report, the difference in the two methodologies is significant. Under the Class II Two-Lane Highway standard used in the FEIS, four of the six road links analyzed on NC 12 have Volume to Capacity (“V/C”) ratios in excess of 1.0. By contrast, when the more appropriate methodology is used, and forecasts are computed directly from the HCM, only one link has a volume to capacity ratio greater than 1.0.

By thus understating the capacity of NC 12, the Transportation Agencies overstated the level of need in the EIS. As noted above, new 2040 traffic forecasts already show that the 2035 numbers were significantly overstated. It is likely, however, that the 2040 numbers continue to be based on this faulty methodology and so even the new, lower numbers remain overstated.

It is worth noting that the two methods of computing capacity yield significantly different levels of traffic performance for Alternative ER2 and the Improved ER2 alternative. The FEIS reports that even after widening to three lanes throughout the two busiest Dare County links (Links 9 and 10) would still operate at LOS F, with V/C ratios of 1.36 and 1.15 respectively. Although the FEIS does not offer operable guidelines defining the project’s purpose to “substantially improve traffic flow” on NC 12, the failure to eliminate LOS F conditions could reasonably be interpreted as failure to “substantially improve”.

When the same three lane expansion is analyzed pursuant to the more proper methodology using the HCM, however, not one of the links along NC 12 operates at LOS F. The worst conditions, LOS E, which occur on the two most congested links, is considered acceptable for peak hour conditions in developed areas such as the NC 12 corridor.¹⁶³ In the Supplemental EIS, the Transportation Agencies should reanalyze all alternatives, including the Improved ER2, based on the more appropriate HCM methodology.

¹⁶² The EIS fails to provide data regarding, for instance, the number of vehicles crossing between Dare and Currituck Counties, which would allow for a more complete picture of traffic patterns and the effect of the Bridge on alleviating traffic bottlenecks.

¹⁶³ Kulash Report at 6 (Exhibit 2).

IV. THE NEPA DOCUMENTS RELY ON A FLAWED HURRICANE EVACUATION RATIONALE TO JUSTIFY THE BRIDGE

Since 1950, only three Category 3 storms, and no category 4 or 5 storms, have touched the North Carolina coast during peak tourist season.¹⁶⁴ When storms have struck, the Northern Outer Banks has been successfully evacuated.¹⁶⁵ In response to prior attempts to include hurricane evacuation in the project's Purpose and Need Statement, resource agencies repeatedly commented that building a bridge may very well *increase* hurricane evacuation times in the long run, as additional access will mean there will simply be more people on the Outer Banks who need to be evacuated.¹⁶⁶ As the Corps long ago observed, Transportation Agencies are simply using hurricane evacuation to prey on fears of a "what if?" scenario to obtain public support for an ill-advised project.¹⁶⁷

The Draft Reevaluation does not reexamine the Purpose and Need Statement, which includes "[t]he need to reduce substantially hurricane evacuation times from the Outer Banks for residents and visitors who use US 158 and NC 168 as an evacuation route."¹⁶⁸ The Purpose and Need Statement does not define the substantial reduction with any specificity, but instead states, "an improvement is considered substantial as opposed to minor if the improvement is great enough to be largely noticeable to typical users of the transportation system and if the improvement offers some benefit across much of the network, as opposed to offering only a few localized benefits."¹⁶⁹

18 Hour Evacuation "Standard"

As justification for this purported need, the FEIS states that "[h]urricane evacuation times . . . far exceed the state-designated standard of 18 hours."¹⁷⁰ The stand-alone Purpose and Need document also states that "law enforcement and emergency management indicate a preference for an 18-hour maximum."¹⁷¹ The state-designated standard referred to by the FEIS was enacted by the North Carolina General Assembly in 2005.¹⁷² The law states in its entirety: "The hurricane evacuation standard to be used for any bridge or highway construction project pursuant to this Chapter shall be no more than 18 hours, as recommended by the State Emergency

¹⁶⁴ NCTA Response to Written TEAC Comments Requested in Jul. 2007 (Sep. 19, 2007 update) (Exhibit 97).

¹⁶⁵ Email from Drew Pearson, Dare County Emergency Management, to Angela Welsh, ARPO (Jan. 2, 2015) (Exhibit 98).

¹⁶⁶ Email from Gary Jordan to Tonya Caddle (Sep. 29, 2003); Meeting with DENR RE R-2576, Currituck Sound Area Transportation Study (Aug. 26, 2003) (Exhibit 99).

¹⁶⁷ "Mike Bell stated that he was against hurricane evacuation as part of the purpose and need because it is only included to obtain public acceptance for the project." Meeting Minutes from Jul. 24, 2002 Merger Team Meeting (Aug. 28, 2002) (Exhibit 100).

¹⁶⁸ Draft Reevaluation at 29 (Exhibit 1).

¹⁶⁹ Draft Reevaluation at 29 (Exhibit 1).

¹⁷⁰ Draft Reevaluation at 29 (Exhibit 1).

¹⁷¹ Statement of Purpose and Need at 39 (Oct. 2008) (Exhibit 101).

¹⁷² See SL 2005-275, Section 5, effective Aug. 12, 2005.

Management officials.”¹⁷³ The law, therefore, does not mandate an 18 hour evacuation standard for all locations throughout the coastal region, but instead states that if a bridge or highway is to be built, then it should be built with the goal of providing an evacuation time of no more than 18 hours. In other words, the law is meant to provide a standard for an assumed bridge or highway project, not to serve as a justification for the creation of a bridge or highway project.

State officials have also acknowledged that the legislature intended the 18 hour standard to be a “goal” for evacuation and not a “must meet” rule.¹⁷⁴ Indeed, there are many NC coastal communities that would fail this 18 hour standard.¹⁷⁵ The transportation agencies have also not put forth any data, or any other form of logical justification, for this arbitrary standard and have not identified any other states that have a similar goal evacuation time. The report prepared by transportation expert Walter Kulash further discusses the arbitrary nature of the 18 hour standard,¹⁷⁶ noting that it has no basis in meteorology, storm forecasting, peer site comparison, or locally adopted preparedness planning. As stated in the report:

The three arguments for “preferred clearance time” of 18 hours (P&N Statement, Section 1.10) are all based on unsupported assumptions:

1. Requiring that evacuation be “conducted mostly during daylight hours” is not only arbitrary and unsupported by any emergency-management advisories, but also contradictory, in that (1) there is not likely to be 18 hours of daylight in hurricane season with a storm looming and (2) waiting for daylight to begin an evacuation would almost certainly contribute to “violating” the 18-hour “standard”.
2. The goal of “Limiting the amount of personnel that North Carolina law enforcement would have to commit to one shift for an evacuation” presumably is intended to accommodate the availability of locally-stationed North Carolina State Highway Patrol (“NCSHP”) officers, and possibly also to minimize the cost of an evacuation. Neither of these concerns is justified or quantified. Under a governor-mandated state of emergency multiple shifts of NCSHP officers could be made available, particularly for the small number of relevant postings. Furthermore, at no point in any available documentation is the cost of additional NCSHP manpower weighed against the half-billion dollar cost of the build alternatives.
3. A “preference” for evacuation within the “National Hurricane Center’s warning period as opposed to... hurricane watch period” in no way supports the 18-hour evacuation “standard”. Warnings are typically issued 36 hours ahead of the expected arrival of tropical storm force winds (39 miles per hour) and, depending on the speed of the storm,

¹⁷³ N.C. Gen. Stat. § 136-102.7

¹⁷⁴ MCB Turnpike Authority Bridge Study Response to Agency Comments at the Jul. 18, 2007 TEAC meeting (Exhibit 102).

¹⁷⁵ Stakeholder Involvement Report at 2-36 (Exhibit 103).

¹⁷⁶ See Kulash Report at 8-10 (Exhibit 2).

48–60 hours ahead of the arrival of hurricane-force winds. A 36-hour evacuation time is therefore possible entirely within the hurricane warning period.¹⁷⁷

Finally, the Purpose and Need’s 18 hour standard does not comport with the State’s Standard Operating Guide for coastal evacuation. That guide sets forth a detailed schedule for evacuation, below, that does not contemplate 75% occupancy within 18 hours of a storm’s landfall.

- 72 hours – State implements partial activation of the EOC based on the approaching hurricane. State activates depending on storm progress. NCSHP and NCDOT engaged in evacuation.
- 48 hours – Division of social services activates the sheltering program. County Board Chairman decides whether or not to call a phased evacuation of special needs population. If so he issues that order now.
- 40 hours – Division of social services and ARC begin preparations to open general population shelters.
- 36 hours – County Board Chairman gives evacuation notice for the general population in the county.
- 32 hours – Voluntary evacuation of general public begins in the county.
- 18 hours – Depending on county clearance times, mandatory evacuation begins in the county.
- 12 hours – The last bus leaves on rout to in-county shelter.¹⁷⁸

The 18 hour evacuation “standard” cannot serve as a justification for this project.

Hurricane Evacuation Alternatives Analysis Technical Memorandum

To support their position that the Bridge will address a need for improved hurricane evacuation, the Transportation Agencies rely on a 2010 memorandum prepared by Parsons Brinckerhoff. For purposes of analyzing project alternatives, the memorandum assumes 75 percent tourist occupancy and a Category 3 storm.¹⁷⁹ Notably, there is no evidence provided that a Category 3 storm has ever struck the Currituck Outer Banks when there was 75 percent occupancy.¹⁸⁰ The Hurricane Technical Memorandum states that, as of 2010, the existing

¹⁷⁷ *Id.*

¹⁷⁸ 2011 NC Coastal Region Evacuation and Sheltering Standard Operating Guide for the Northern Coastal Plain (Exhibit 104).

¹⁷⁹ Hurricane Technical Memorandum at 2 (Exhibit 106).

¹⁸⁰ *See* Stakeholder Involvement Report at 2-36 (Exhibit 103).

hurricane evacuation time was 27 hours, and it predicts an evacuation time of 35.9 hours in 2035 under a no-build scenario.¹⁸¹ As discussed above in section III, however, the Draft Reevaluation forecasts significantly reduced traffic volumes in 2040. In order to present a valid analysis of the need for improved hurricane evacuation, the Transportation Agencies must complete a new Hurricane Evacuation Alternatives Analysis with this new traffic forecast data.

Finally, even using outdated traffic forecast data, the memorandum does not predict that *any* of the alternatives, including the preferred alternative, would achieve hurricane evacuation times of 18 hours or less.¹⁸² And the technical memorandum anticipated that ER2 and MCB4 would achieve the same 2035 hurricane evacuation time—27 hours.¹⁸³ The Transportation Agencies, therefore, cannot defend their selection of the preferred alternative based on this report. To do so would amount to a “subterfuge designed to rationalize a decision already made.” *Forest Guardians v. USFWS*, 611 F.3d 692, 712 (10th Cir. 2010).

Resource Agency Objections

State and federal resource agencies have long questioned the legitimacy of hurricane evacuation as a need for the Bridge. In comments on the FEIS, EPA noted that there have not “been any documented hurricane evacuation problems in this area of the Outer Banks in modern times using the existing roadway system.”¹⁸⁴ Regarding the 18 hour standard, EPA stated that “this desired goal should be a consideration but not a finite decision point in the preferred alternative selection process.”¹⁸⁵ EPA also noted that “[t]here are other areas of the Outer Banks that potentially cannot meet this 18-hour goal even if a new bridge is constructed over Currituck Sound.”¹⁸⁶ Finally, EPA noted that only two Category 3 hurricanes have struck the outer banks since 1930.¹⁸⁷ Instead of focusing on building the proposed bridge, EPA suggests that the Transportation Agencies should focus on local planning and early warning to lower hurricane evacuation times, “*including the consideration of minimizing new development along isolated and remote areas of barrier islands.*”¹⁸⁸

In response to EPA, the Transportation Agencies cite a letter from Currituck County Emergency Management describing an incident during the evacuation for Hurricane Earl in

¹⁸¹ Hurricane Technical Memorandum at 3 (Exhibit 106); *see also* (Exhibit 107)

¹⁸² Hurricane Technical Memorandum at 3-4 (Exhibit 106); *see also* 2010 MCB Hurricane Evacuation Meeting (Exhibit 108).

¹⁸³ Hurricane Technical Memorandum at 3-4 (Exhibit 106).

¹⁸⁴ Stakeholder Involvement Report at 2-36 (Exhibit 103).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*; *see also* NCTA Response to Written TEAC Comments Requested in July 2007 (Exhibit 97) (“EPA is uncertain as to the likelihood of a Category 3-5 hurricane prior to September 1st. Most of the strongest and most damaging storms have occurred later in the hurricane season (September and October). EPA requests that a ‘risk analysis’ be performed by NCTA and FHWA that documents the past recorded storm events along the Outer Banks that met or exceeded the Category 3 status and the time when these storms occurred.”).

¹⁸⁸ Stakeholder Involvement Report at 2-36 (emphasis added) (Exhibit 103).

which traffic was stalled because of an accident in Duck and a malfunctioning traffic light.¹⁸⁹ Far from providing justification for the proposed bridge, this example shows how upgrades to existing roads and traffic technology could substantially reduce hurricane evacuation time. A \$600 million bridge cannot be justified by a broken traffic signal.

As discussed in Section I, above, other agencies, including the USFWS and the Corps, have noted that the Bridge could actually increase hurricane evacuation times because of the induced development and additional population on the Currituck Outer Banks created by the Bridge.¹⁹⁰ These concerns are succinctly summarized in an email from USFWS to Parsons Brinckerhoff: “[T]he secondary development that goes along with improved transportation could (by bringing more people to the Outer Banks) create a worse evacuation problem even with improved transportation. In other words, improved transportation could be self-defeating with regard to hurricane evacuation times.”¹⁹¹ The Transportation Agencies have failed to consider these effects of induced growth on hurricane evacuation as required by NEPA.

The FEIS’ claim that the Bridge would reduce hurricane evacuation time is based on the assumption that the Toll Bridge would not cause any growth in travel to the Outer Banks. As discussed further in section VI, that assumption is not scientifically credible or legally defensible. In fact, as the Corps pointed out in its comments on the initial DEIS, the transportation agencies should have disclosed the impacts associated with “hurricane evacuation time increase” resulting from the Project.¹⁹² Public Comment also noted that the Bridge would increase the population of the Northern Outer Banks, and therefore drive up evacuation times.¹⁹³

It is not at all surprising that the Transportation Agencies have for so long attempted to use hurricane evacuation as a justification for the Bridge, as for many years NCDOT included hurricane evacuation in the purpose and need for every coastal bridge project in the State.¹⁹⁴ Indeed, the trumped up need for improved hurricane evacuation, and the fear it instills in the public, was the driving force that revived the Bridge project in the early 2000s.¹⁹⁵ The Transportation Agencies do not, however, have scientific evidence or sound analysis to support this purported need, and their own outdated study shows that the Bridge would not achieve the State’s arbitrary 18 hour evacuation goal. For these reasons, resource agencies previously refused to sign off on including hurricane evacuation in the project’s purpose and need.¹⁹⁶

¹⁸⁹ Stakeholder Involvement Report at 2-37 (Exhibit 103).

¹⁹⁰ Email from Gary Jordan to John Hennessy (Sep. 30, 2003) (Exhibit 109); Aug. 26, 2003, Notes of Cathy Brittingham (Exhibit 99).

¹⁹¹ Email from Gary Jordan to Tonya Caddle (Sep. 29, 2003) (Exhibit 63).

¹⁹² U.S. Army Corps of Engineers' Comments on 1995 Mid-Currituck Sound Bridge DEIS (1995) (Exhibit 110).

¹⁹³ Stakeholder Involvement Report at 4-12 (Exhibit 103).

¹⁹⁴ Email from Mike Bell to Dan Scanlon (May 13, 2002) (“[H]urricane evacuations have been included in all of the recent bridges that have been constructed in North Carolina”) (Exhibit 111).

¹⁹⁵ Notes from R-2576 Mid-Currituck Sound Bridge Informational Meeting (Aug. 16, 2001) (“Evacuation is the main driving force for the resurrection of the bridge.”) (Exhibit 112).

Nothing has changed since then to strengthen the argument for hurricane evacuation as a justification for the Bridge. On the contrary, the purported need has only been weakened by reduced traffic forecasts which the Transportation Agencies have yet to consider in this context.

V. THE TRANSPORTATION AGENCIES HAVE FAILED TO ADEQUATELY ANALYZE A REASONABLE RANGE OF ALTERNATIVES

NEPA requires agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives.” *N.C. Wildlife Federation*, 677 F.3d at 602 (citing 40 C.F.R. § 1502.14(a)). Agencies have a “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. US EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (internal quotation marks omitted). Only unreasonable alternatives can be eliminated. 40 C.F.R. § 1502.14(a).

Moreover, the Clean Water Act (“CWA”) mandates, with limited exception, an analysis of alternatives and the selection of the alternative with the least impact on the aquatic environment. CWA regulations state that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the *aquatic ecosystem*, so long as the alternative does not have other significant adverse environmental consequences.” *Id.* § 230.10(a). At the outset, only adverse impacts to the aquatic ecosystem can be considered. A practicable alternative that would have the least impact on the aquatic ecosystem can only be rejected if it has “other significant adverse environmental consequences.” The preamble to the rule makes clear that this secondary analysis is intended to “take into account evidence of damage to other *ecosystems* in deciding whether there is a ‘better’ alternative.”¹⁹⁷ The Corps has recognized that the secondary analysis focuses on “substantial impacts to other *natural* environmental values.”¹⁹⁸ In short, the environmental impacts that can be considered in designating the “Least Environmentally Damaging Practicable Alternative (“LEDPA”) are significantly narrower than those that may be considered in selecting a preferred alternative under NEPA. The Coastal Area Management Act (“CAMA”) N.C. GEN. STAT. § 113(A)-120(a)(9), and section 401 of the Clean Water Act 15A N.C. Admin. Code § 02H .0506(b)(1) similarly include requirements that the least damaging, practicable alternatives be selected.

In North Carolina, new location highway projects are developed through the “merger process,” which aims to integrate NEPA and section 404 of the CWA. The Transportation Agencies thus work closely with the Corps as each highway project is reviewed and advanced to

¹⁹⁶ Letter from John Page to Dan Scanlon (Jun. 25, 2002) at 4 (Exhibit 55); Meeting Minutes from May 8, 2002 Merger Team Meeting (Exhibit 56); *see also* Revised Draft Summary of the Purpose of the Proposed Action (Jun. 25, 2002) (Exhibit 57); Currituck Sound Area Transportation Study, Southern Shores Meeting (Jul. 18, 2002) (Exhibit 58).

¹⁹⁷ Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980) (emphasis added).

¹⁹⁸ Regulatory Guidance Letter 93-02, Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking (Aug. 23, 1993) (emphasis added) (Exhibit 113).

ensure, in theory, that “the regulatory requirements of Section 404 of the Clean Water Act are incorporated into the NEPA decision-making process for transportation projects.”¹⁹⁹ Through this process the agencies are required to meet consensus on the “preferred alternative” and the LEDPA prior to publication of an FEIS. At the time it is selected, the agencies are required to be “reasonably certain that the LEDPA/ Preferred Alternative will comply with all relevant regulations and permit requirements” and “can be authorized.”²⁰⁰ In the case of the Mid-Currituck Bridge, however, all resource agencies have consistently stated that ER2, the alternative which focuses on improving existing roads, should be considered the LEDPA. The alternative is undeniably the least environmentally damaging, and any concerns about its lack of practicability, as compared to other alternatives, have changed with the revisions to North Carolina’s funding system.

Despite the importance of an accurate, up-to-date assessment of alternatives under NEPA, the CWA, and CAMA, the Transportation Agencies’ review of alternatives has not been updated since 2009. We have previously commented on the agencies’ failure to examine a reasonable range of alternative solutions. In particular, we have criticized the agencies’ failure to look closely at non-Bridge alternatives and combinations of alternatives that could work in concert to replace the need for the \$600 million Bridge.²⁰¹ In the Draft Reevaluation, the Transportation Agencies have again failed to take a hard look at any non-Bridge alternatives.²⁰² Importantly, the Draft Reevaluation also fails to consider how altered circumstances, including changes to funding streams, altered population dynamics, reduced traffic forecasts, and evolving trends in vacation patterns could change the relative merits of alternatives previously studied, as well as innovative new alternative solutions.²⁰³

Improved ER2

Residents and visitors to the Outer Banks and across Currituck County have worked with transportation expert Walter Kulash to develop an alternative that combines a variety of low-cost solutions to solve the concerns intended to be met by the Bridge.²⁰⁴ The alternative is described in detail in Mr. Kulash’s report, but includes the following elements:

- From the eastern end of the Wright Memorial Bridge to the entrance to the Home Depot, a distance of 1.3 miles, reconstruct US 158 into a **four-lane superstreet**. This is a modified version of the Transportation Agencies’ suggestion for ER2, but includes four

¹⁹⁹ Memorandum of Understanding, Section 404 of the Clean Water Act and National Environmental Policy Act Integration Process for Surface Transportation Projects in North Carolina at 1 (last rev. May 16, 2012) (Exhibit 114).

²⁰⁰ *Id.* at 12.

²⁰¹ *See, e.g.*, Letter from Kym Hunter to the Board of Transportation (Nov. 24, 2015) (Exhibit 115); Letter from David Farren to Jennifer Harris (March 12, 2012) (Exhibit 116); Letter from David Farren to Jennifer Harris (June 7, 2010) (Exhibit 117).

²⁰² Draft Reevaluation at 10-14 (Exhibit 1).

²⁰³ *Id.* at 10-14, 20-44.

²⁰⁴ Kulash Report at 14-16 (Exhibit 2).

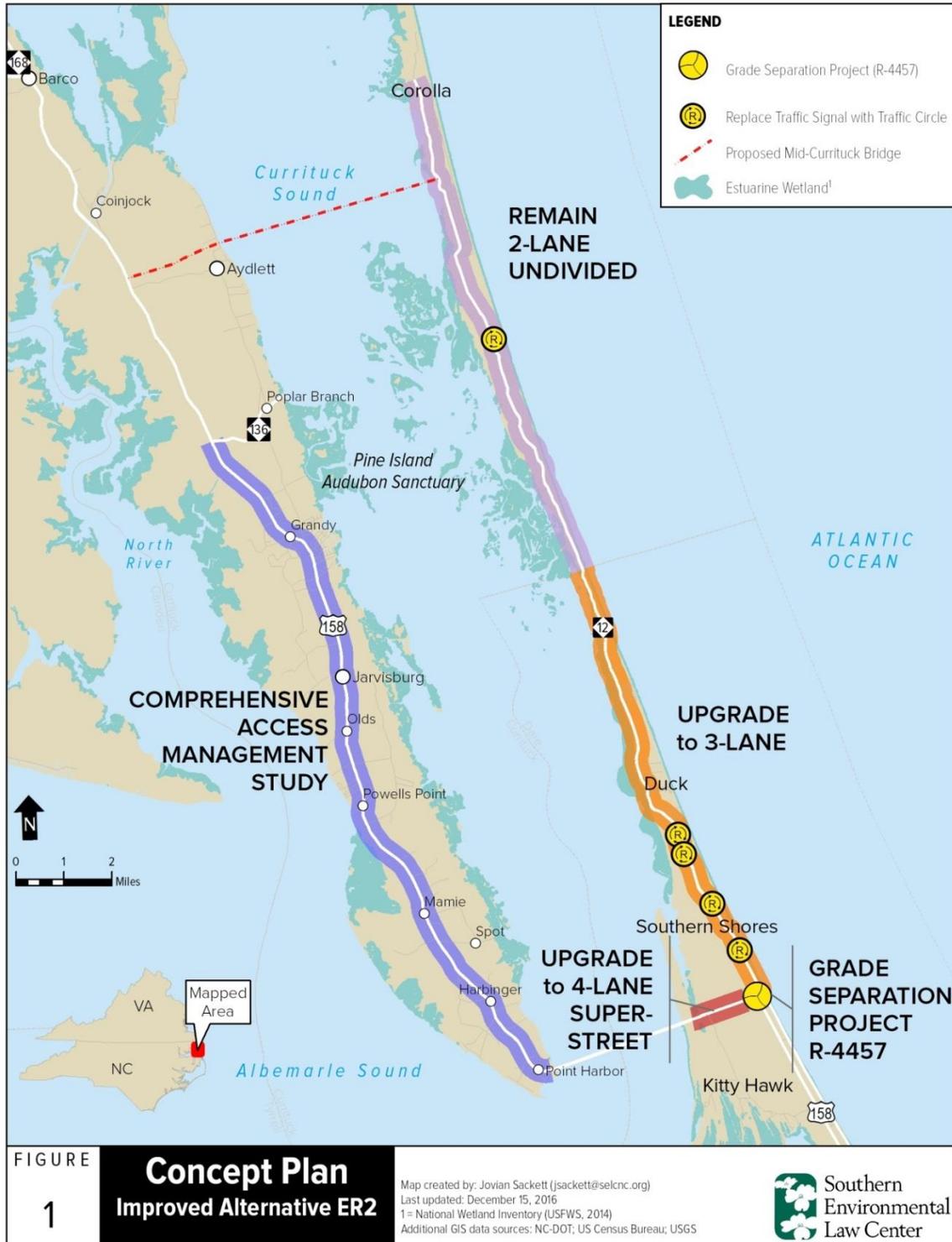
lanes instead of six to eight. As such the element would be less costly than that included in ER2. The purpose of the improvement would be to improve access for properties fronting onto US 158 while simultaneously improving the flow of through-traffic.

- At the US 158/NC 12 junction, proceed with project R-4457 for the grade separation of the existing intersection. However, in light of the reduced year 2040 traffic volumes and to assist in cost reduction, Mr. Kulash suggests consideration of two modifications to the full interchange that has been planned: (1) a simple flyover, permitting conflict-free movement between US 158 eastbound and NC 12 northbound and also the reverse movement, from NC 12 southbound to US 158 westbound or (2) a Continuous Flow Intersection.
- NC 12 in Dare County should be configured as a three lane, undivided roadway with a continuous two way left turn lane. The roadway will have 4-foot paved shoulder and swale drainage. Unlike ER2 which requires a four lane roadway, this modified alternative solution for NC 12 in Dare County could be constructed on existing right-of-way.²⁰⁵
- NC 12 in Currituck County should remain a two-lane undivided roadway.
- All signalized intersections on NC 12 should be converted to one-lane roundabouts which reduce congestion and improve through-flow. In addition, the Transportation Agencies should develop a plan for adding roundabouts at currently unsignalized intersections to: (1) control speed, (2) provide cross-street access, and (3) provide U-turn opportunities so drivers can avoid left turns into NC 12 during when traffic is congested.
- On key holidays and other days when there is a predictable pattern of extreme peak travel, NCDOT should employ manned traffic control at key intersections.
- The Transportation Agencies should develop a plan for more connectivity between local streets that feed onto NC 12.
- The Transportation Agencies should consider overhead pedestrian walkways in Duck to increase pedestrian safety and improve through-flow. This improvement was suggested by Currituck County Commissioner Bobby Hanig.²⁰⁶
- The Transportation Agencies should identify places to consolidate driveways along NC 12.
- To improve pedestrian safety, the Transportation Agencies should add hybrid beacon pedestrian signals at selected non-intersection pedestrian crossings and add a variety of crossing warning devices as outlined in the *Manual on Uniform Traffic Control Devices*.

²⁰⁵ FEIS 2-35 -2-36.

²⁰⁶ William F. West, *Hanig, White meet with anti-bridge group*. DAILY ADVANCE (Dec. 19 2016) available at <http://www.dailyadvance.com/News/2016/12/19/Hanig-White-meet-with-anti-bridge-group.html> (Exhibit 230).

- For US 158 from Barco to the Wright Memorial Bridge, the Transportation Agencies should retain the existing five-lane undivided cross section with the continuous two-way left turn lane.
- For the 15.5 mile segment between NC 136 and the western end of the Wright Memorial Bridge, the Transportation Agencies should conduct a comprehensive access management study to identify small-scale road improvements including the addition of traffic signals, coordination of traffic signals, development of seasonal traffic signal timing algorithms, new or extended local streets and roads providing access to streets served by a traffic signal on US 158 and designated U-turn locations. The study should also explore the feasibility of converting some segments to a superstreet.



- NCDOT should also explore implementation of some other changes to reduce demand. An incentive program to better stagger change-over days at rental companies away from the current norm of Saturday change-overs could greatly help to reduce the congestion on those busy days. The alternative is discussed in

more detail below. In addition, a program establishing “electronic keys” should be encouraged.²⁰⁷ Such programs reduce congestion by eliminating trips that tourists need to take to a central rental check-in company, and allow them to proceed directly to their rental house.

This comprehensive set of solutions should be given serious consideration by the Transportation Agencies. NEPA requires that the agencies examine “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. USEPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (quoting *Seacoast Anti-Pollution League v. Nuclear Regulatory Comm’n*, 598 F.2d 1221, 1230 (1st Cir. 1979)).

Much has changed since the agency last put the NEPA document for the Bridge out for comment in 2012. Funding constraints previously in place have been replaced by an entirely new funding system.²⁰⁸ In addition, there is now greater financing flexibility in the form of GARVEE bonds.²⁰⁹ At the same time, the need for the Bridge has diminished dramatically. Current and future traffic forecasts are much lower than anticipated the last time the public had the opportunity to review the Bridge and alternative solutions.²¹⁰ As such, it is imperative that the Transportation Agencies issue a Supplemental EIS that takes a hard look at Mr. Kulash’s comprehensive set of alternative solutions as well as other solutions that the public may now have to offer.

Moreover, it is important to note that the Transportation Agencies will only be able to acquire construction permits for the LEDPA. Because the Improved ER2 alternative, like ER2, would result in significantly less environmental damage than construction of the Mid-Currituck Bridge, it will undoubtedly be the “least environmentally damaging” alternative. And where questions had previously arisen about the practicability of ER2,²¹¹ the “Improved” alternative demands fewer large scale improvements and would therefore be less expensive than ER2.²¹² As such, it is likely the LEDPA and should be given a thorough review.

Ferries

In addition to taking a hard look at the Improved ER2 alternative, the Transportation Agencies should use a Supplemental EIS to take a hard look at alternatives that have not yet been adequately reviewed, and should conduct their review based on up-to-date accurate data.

²⁰⁷ See, e.g., eRentalLock: <http://www.arentallock.com/> (last visited 12/14/2016) (Exhibit 118).

²⁰⁸ Strategic Transportation Investments Act, N.C. GEN. STAT. § 136-189 (2016).

²⁰⁹ McIntyre Deposition (Exhibit 93).

²¹⁰ See Section III, above.

²¹¹ The question of practicability is discussed more above in Section III.

²¹² Kulash Report at 14–16 (Exhibit 2).

Throughout the NEPA analysis, the Transportation Agencies have failed to conduct a reasoned analysis of ferry alternatives. This is despite the fact that the former NC Secretary of Transportation stated publicly that ferries should be considered in lieu of the Bridge.²¹³ As noted below, ferries should be considered not just as a stand-alone alternative, but as part of a combined solution to meet the stated purpose and need. The Draft Reevaluation cites the Alternatives Screening Report and states that the ferry alternative was not selected as a detailed study alternative because it would require dredging 711 acres and the disposal of 14.5 million cubic yards of dredged material.²¹⁴ The Alternatives Screening Report does not, however, specify what type of ferry technology was assumed in arriving at those figures. Instead, the report states: “The Ferry Alternatives use equipment and has operating characteristics similar to the current ferry service operated by NCDOT which, because of NCDOT’s many years of experience in operating ferry service in North Carolina, *is assumed* to have the equipment and operating characteristics best suited for North Carolina waters.”²¹⁵ Rather than assuming NCDOT is presently using the best and most appropriate equipment, the Transportation Agencies must conduct a complete analysis of ferries that incorporates the latest shallow draft ferry and hovercraft technology.

While it is true that Currituck Sound is shallow, ferries and hovercrafts do exist that are capable of navigating in as little as five feet of water.²¹⁶ For example, the company Sea Transport designs ferries with drafts less than five feet capable of carrying over thirty vehicles at speeds of up to 18 knots.²¹⁷ Nichols Brothers Boat Builders has developed similar technology.²¹⁸ Indeed, NCDOT in the Stakeholder Involvement report did not dispute that ferry technology may exist that would require no dredging whatsoever.²¹⁹ Further, as we noted in our comments on the FEIS, suitable ferry routes might be mapped by using readily available nautical charts and bathymetry data that indicate water depths throughout Currituck Sound.²²⁰ The Knotts Island Ferry that operates in the northern Currituck Sound between Knotts Island and Currituck demonstrates the feasibility of developing suitable ferry routes.²²¹ Ferry terminals for these

²¹³ See “New NCDOT boss talks bridges, ferries, U.S. 64,” The Outer Banks Voice (Feb. 15, 2013), available at <http://outerbanksvoice.com/2013/02/15/new-transportation-boss-talks-obx-bridges-surfing/> (last visited December 14, 2016) (Exhibit 119).

²¹⁴ See Draft Reevaluation at 45 (Exhibit 1).

²¹⁵ Alternatives Screening Report for the Mid-Currituck Bridge at 46 (2009), (emphasis added), available at <https://connect.ncdot.gov/projects/MidCurrituckBridgeDocuments/Alternatives%20Screening%20Report%20October%202009.pdf> (Exhibit 120) [hereinafter 2009 Alternatives Report].

²¹⁶ See <http://www.seatransport.com/ferries/> (Exhibit 121); see also Letter from Clarence Coleman to L. Winslow (November 28, 2011) (Exhibit 122).

²¹⁷ <http://www.seatransport.com/ferries/> (Exhibit 121).

²¹⁸ <http://www.nauticexpo.com/prod/nichols/product-21674-230951.html> (Exhibit 123).

²¹⁹ Stakeholder Involvement for FEIS at 3-7 (Exhibit 103).

²²⁰ See, e.g., NOAA Office of Coast Survey, *Chart 12207* (Oct. 2009), available at <http://www.charts.noaa.gov/OnLineViewer/12207.shtml> (<http://www.charts.noaa.gov/PDFs/12207.pdf>) (Exhibit 124).

²²¹ See NCDOT, North Carolina Ferry Routes, <http://www.ncdot.gov/travel/ferryroutes/#0> (last visited Dec. 20, 2016) (Exhibit 125).

options could financially boost Aydlett and other mainland towns without the impacts to community cohesion, visual impairments, and environmental destruction associated with construction of a new bridge.

In sum, the Transportation Agencies have failed to perform a comprehensive, up-to-date study of ferry alternatives. The very limited analysis of ferries that does appear remains based on a 1991 study. Reliance on two-decade old, outdated information when new data is readily available has been held to be arbitrary and capricious.²²² The Transportation Agencies should a Supplemental EIS to take a hard look at all alternatives, including ferry alternatives, based on recent reliable data and information about new low-draft, high-speed, high capacity ferries, that gives a true picture as to how ferries may fit into a larger comprehensive set of solutions.

Staggered Check Outs

The Currituck Outer Banks include a substantial number of vacation rental properties that commonly rent by the week, with their peak use being in the summer (June to August). Currently, the vast majority of these property rentals turn over occupancy on Saturdays. As a result, congestion is extremely high on Saturdays during the summer as tens of thousands of tourists attempt to check into their properties, while others are attempting to leave. Additional traffic comes from the hundreds of workers involved with the switch-over as they clean and otherwise manage the properties. In 2009, 70% of turnovers were on Saturdays, 25% on Sundays, and 5% on Fridays.²²³ No more recent data is available from the Transportation Agencies.

Staggered check outs would better spread out rental turnover days throughout the week and alleviate heightened weekend congestion, particularly on Saturdays. The Draft Reevaluation demonstrates why staggered check outs would be effective. Summer weekend traffic is currently much worse than summer weekday traffic. In 2015, the entire road network operates at LOS A-D on summer week days.²²⁴ It is only on summer weekends that portions of NC 12 and the Wright Memorial Bridge slip to LOS E and F. The Transportation Agencies do not provide a break-down of traffic between Saturdays and Sundays, but anecdotally we have been informed that the worst congestion is typically limited to Saturdays.

With the Transportation Agencies' new projections for future traffic, a similar picture emerges. During the week US 158 is projected to remain at LOS A-D even by 2040. It is only on summer weekends that it is anticipated to slip to LOS D. Extremely congested conditions, i.e., LOS F ($V/C > 1.3$), south of Duck and on the Wright Memorial Bridge are also only anticipated to occur on summer weekends. As a result, much of the purpose and need that is attempted to be addressed by construction of the Bridge, as articulated in the Draft Reevaluation, is limited to congestion found on summer weekends.

²²² See *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2011).

²²³ 2009 Alternatives Report at 37–38 (Exhibit 120).

²²⁴ Draft Reevaluation at 33, Figure 4 (Exhibit 1).

The Transportation Agencies' only look at a "shifting rental times" alternative was in the Alternatives Screening Report in 2009. In this report, the Transportation Agencies looked at how traffic would function if rental change-over-days were shifted to an even distribution on Fridays, Saturdays and Sundays. The Transportation Agencies did not consider further expanding this analysis to include other week days. The Transportation Agencies' 2009 analysis found that shifting to this even, three day distribution would result in a 28% reduction in the miles of road operating at LOS F during summer weekend days. This analysis was based on the old traffic forecasts and has not been updated.

Despite the significant reduction in congested VMT that this very low-cost solution could effectuate, the Transportation Agencies rejected the alternative by minimizing its impact.²²⁵ Rather than focus on its ability to alleviate congestion during the most congested times of the year, the Transportation Agencies averaged out the alternative's impact over the entire summer and the entire year.²²⁶ Because the solution, by design, would not have any impact on week days, the Transportation Agencies determined that overall its impact on congestion would be minimal.²²⁷ This surprising conclusion overlooks the fact that the congestion problem the Bridge is intended to address occurs not throughout the year, or throughout the summer, but almost exclusively on summer weekends. The Transportation Agencies' lack of candor about the potential success of such a solution was further compounded because all future NEPA documents simply included the assertion that the alternative was eliminated because it would have just 1%, or a "minimal", impact on congestion.²²⁸ The larger, 28% impact on summer weekend congestion was excluded.²²⁹

The Transportation Agencies must publish a Supplemental EIS that takes hard look at this alternative. First, the Transportation Agencies must re-visit the alternative in light of changed projections of traffic and socio-economic growth. Second, the Transportation Agencies must expand the alternative so that it looks at shifting some rental change overs to weekdays, Monday-Thursday. Third, the Transportation Agencies must express clearly in the EIS how this solution will assist with peak days of congestion on summer weekends and not dilute the impact of the alternative by considering its impact across an entire year. Fourth, as discussed further below, the Transportation Agencies must consider how this alternative will work in combination with other alternative solutions to meet the purpose and need established by the Transportation Agencies.

As they re-study the shifting-rental-times alternative, the Transportation Agencies should also consider how evolving vacation habits may make this solution more workable than it may have been in 2009.²³⁰ Anecdotal evidence from property owners who rent houses in the Outer

²²⁵ 2009 Alternatives Report at 37-38 (Exhibit 120).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ DEIS at 2-40; FEIS at 2-53; Draft Reevaluation at 44 (Exhibit 1).

²²⁹ *Id.*

²³⁰ Numerous Outer Banks Rental companies now offer Friday and Sunday rentals in addition to the more traditional Saturday rentals and/or encourage people to start their rental on Friday or Sunday in order to avoid traffic. *See, e.g.*, Sun Realty, <https://www.sunrealtync.com/friday-friday-rentals-on-the-outer-banks> (last visited Dec. 14, 2016)

Banks suggest that rental switch over times may be starting to shift independently of any policies. According to these property owners, there is an ongoing switch from the traditional property rental companies to companies like VBRO who offer more flexible rental arrangements. This shift is in accordance with market preferences and the changing way that people work and vacation.²³¹ People are increasingly looking for shorter stays, and booking their vacations later in the season.²³²

Even if some reluctance remains on the part of rental home owners to switch away from the Saturday to Saturday rental market, one way to potentially implement this alternative would be to provide monetary incentives for rental companies willing to make the shift. Such a program would be significantly less costly as well as less destructive to the environment than the construction of a \$600 million Bridge.

Small-Scale Solutions

The Transportation Agencies should also use a Supplemental EIS to consider how a number of small scale solutions could play a role in augmenting mobility and reducing congestion. A shuttle service along NC 12 could help alleviate some of the traffic that stems from tourists taking outings. The linear nature of the OBX makes it particularly suited to such a service. Similarly, improved bike and pedestrian facilities could help take cars off the roads while also providing needed safety improvements and an economic boon to the tourist economy. Many suggestions for the types of public transportation solutions that should be explored were catalogued in 2006.²³³ This study should be updated and considered in the context of a comprehensive transportation solution for the Northern Outer Banks that does not include the Mid-Currituck Bridge.

Several other solutions for summer congestion relief were discussed at a meeting between the Transportation Agencies and Currituck County in December 2014.²³⁴ These solutions,

(Exhibit 126); Southern Shores Realty, <https://www.southernshores.com/friday-to-friday-rentals>, (last visited Dec. 14, 2016) (Exhibit 127); Rent A Beach, <http://www.rentabeach.com/friday-to-friday.html>, (last visited Dec. 14, 2016) (Exhibit 128); Atlantic Realty of the Outer Banks, <https://www.atlanticrealty-nc.com/vacation-rentals/friday-check-ins> (last visited Dec. 14, 2016) (Exhibit 129); Rent A Beach, <http://www.rentabeach.com/sunday-to-sunday.html>, (last visited Dec. 14, 2016) (Exhibit 130); Beach Realty & Construction, <http://www.beachrealtync.com/sunday-turnover-outer-banks-rentals> (last visited Dec. 14, 2016) (Exhibit 131).

²³¹ Kipp Taban, “*There’s Something Strange Going On This Year*”, OUTER BANKS SENTINEL (Aug. 30, 2016) available at http://www.obsentinel.com/news/there-s-something-strange-going-on-this-year/article_120cecbc-58c5-11e6-b524-cb2aaa8299c6.html#.V6DQVOFxEgOE.facebook (Exhibit 132); Independent Traveler, Vacation Tips, available at <http://www.independenttraveler.com/travel-tips/hotel-and-b-and-b/vacation-rentals-right-for-you> (last visited Dec. 14, 2016) (Exhibit 133); Holiday Lettings, Flexible Changeovers, available at <https://www.holidaylettings.co.uk/resources/owner-advice/managing-rentals/flexible-changeover-days/a-1-32-1659/> (last visited Dec. 14, 2016) (Exhibit 134).

²³² *Id.*

²³³ Jud Lawrie and Thomas Cook, FINAL REPORT, OUTER BANKS TRANSPORTATION STUDY (Feb. 2006) (Exhibit 135).

²³⁴ Email from Donna Creef, Dare County Planning Director, to Bobby Outen Dare County Manager (Dec. 16, 2014) (Exhibit 136).

including the promotion of alternative routes, the use of police officers, better signage, and the use of ferry and bus shuttles should all be expanded and considered as part of a comprehensive set of alternatives to the Bridge. Follow-up meetings were held again in February 2015, and in spring of 2016.²³⁵ A number of additional small-scale improvements were suggested during those meetings, and some success was noted from their implementation.²³⁶ The Currituck Chamber also has recommendations as to how to improve traffic flow.²³⁷

The Transportation Agencies recently employed a similar non-traditional approach to improving congestion with the Fortify project in Wake County.²³⁸ In order to alleviate congestion during multi-year construction, NCDOT increased public transit, working with local businesses to alter commuting patterns and employing a heavy use of social media to encourage the use of alternative routes, non-peak travel, and non-highway transportation.²³⁹

Combinations of Alternatives

The Transportation Agencies' analysis of the Bridge has been flawed from its inception because it fails to look at how combinations of alternative solutions can work together to meet the purpose and need. See *Rankin v. Coleman*, 394 F. Supp. 647, 657-59 (E.D.N.C. 1975). For example, the Transportation Agencies dismissed alternatives such as ferries and shifting rental times because, standing alone, the Transportation Agencies argued they would not meet the established purpose and need. In the Supplemental EIS, the Transportation Agencies must consider how a combinations of smaller scale solutions, including those set out in Improved ER2, can work together to meet the project need.

VI. IMPACTS ANALYSIS

Direct Impacts

As detailed in our previous comments, construction of the Mid-Currituck Bridge will result in a number of harmful direct impacts to the natural environment. Draining and fill of wetlands to make way for the proposed bridge will reduce habitat for waterfowl and their food sources. The Bridge will create 71.5 acres of additional impervious surface, and runoff from the Bridge will pollute the waters used by waterfowl, fish and other species. Increased traffic that

²³⁵ Email from Jerry Jennings, NCDOT, to Jason Davison and Anthony Roper, NCDOT (Apr. 21, 2016) (Exhibit 137).

²³⁶ Email from Paul O'Neal to Peter Rascoe (Apr. 22, 2016) (Exhibit 138).

²³⁷ Currituck Chamber Talking Points (Sep. 29, 2015) (Exhibit 139).

²³⁸ NCDOT, *Fortify* website, https://www.ncdot.gov/fortifync/resources/docs/Fortify_FAQ.pdf (last visited Dec. 16 2016) (Exhibit 140).

²³⁹ NCDOT, *Fortify Powerpoint Presentation*, available at <http://ncdot.gov/fortifync/resources/docs/NCDOTPowerPointFORTIFY1182013.ppt> (Exhibit 141); NCDOT, *Fortify: Driver Information*, available at <http://ncdot.gov/fortifync/driver-info/> (Exhibit 142); Dawn Curry, *Massive I-40/440 rebuild means Raleigh must 'Fortify' through 2016*, TRIANGLE BUSINESS JOURNAL (Oct. 28, 2013) (Exhibit 143); Bruce Siceloff, *Road Worrier: NCDOT says not to worry about 3 years of Beltline misery – be happy!*, NEWS & OBSERVER (Oct. 28, 2013) (Exhibit 144).

will accompany the Bridge will increase bird-vehicle collisions, and increased noise and visual disturbance is likely to disrupt waterfowl and potentially cause sensitive species to abandon the area. Shading from the bridge will directly impact existing areas of SAV, and areas of potential future establishment, reducing important fish spawning habitat in the Currituck Sound. Construction may also introduce a range of invasive species into the Sound, including plants such as Phragmites, which are extremely difficult to eliminate. Any discussion of the impacts that is included is overly general in nature and falsely minimizes the effects that these impacts will have on the sensitive resources in the project area, particularly when considered in combination.

In our 2012 comments on the FEIS,²⁴⁰ we noted that the Transportation Agencies had spent time working with resource agencies to minimize some of the direct environmental impacts of the Bridge. We specifically approved of the decision to bridge Maple Swamp and the commitment to construct the bridge without any dredging and with a moratorium placed on construction during fish spawning. We also, however, noted that these improvements do not change the fact that overall the bridge will result in devastating direct impacts to the Currituck Sound. The FEIS' insufficient analysis of these effects violates NEPA and a Supplemental EIS must be completed to adequately address these impacts.

There has never been a dispute about the unique and valuable nature of the Sound. As stated by a DCM official, "review agencies . . . recognize[] the sound as one of the most valuable estuaries on the coast."²⁴¹ For decades resource agencies have strongly emphasized how the Bridge would harm the Currituck Sound. As summarized in section I, above, ever since the publication of the initial DEIS in the mid-1990s, resource agencies have noted the impact the bridge would have on wetlands, SAV, water quality, and fish and waterfowl in the Sound. These concerns remain and, if anything, are now stronger because of growing pressures on the Sound.

Development of the Northern Outer Banks over the past several decades has deteriorated the water quality of the Currituck Sound. Turbidity in the Sound has increased, SAV has decreased, and the overall health of the ecosystem has declined considerably.²⁴² Fish and waterfowl populations have been harmed, with the waterfowl population dropping sharply from a peak of 305,000 birds in 1976 to a current estimated average of 25,000.²⁴³ At least five fish species have disappeared entirely from the sound since the 1960s.²⁴⁴ This degradation prompted

²⁴⁰ Letter from David Farren to Jennifer Harris at 10 (Mar. 12, 2012) (Exhibit 116).

²⁴¹ Email from Donna Moffitt to Charles Jones and Doug Huggett (Aug. 29, 2000) (Exhibit 145).

²⁴² CURRITUCK SOUND ESTUARY RESTORATION; A CASE STUDY IN OBJECTIVE SETTING, by S. Kyle McKay, Charles R. Wilson, and Douglas Piatkowski (Nov. 2012), available at <http://acwc.sdp.sirsi.net/client/search/asset/1013340> (last visited Dec. 14, 2016) (Exhibit 146); see also CURRITUCK SOUND ECOSYSTEM RESTORATION STUDY, FEASIBILITY SCOPING MEETING, SEPTEMBER 2, 2011, U.S. Army Corps of Engineers, available at http://www.saw.usace.army.mil/Portals/59/docs/ecosystem_restoration/Currituck%20FSM%20presentation%208.30.11.pdf (last visited Dec. 14, 2016) (Exhibit 147).

²⁴³ CURRITUCK SOUND ECOSYSTEM RESTORATION STUDY, FEASIBILITY SCOPING MEETING, SEPTEMBER 2, 2011, U.S. Army Corps of Engineers, available at http://www.saw.usace.army.mil/Portals/59/docs/ecosystem_restoration/Currituck%20FSM%20presentation%208.30.11.pdf (last visited Dec. 14, 2016) (Exhibit 147).

²⁴⁴ *Id.*

the Corps to initiate a Currituck Sound Ecosystem Restoration Feasibility Study.²⁴⁵ According to the Corps' Scoping document for this project, "the decline in water quality from residential development, agriculture, and dredging activities has left the sound in an impaired state."²⁴⁶ A major purpose of this project was to study water quality and SAV decline and to take action to restore water quality and SAV habitat.²⁴⁷ While this project was never implemented, a new effort to study the Currituck Sound has been put in place to study environmental stresses on the Sound.²⁴⁸ EPA has also expressed concern over the current state of the Sound²⁴⁹ and, as WRC has previously stated, "[i]t is essential to ensure that the implementation of this project does not contribute to the continued decline of the Currituck Sound ecosystem."²⁵⁰

Against this backdrop of concern for the health of the Sound, the Transportation Agencies are proposing to build a bridge that would exacerbate the very problems the Corps has previously sought to address. The Bridge would add 71.5 acres of impervious surface, shade 8.7 acres of SAV habitat and potential SAV habitat, and fill 7.9 acres of wetlands.²⁵¹ In its presently weakened state, the Sound cannot afford the stress of 7.5 mile long and 50 feet wide bridge. State and federal resource agencies agree.

Before the FEIS was issued NCTA summarized the concerns of various resource agencies with how stormwater runoff had been addressed in the DEIS.²⁵²

USEPA

- Noted that the DEIS does not fully address the fact that water quality in Currituck Sound has declined substantially in the last several decades primarily due to an increase in turbidity and nutrient loading from non-point source runoff.
- Stated concern for degradation of water quality in Currituck Sound.
- Stated that a full collection and treatment system is needed for any of the bridge alternatives.

²⁴⁵ See *Corps Plans Study to Restore Currituck Sound Ecosystem*, DAILY ADVANCE, by Cindy Beamon (Sep. 30, 2010) (Exhibit 148).

²⁴⁶ CURRITUCK SOUND ECOSYSTEM RESTORATION STUDY, FEASIBILITY SCOPING MEETING, SEPTEMBER 2, 2011, U.S. Army Corps of Engineers at 39, available at http://www.saw.usace.army.mil/Portals/59/docs/ecosystem_restoration/Currituck%20FSM%20presentation%208.30.11.pdf (last visited Dec. 14, 2016) (Exhibit 147).

²⁴⁷ *Id.*

²⁴⁸ *Corps project is taking the pulse of the Currituck Sound*, by Catherine Kozak, outerbanksvoice.com (Jan. 21, 2016), available at <http://outerbanksvoice.com/2016/01/21/corps-project-is-taking-the-pulse-of-the-currituck-sound/> (last visited Dec. 14, 2016) (Exhibit 149).

²⁴⁹ Appendix C, USEPA Agency Letter (Apr. 15, 2011) on Stormwater Management and FHWA/NCTA Response at C-6 (Exhibit 150).

²⁵⁰ Memorandum from Travis Wilson to Melba McGee (Feb. 27, 2012) (Exhibit 151).

²⁵¹ FEIS at Table S-1.

²⁵² Email from Tracy Roberts to Matthew Lauffer (Jun. 23, 2010) (Exhibit 152).

NMFS

- Recommended that a stormwater management plan be a high priority in the project design and stated the need for a concerted effort to address runoff from a new bridge.
- Noted a need to provide additional treatment to a portion of the existing runoff into the Sound as well as full treatment of all new runoff from the proposed highway improvements.

NCDENR-DCM

- Requested more detail regarding stormwater management.
- Noted need for revised stormwater management design.

NCDENR-DWQ

- Was concerned with the effects on benthic macroinvertebrates, SAV, fish and wildlife, and overall water quality of untreated stormwater runoff from the bridge.
- Stated that in order to obtain a 401 Water Quality Certification, the NCTA will have to provide reasonable assurance to DWQ that the associated water protection criteria are met.
- Noted that details on the characteristics, location, and impacts of off-site bridge water treatment components are needed.
- Noted that an operation and maintenance agreement would be needed for stormwater treatment using deck filters and perhaps some detention basin options.

The FEIS did not adequately address these concerns, stating simply that a stormwater management plan will be created in the future and that water quality in the Sound will be “monitored.”²⁵³

The resource agencies also have consistently stated concerns regarding the bridge’s impact on SAV habitat, dredging, stormwater management, and impacts to SAV from bridge shading and pile driving.²⁵⁴ Indeed, NCDMF stated its opposition to the preferred alternative largely because of its impact on SAV,²⁵⁵ and agencies have stated a strong preference for in-kind

²⁵³ FEIS at 2-30.

²⁵⁴ CDG Mid-Currituck Bridge Project LEDPA Achievement Process, Submerged Aquatic Vegetation (Apr. 2011) (Exhibit 153); Survey of the Submerged Aquatic Vegetation in the Proposed Alignment for the Mid-Currituck Bridge, A Report to the North Carolina Turnpike Authority (Oct. 29, 2010) (Exhibit 154); Letter from Kevin Hart to Melba McGee (Feb. 23, 2012) (Exhibit 155); *see also* Memorandum from Charles Owens to Cathy Brittingham (Mar. 5, 2012) at 12-13 (Exhibit 156); Letter from David Wainwright to Jennifer Harris (Nov. 29, 2010) (Exhibit 157); Letter from Doug Huggett, Major Permits and Consistency Coordinator, DCM, to Melba McGee, Environmental Coordinator, NCDENR (Mar. 5, 2012) (Exhibit 158); Turnpike Environmental Agency Coordination Meeting at 3-4 (Jan. 20, 2011) (Exhibit 159); Letter from Gregory Hogue to Jennifer Harris (May 25, 2010) (Exhibit 160).

²⁵⁵ Letter from Kevin Hart to Melba McGee (Feb. 23, 2012) (Exhibit 161); *see also* NCTA Meeting Summary (Apr. 6, 2011) (noting that agencies had raised SAV as an issue) (Exhibit 162).

mitigation for SAV instead of other proposed measures.²⁵⁶ Agencies have also expressed doubt over the Transportation Agencies' proposed solutions to address direct impacts of the bridge, including the proposed stormwater management plan.²⁵⁷ As stated by NCWRC, "the impacts associated with the preferred alternative are substantial and continued efforts to avoid and minimize impacts are necessary."²⁵⁸

In addition to these long-standing concerns, USFWS has also expressed concern about bird-vehicle collisions, and has stated that it would like to see avoidance measures put in place.²⁵⁹ In particular, USFWS noted that the California Department of Transportation plans to utilize a 14' tall bird rail/fence design that will force migratory birds to fly over the traffic instead of through the line of traffic and suggested that a similar design could be utilized for the proposed MCB. USFWS had previously noted its concern about bird-vehicle collisions and other negative effects of the bridge on waterfowl when commenting on the DEIS.²⁶⁰ In those comments, FWS noted that "[t]he evaluation of alternatives only included two sentences, in the entire DEIS, on how waterfowl may be affected This level of analysis is inadequate to evaluate the alternatives for potential impacts to wintering and breeding waterfowl in the DEIS."²⁶¹ The Supplemental EIS must address this new information provided by USFWS, which is ignored in the Draft Reevaluation.

Indirect and Cumulative Effects Analysis

In our comments on the FEIS, we noted that the Transportation Agencies' analysis failed to provide a true "No-Build" scenario for purposes of analyzing indirect effects, but instead assumes the existence of the Bridge when forecasting the baseline of future development in the project area. The Draft Reevaluation doubles down on this flawed analysis, while also suggesting that reduced traffic forecasts further close the gap between a true "No-Build" scenario and a scenario where NCDOT's Preferred Alternative is constructed.²⁶²

Regulations promulgated by the Council on Environmental Quality ("CEQ") require each EIS to include "the alternative of no action," 40 C.F.R. § 1502.14(d); § 1508.25(b)(1). This alternative must be presented in a comparative fashion so as to "sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. A true "No-Build" scenario should present a clear picture of what would

²⁵⁶ NCTA Meeting Summary (Apr. 6, 2011) (Exhibit 162); *see also* TEAC Meeting Minutes (Jul. 8, 2008) (Exhibit 163).

²⁵⁷ CDG, LEDPA Achievement Process, Stormwater Management (Mar. 2011) (Exhibit 164); *see* Preferred Alternative Report at 12 (Exhibit 165); Letter from Heinz Mueller to Jennifer Harris (Mar. 12, 2012), attachment A at 6-7 (Exhibit 166).

²⁵⁸ Memorandum from Travis Wilson to Melba McGee (Feb. 27, 2012) (Exhibit 151).

²⁵⁹ Email from Gary Jordan to Tracy Roberts (Feb. 6, 2012) (Exhibit 167).

²⁶⁰ *See* Memorandum from Supervisory Wildlife Biologist to Gary Jordan (May 4, 2010) (Exhibit 168).

²⁶¹ *Id.*; *see also* Meeting Summary Notes on Wildlife Crossing Structures and Mid-Currituck Bridge Study (Jul. 30, 2009) (Exhibit 169).

²⁶² Draft Reevaluation at 79-80 (Exhibit 1).

occur if the Mid-Currituck Bridge were not to be built. All impacts that result from building the Bridge should be based from this “No-Build” baseline and should be reported and analyzed accordingly.

The current FEIS and Draft Reevaluation do not follow this legally required approach. Rather than using a “No-Build” scenario as the baseline from which to calculate impacts, the FEIS implicitly uses a “Build” scenario. The analysis of alternatives and impacts is based on a scenario that assumes “full build-out” of commercial and residential development²⁶³ despite the fact that “full build-out” is only expected to occur if the bridge is constructed. Relying on this flawed baseline, the FEIS repeatedly reports that construction of a seven mile bridge out to a remote barrier island would result in *no induced growth or development on the barrier island*, while simultaneously reporting that failure to construct the bridge would inhibit development.²⁶⁴ The FEIS states:

For the NC 12-accessible Outer Banks, there would be no reasonably foreseeable change in the overall type and density of development with implementation of the detailed study alternatives, including the Preferred Alternative, compared to the No-Build Alternative. Negligible or no increase in the demand for houses and businesses throughout the Outer Banks resort area would be foreseeable over the No-Build Alternative.²⁶⁵

The FEIS then goes on to state, however, that the Bridge alternative would result in substantially more growth than the No-Build alternative. Specifically, it states that the No-Build alternative could result in 70 percent “build-out”, and that the Bridge would result in 86 percent “build-out” in the region, but that the 86 percent build out should be considered the baseline.²⁶⁶ As stated by an NCDOT employee, however, “It can be argued that the higher percentages of build-out . . . with the bridge alternatives [] are the induced changes of the study alternatives.”²⁶⁷

Not only is the FEIS itself a self-contradictory document in this respect, but other documents prepared by the Transportation Agencies also repeatedly acknowledge that construction of the Mid-Currituck Bridge *will* encourage growth. For example, the 2011 Traffic and Revenue study states that construction of the bridge “could greatly facilitate the continued growth within the area.”²⁶⁸ The report explains that the bridge “will significantly increase the

²⁶³ See, e.g., Stakeholder Involvement FEIS Technical Report at 3-12 (explaining that “the project’s traffic forecasts assume full build-out of the NC 12-accessible Outer Banks north of US 158 in Dare and Currituck counties”) (Exhibit 103).

²⁶⁴ See, e.g., Mid-Currituck Bridge, FEIS at 3-107 to 3-114; Stakeholder Involvement FEIS Technical Report at 3-11 to 3-13 (Exhibit 103).

²⁶⁵ FEIS at 3-109.

²⁶⁶ FEIS at 3-109.

²⁶⁷ Herman Huang, Comment on INDIRECT AND CUMULATIVE EFFECTS TECHNICAL REPORT, at 6-5 (May 2011) (Exhibit 170).

²⁶⁸ Traffic and Revenue study at 2 (Exhibit 84); see also ACS Infrastructure Development, BRIDGE LENDERS’ TRAFFIC CONSULTANT REPORT 3 (Oct. 2011) (Exhibit 85).

level of access to this key vacation destination.”²⁶⁹ Indeed, the report goes as far as to state that “the project presents a unique marketing opportunity to leverage the existing Outer Banks travel/tourism industry with tailored marketing strategies to highlight substantial travel time savings, cost savings, and increased accessibility to this beautiful and unique destination.”²⁷⁰

Thus, when it comes to examining environmental impacts, the Transportation Agencies would have us believe that construction of the Bridge would make not the slightest of differences to development.²⁷¹ When attempting to justify the need for the project, however, or make clear that substantial toll revenues will be generated as a result of construction, the Transportation Agencies attest that construction of the Bridge is an important mechanism to facilitate tourism and additional development. These two contradictory positions cannot be reconciled. Moreover, it is clear which scenario is more likely. As we explained in our comments on the DEIS,²⁷² the idea that transportation improvements encourage growth and development in areas that were previously difficult to access is nothing new and has been carefully documented by transportation experts²⁷³ and recognized by the courts.²⁷⁴

Local government entities and members of the public have also recognized that the Bridge will increase development of the Currituck mainland and the Northern Outer Banks. The Dare County Board of Commissioners, the Currituck County Board of Commissioners, the Town of Southern Shores, the Town of Kill Devil Hills, and the Albemarle RPO Transportation Advisory Committee have all adopted resolutions and policies supporting the Mid-Currituck Bridge because of, among other things, the economic development it would bring to the area.²⁷⁵ Members of these and other entities have also written to members of the General Assembly and to NCDOT, urging them to pursue continued funding for the bridge on the ground that it would

²⁶⁹ *Id.* at 11.

²⁷⁰ *Id.*

²⁷¹ Consultants for the Transportation Agencies have, however, noted that the Bridge will lead to increased beach driving in Carova. *See* Email from Daniel Marcucci to John Page and Katharine Braly (Apr. 18, 2011) (Exhibit 171).

²⁷² Stakeholder Involvement FEIS Technical Report at C7-C10 (Exhibit 103).

²⁷³ *See, e.g.,* Robert B. Noland, A Review of the Evidence for Induced Travel and Changes in Transportation and Environmental Policy in the United States and the United Kingdom, (Feb. 2001) *available at* https://www.researchgate.net/publication/222574378_A_review_of_the_evidence_for_induced_travel_and_changes_in_transportation_and_environmental_policy_in_the_US_and_the_UK (Exhibit 172); Gilles Duranton and Matthew A. Turner, The Fundamental Law of Road Congestion: Evidence from US cities, *American Economic Review*, American Economic Association, vol. 101(6) (Oct. 2011) (Exhibit 173).

²⁷⁴ *See, e.g.,* *Mullin v. Skinner*, 756 F. Supp. 904, 917 (E.D.N.C. 1990); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Conservation Law Found. v. Fed. Highway Admin.*, 630 F. Supp. 2d 183 (D.N.H. 2007); *Highway J Citizens Group v. U.S. DOT*, 656 F. Supp. 2d 868 (E.D. Wis. 2009); *N.C. Alliance for Transp. Reform v. U.S. DOT*, 151 F. Supp. 2d 661 (M.D.N.C. 2001); *Sierra Club v. U.S. DOT*, 962 F. Supp. 1037 (N.D. Ill. 1997).

²⁷⁵ Dare County, Resolution (Jan. 22, 2013) (Exhibit 174); Town of Southern Shores, Resolution (Apr. 5, 2011), (Exhibit 175); Albemarle Rural Planning Organization, Resolution (Jun. 18, 2014) (Exhibit 176); Town of Kill Devil Hills, Resolution (Feb. 11, 2013) (Exhibit 177); Currituck County, Resolution (Feb. 7, 2011) (Exhibit 178); Currituck County Board of Commissioners, Currituck County 2006 Land Use Plan 9-12 (2006) (Exhibit 179). Local elected officials have also acknowledged the importance of the Bridge for economic development. *See*, Email from Representative Bob Steinburg to Carolyn Riggs (May 9, 2013) (Exhibit 180).

spur economic development in the area.²⁷⁶ High-ranking members of local governmental entities have delivered presentations and given interviews with the same message.²⁷⁷ Local business groups have also been strong supporters of the Bridge due to the economic growth it would bring to the Northern Outer Banks.²⁷⁸ Finally, the North Carolina State Travel and Tourism Board has been particularly vocal about the economic growth that would be driven by the Bridge, calling the Bridge “one of the highest priority Tourism-development infrastructure projects within the State of North Carolina.”²⁷⁹ The Transportation Agencies have failed to consider the input from local governments and citizens who acknowledge the significant growth the bridge will bring to the Currituck mainland and the Northern Outer Banks.²⁸⁰

The Transportation Agencies have a duty under NEPA to carefully examine alternatives to the project and the impacts that will result from those alternatives. 40 C.F.R. § 1502.14. These impacts must be analyzed from a base scenario which shows what would be likely to occur if the project was not constructed. 40 C.F.R. § 1502.14 (d). The Fourth Circuit has made clear that operating from a misstated baseline can lead to an arbitrary and capricious decision. *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 588 (4th Cir. 2012). If, as the FEIS states, development would be inhibited by a failure to construct the Bridge, then full build-out is not a reasonable baseline from which to measure impacts and compare alternatives.

²⁷⁶ Letter from Warren Judge, Chairman, Dare County Board of Commissioners, to Joint Legislative Transportation Oversight Committee (Oct. 2, 2012) (Exhibit 181); Letter from Lloyd Griffin, ARPO, to Kerry Morrow, NCDOT (Nov. 17, 2014) (Exhibit 182); Letter from Warren Judge, Dare County Board of Commissioners, to Phil Berger, President Pro Tempore, North Carolina Senate (Jun. 13, 2012) (Exhibit 183); Letter from John Rorer, Chairman, Currituck County Board of Commissioners, to Phil Berger, President Pro Tempore, North Carolina Senate (Jun. 12, 2012) (stating that the Bridge “is vitally important to the economic growth and general well-being of Currituck County...”) (Exhibit 184); Letter from Christopher Layton, Manager, Town of Duck, to Julia Howard, NCGA (May 1, 2013) (Exhibit 185); Undated letter from the Mayor of the Town of Southern Shores to Kathy Harrington, North Carolina Senate (Exhibit 186); Letter from Dave Wessel, Mayor, Town of Duck, to Jeff Barnhart, Appropriations Chair, North Carolina House of Representatives (Mar. 28, 2011) (Exhibit 187); Letter from Dave Wessel, Mayor, Town of Duck, to Chris Militscher, EPA (Jan. 10, 2011) (Exhibit 188); Warren Judge, Dare County Board of Commissioners Presentation at Slide 15 (Oct. 4, 2012) (Exhibit 189); *see also* E-mail from Denise Walsh, Town of Duck, to Dorothy Killingsworth, Dare County (May 1, 2013) (Exhibit 190); E-mail from Peter Bishop, Currituck County, to Warren Judge, Dare County Board of Commissioners (Oct. 2, 2012) (Exhibit 191); Mid-County Bridge Letter Instructions (Exhibit 192); E-mail from Dan Scanlon, Manager, Currituck County (Nov. 19, 2014) (Exhibit 193); E-mail from Owen Etheridge, Chairman, Currituck Board of Commissioners, to Shelton Harrell, managing partner, Lynberg & Watkins, APC (Jun. 2, 2011) (Exhibit 194); E-mail from Denise Walsh, public information officer, Town of Duck, to Jeff Smith, UNC-TV (May 14, 2013) (Exhibit 195); Sample letter to Pat McCrory, Governor, North Carolina (Exhibit 196); Mid-Currituck Bridge (MCB) Talking Points, Dare County (Exhibit 197); Letter from Warren Judge, Dare County Board of Commissioners, to Phil Berger, President Pro Tempore, North Carolina Senate (Jun. 13, 2012); Email from Michelle La Motte, Delta Associates, to Warren Judge, Dare County Board of Commissioners (Sep. 25, 2009) (Exhibit 198).

²⁷⁸ E-mail from John Neighbors, Kitty Dunes Realty Company, to Tim Spear, NCGA (Oct. 4, 2012) (Exhibit 199); Sample Letter from Outer Banks Chamber of Commerce to Phil Berger, President Pro Tempore, North Carolina Senate (Exhibit 200); E-mail from Michael Lancsek, Realtor, RE/MAX Ocean Realty, to Donna Creef, Planning Director, Dare County (Apr. 21, 2010) (Exhibit 201); Video Interview of Judy Randall, Randall Travel & Marketing (Oct. 3, 2012) (Exhibit 202); E-mail from Karen Brown, President, Outer Banks Chamber of Commerce, to Denise Walsh, public information officer, Town of Duck (Nov. 21, 2014) (Exhibit 203).

²⁷⁹ NCTTB, Resolution (May 14, 2013) (Exhibit 204); *see also* Video Interview of Josh Bass, NCSTTB (Oct. 3, 2012) (Exhibit 205).

²⁸⁰ *See* Summary of Public Participation and Comment, Handout 21 – Jun. 28, 2010 at 4-7 (Exhibit 206).

Accordingly, if the Transportation Agencies wish to move forward with this project, they must prepare a Supplemental EIS that is founded on a realistic “No-Build” baseline. Failure to do this infects all aspects of the EIS and renders the NEPA analysis inadequate. *See N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (“[C]ourts not infrequently find NEPA violations when an agency miscalculates the ‘no build’ baseline or when the baseline assumes the existence of a proposed project”).

Cumulative Impacts

NEPA requires that an EIS disclose not just the direct and indirect impacts of a specific project, but also the cumulative impacts of the project when considered in conjunction with other “past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions.” 40 C.F.R. § 1508.25(a)(2). Cumulative impacts may result from “individually minor but collectively significant actions taking place over a period of time.” *Id.* § 1508.7. In determining whether a project will have a “significant” impact on the environment, an agency must consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” *Id.* § 1508.27(b)(7). “The purpose of the cumulative impact analysis is to provide readers with a complete understanding of the environmental effects a proposed action will cause.” *N.C. Alliance for Transp. Reform, Inc. v. US DOT*, 151 F. Supp. 2d 661, 698 (M.D.N.C. 2001).

In addition to the problems with the ICE analysis noted in our comments on the FEIS, the Draft Reevaluation fails to take into account several developments since the FEIS was issued: the development of a 80-acre water park in lower Currituck; a proposed land swap between USFWS and Currituck County; and the creation of a community park in Currituck County that aims to attract a “critical mass”²⁸¹ of residents to the area. These projects, in combination with the proposed Bridge, would further induce development of the Currituck Mainland and Northern Outer Banks, putting additional stresses on natural resources and the environment.

Construction is in progress on an 80-acre, 45 million dollar waterpark in lower Currituck County scheduled to open by Memorial Day 2017.²⁸² The park, located three miles north of the Wright Memorial Bridge, will consume 76,000 gallons of water per day, create 200 full-time and seasonal jobs, and draw up to 5,000 guests daily.²⁸³ The company developing the park is promising major economic impacts from the park, including “direct and indirect economic

²⁸¹ *See Scanlon: Park is a ‘gold mine,’* by William F. West, DailyAdvance.com (Nov. 27, 2016), available at <http://www.dailyadvance.com/News/2016/11/27/Scanlon-Park-is-a-gold-mine.html> (last visited Dec. 9, 2016) (Exhibit 207).

²⁸² *Water park in lower Currituck plans opening next summer*, by Sam Walker, outerbanksvoice.com (Jul. 27, 2016), available at <http://outerbanksvoice.com/2016/07/27/water-park-in-lower-currituck-county-to-open-next-summer/> (last visited Dec. 14, 2016) (Exhibit 208); *Currituck waterpark eyes May opening*, by Mike Bollinger, DailyAdvance.com (Oct. 26, 2016), available at <http://www.dailyadvance.com/News/2016/10/26/Currituck-waterpark-eyes-May-2017-opening.html> (last visited Dec. 14, 2016) (Exhibit 209).

²⁸³ *Water park in lower Currituck plans opening next summer*, by Sam Walker, outerbanksvoice.com (Jul. 27, 2016), available at <http://outerbanksvoice.com/2016/07/27/water-park-in-lower-currituck-county-to-open-next-summer/> (last visited Dec. 14, 2016) (Exhibit 208).

impacts through suppliers, real estate services, retail, food service, health care and more.”²⁸⁴ The park will operate from Memorial Day through Labor Day²⁸⁵—the height of tourist season in the Outer Banks, when stresses on the area’s natural resources are at their peak. The park could have even larger, long-term impacts on development in lower Currituck. In an article in Daily Advance about the park, Currituck Economic Development Advisory Board Vice Chairwoman Barbara Courtney stated, “My vision is that in five years, this end of the county is going to be booming When you can bring something big into an area, others seem to follow.”²⁸⁶

A deal is in progress between Currituck County and USFWS that will ultimately remove a sensitive portion of the Currituck National Wildlife Refuge from federal protection and place it in the hands of Currituck County.²⁸⁷ Under the terms of the agreement, the county will spend nearly one-million dollars to purchase 380 acres of marsh land adjacent to Mackay Island National Wildlife Refuge, then swap that land for 700 acres of land owned by USFWS that is part of the Currituck National Wildlife Refuge.²⁸⁸ Currituck County initiated the land swap because it feared USFWS may ultimately limit beach driving in the refuge and wanted to take control of the area before USFWS created any restrictions.²⁸⁹ If the deal is completed, Currituck County has stated it intends to develop three acres of refuge area into a “day-use facility.” In addition to direct environmental impacts, this facility would, in combination with the proposed bridge, doubtless attract increased day-trippers and other tourists to Carova.²⁹⁰

Currituck County recently completed development of a community park site near the Currituck County airport that houses sports fields, a YMCA, a healthcare facility, a cooperative

²⁸⁴ *Construction of H2OBX Waterpark begins in Currituck*, by Sam Walker, outerbanksvoice.com (Oct. 25, 2016), available at <http://outerbanksvoice.com/2016/10/25/construction-of-h2obx-waterpark-in-lower-currituck-begins/> (last visited Dec. 14, 2016) (Exhibit 210).

²⁸⁵ *Currituck waterpark eyes May opening*, by Mike Bollinger, DailyAdvance.com (Oct. 26, 2016), available at <http://www.dailyadvance.com/News/2016/10/26/Currituck-waterpark-eyes-May-2017-opening.html> (last visited Dec. 14, 2016) (Exhibit 209).

²⁸⁶ *Id.*

²⁸⁷ *Currituck land deal could protect beach driving privileges and offer haven for wild horses*, by Jeff Hampton, pilotonline.com (Mar. 2, 2016), available at http://pilotonline.com/news/local/environment/currituck-land-deal-could-protect-beach-driving-privileges-and-offer/article_b46aad91-2268-5a9d-9849-b9a089d572ed.html (last visited Dec. 14, 2016) (Exhibit 211); see also Letter from Bill Holman, NC State Director, The Conservation Fund, to David Griggs, Chairman, Currituck County Board of Commissioners (Jan. 4, 2016) (Exhibit 212).

²⁸⁸ Resolution of the Currituck County Board of Commissioners (Oct. 3, 2016) (Exhibit 213); Minutes of Oct. 3, 2016 Meeting of Currituck County Board of Commissioners at 16-17 (Exhibit 214).

²⁸⁹ *Everyone wins in Currituck County USFW Landswap*, posted by Brindley Beach Vacation and Sales, brindleybeach.com (Mar. 2, 2016), available at <http://www.brindleybeach.com/blog/everyone-wins-in-currituck-county-usfw-landswap> (last visited Dec. 14, 2016) (Exhibit 215); *Land swap would give Currituck control of northern beaches*, by Dee Langston (Feb. 23, 2016), available at <http://outerbanksvoice.com/2016/02/23/land-swap-would-give-currituck-control-of-northern-beaches/> (last visited Dec. 14, 2016) (Exhibit 216).

²⁹⁰ *Land swap would give Currituck control of northern beaches*, by Dee Langston (Feb. 23, 2016), available at <http://outerbanksvoice.com/2016/02/23/land-swap-would-give-currituck-control-of-northern-beaches/> (last visited Dec. 14, 2016) (Exhibit 216); see also Email from Jennifer Harris to Tracy Roberts pages 2-3 (Jun. 29, 2010) (Exhibit 217).

extension center, and a community college training center.²⁹¹ Currituck County Manager Dan Scanlon has said he hopes the park will help create a “critical mass” to drive development of hotels, restaurants, and “all kinds of related developments.”²⁹² Scanlon also emphasized the park’s proximity to the site of the proposed bridge and says he hopes the park could draw thousands of people per weekend.²⁹³

Each of these projects, in combination with the proposed bridge, has the potential to induce further development and increase stress on the area’s limited natural resources. The transportation agencies must complete a reasoned ICE analysis as part of a Supplemental EIS that takes into account these major new developments in the area. In addition, because the waterpark and community park are expected to draw significant numbers of visitors, NCDOT should analyze how patterns of traffic may change once these facilities are set in place and how those developments will affect the need for, and success of, different project alternatives.

The Draft Reevaluation also fails to make any mention of the proposed new Interstate, I-87 which would connect Raleigh and Norfolk.²⁹⁴ This proposed Interstate, which was unveiled by Governor McCrory in October 2016, could impact the project study area by decreasing travel time to northeastern NC from major population centers such as Raleigh and Norfolk.²⁹⁵ In the Supplemental EIS, the Transportation agencies should determine what affect this new interstate might have when combined with the increased access that would be occasioned by the Bridge.

VII. SEA LEVEL RISE AND CEQ REGULATIONS

To date, the Transportation Agencies have not conducted a thorough analysis of how the Bridge may impact, and be impacted by, climate change. There is no discussion in the EIS or Draft Reevaluation about the extent to which construction of the Bridge may contribute to greenhouse gas emissions and associated impacts to climate change.

On August 1, 2016, the CEQ published new guidance on “CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS.”²⁹⁶ The new guidelines require federal agencies to

²⁹¹ *Scanlon: Park is a ‘gold mine,’* by William F. West, DailyAdvance.com (Nov. 27, 2016), available at <http://www.dailyadvance.com/News/2016/11/27/Scanlon-Park-is-a-gold-mine.html> (last visited Dec. 9, 2016) (Exhibit 207).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Jeff Hampton, *New \$1 Billion, 213 mile interstate planned to connect Norfolk and Raleigh*, pilotonline.com (Jun. 9, 2016), available at http://pilotonline.com/news/local/transportation/new-billion--mile-interstate-planned-to-connect-norfolk-and/article_b621ca2d-0824-5d08-9ca8-636230f8475b.html (last visited Dec. 15, 2016) (Exhibit 218).

²⁹⁵ Ken Watling, *Governor McCrory Unveils Future I-87 in Edenton*, WNCT 9 (Oct. 24, 2016), available at <http://wnct.com/2016/10/24/governor-mccrory-unveils-future-i-87-in-edenton/> (last visited Dec. 15, 2016) (Exhibit 219).

²⁹⁶ Council on Environmental Quality, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* (Aug. 1 2016) (Exhibit 220) [*hereinafter* GHG Guidance].

consider “the effects of greenhouse gas (GHG) emissions and climate change when evaluating proposed Federal actions” under NEPA.

First, the regulations explain that Federal Agencies should “consider the extent to which a proposed action and its reasonable alternatives would contribute to climate change, through GHG emissions.” The regulations further direct the Agencies to “take into account the ways in which a changing climate may impact the proposed action and any alternative actions, change the action’s environmental effects over the lifetime of those effects, and alter the overall environmental implications of such actions.”²⁹⁷

In the past, agency personnel charged with the study of the Mid-Currituck Bridge have asserted that it would not be appropriate to study the impacts of this one project on climate change, because climate change is a global problem and the impact of this one road project will be minimal in the larger scheme and therefore unworthy of study.²⁹⁸ The new guidance directly rejects this approach noting, “a statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether or to what extent to consider climate change impacts under NEPA.” Rather, the guidance states that agencies should “use the projected GHG emissions associated with proposed actions as a proxy for assessing proposed actions’ potential effects on climate change in NEPA analysis.” No such analysis has yet been performed for the Mid-Currituck Bridge, yet it is likely the Bridge—by increasing access and encouraging travel, as well as by inducing growth on the Outer Banks—will lead to additional GHG emissions from vehicles. CEQ has provided a list of GHG accounting tools on its website and we urge NCDOT to make use of them in a Supplemental EIS.²⁹⁹

In addition to requiring Agencies to study the impact of projects on climate change, the guidance also makes clear that NEPA requires agencies to consider “the effects of climate change on a proposed project and its environmental impacts.” The NEPA documents for the Mid-Currituck Bridge have failed to do this, however. The Draft Reevaluation does contain some glancing reference to sea level rise, noting somewhat absurdly that under current projections of sea level rise the Corolla area will ultimately be cut off, making the Bridge as an alternative egress between the Outer Banks and the mainland all the more necessary.³⁰⁰ This brief mention of sea-level rise as an illogical justification for why the Bridge should be built is not sufficient to satisfy NEPA. The Bridge is expected to last for at least 50 years, and NCDOT should carefully consider how sea-level rise projections will play out during this time period. The analysis should extend to the increased development pressure that will be placed on the Outer Banks and the increased traffic that will result on NC 12, as well as other direct and indirect environmental impacts. The analysis should then be presented to the public in the

²⁹⁷ *Id.*

²⁹⁸ *See, e.g.*, FEIS for the Garden Parkway at 2-35- 2-36 (Exhibit 221).

²⁹⁹ Council on Environmental Quality, GREENHOUSE GAS ACCOUNTING TOOLS, (last visited Dec. 14, 2016) (Exhibit 222).

³⁰⁰ FEIS at 3-82-3-84; Draft Reevaluation at 75 (Exhibit 1).

Supplemental EIS so that citizens and decision-makers can weigh-in on whether the project is a wise use of taxpayer dollars.

CEQ has stated that in cases where an FEIS has been completed an agency need not go back and revisit its analysis based on the new guidance.³⁰¹ The guidance makes clear, however, that it does not expand current NEPA law, but rather clarifies what is already required.³⁰² In other words, the guidance merely spells out what was already legally mandated by NEPA. Where then, as is the case with the Mid-Currituck Bridge, the agency is engaged in additional NEPA analysis subsequent to the release of the guidance, it is appropriate for the agency to follow its strictures to the fullest extent possible. Such analysis is even more necessary in this case because the NEPA documents do, in fact, reference sea level rise as a justification for Bridge construction.

VIII. THE TRANSPORTATION AGENCIES MUST USE NEPA AS INTENDED, TO FOSTER GOOD DECISIONMAKING, AND NOT TO JUSTIFY PREDETERMINED OUTCOMES

In 2015, because more than three years had passed since the Transportation Agencies published the FEIS, the agencies began work on a formal “reevaluation,” a draft of which is referenced by these comments. A reevaluation is a legally required step intended to determine whether or not a Supplemental EIS is required. FHWA guidance notes that during a reevaluation “FHWA must assure that the environmental documentation for the proposed action is still valid, prior to proceeding with major project approvals or authorizations.”³⁰³ The guidance goes on to note that this task is accomplished by “an assessment of any changes which may have occurred in either the project’s concept or the affected environment, and a determination of what effects these changes might have on the validity of the environmental documentation.”³⁰⁴ The guidance further stresses that the written reevaluation “must demonstrate that the information presented in the Draft EIS is an accurate analysis of the anticipated project impacts.”³⁰⁵

Like the rest of the NEPA process, the reevaluation process should be performed in good faith and not as an exercise in predetermination. The Council on Environmental Quality’s NEPA regulations specifically require that an EIS be more than merely a “disclosure document,” stating that an “environmental impact statement shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” 40 C.F.R. §§ 1502.1, 1502.2(g). And the United States Court of Appeals for the Fourth Circuit itself has recognized that NEPA requires action and study based on “good faith objectivity.” *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1026 (4th Cir.1975). As that court noted, the “broad dissemination of information mandated by NEPA” allows “the public and other

³⁰¹ GHG Guidance at 33–34 (Exhibit 220).

³⁰² *Id.* at 2.

³⁰³ FHWA Guidance, NEPA AND TRANSPORTATION DECISIONMAKING, available at <https://www.environment.fhwa.dot.gov/projdev/tdmpdo.asp> (last visited Dec. 19, 2016) (Exhibit 223).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

government agencies to react to the effects of a proposed action at a meaningful time.” *Id.* at 601-02 (citing *Robertson*, 490 U.S. at 349).

In the case of the Mid-Currituck Bridge, however, the Transportation Agencies’ actions make clear that despite the many changes that have occurred since publication of the FEIS in 2012, NCDOT determined at the very outset of the reevaluation process that it would conclude no Supplemental EIS was necessary.³⁰⁶ Rather than use the NEPA process to carefully consider changed circumstances, the Transportation Agencies have continued to treat NEPA as a mere paper exercise to justify a decision “already made.” 40 C.F.R. § 1502.2(g). Thus, before any work on the reevaluation commenced, the agency had already pre-determined that it would find no changes, and no significant new information or circumstances. A draft of the reevaluation from September 2016 shows the same.³⁰⁷

NEPA requires preparation of a Supplemental EIS when “(1) [c]hanges to the proposed action would result in significant environmental impacts that were not evaluated in the EIS;” or when “(2) [n]ew information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.” Many of the changes that have occurred since 2012 demand publication of a Supplemental EIS. New funding constraints limit the amount of funding available for construction of the Bridge, while additional financial flexibility renders project alternatives easier to fund. Significantly altered traffic forecasts call into question the need for the Bridge and have rendered less expensive and less destructive alternatives even more viable than they were in the past. This change to the range of alternatives demands publication of a Supplemental EIS. *See Alaska Wilderness Recreation and Tourism Ass’n v. Morrison*, 67 F.3d 723 (9th Cir. 1995) (noting that “[b]ecause the consideration of alternatives is the heart of the environmental impact statement,” the cancellation of a contract which removed constraints on the range of available alternatives was a substantial change” that required publication of an Supplemental EIS).

Similarly, new projections of traffic and socio-economic growth show that baseline conditions will be significantly different than those presented in the EIS. As a result, a new review of the environmental impact of the Bridge will present a “seriously different” picture to that previously set out to the public. *See Louisiana Wildlife Federation, Inc. v. York*, 761 F.2d 1044 (5th Cir 2009) (holding that a significant change to the assumption of baseline conditions “present[ed] a seriously different picture of the environmental impact of the proposed project from what was previously envisioned, it [wa]s significant new information and [wa]s sufficient to require an agency to supplement an original EIS”). Furthermore, the Transportation Agencies must consider the project’s effect in conjunction with continued deterioration of the Currituck Sound, increased development of the Northern Outer Banks, the proposed land swap between Currituck County and USFWS, and new economic development projects on the Currituck Mainland. *See, e.g., Portland Audubon Soc. V. Babbitt*, 998 F.2d 705 (9th Cir. 1993).

³⁰⁶ Mid-Currituck Bridge Project Schedule (Exhibit 224); *see also* Email from Carr McLamb, NCDOT, to Kym Hunter, SELC (Oct. 12, 2016) (Exhibit 225).

³⁰⁷ NCDOT, Partial Draft Reevaluation of the Final Environmental Impact Statement, (Aug. 3, 2015) (Exhibit 226).

The Transportation Agencies' actions outside of the NEPA process similarly make clear that it has been undercutting the objective NEPA process, and that rather than engaging in thoughtful decision-making, the agency has been pursuing steps to build the Bridge before any Record of Decision has been published. A \$5.6 million property was purchased in 2015 to make way for the Bridge landing site on the Outer Banks.³⁰⁸ This property was purchased even while the reevaluation, which should carefully consider alternatives, was still underway. While MAP-21 made it permissible to purchase right-of-way while a NEPA process is ongoing, the statute demands that the purchase of the property "will not limit the choice of reasonable alternatives for the project or otherwise influence the decision of the Secretary [of Transportation] on any approval required for the project." 23 U.S.C.A. § 108. Spending \$5.6 million on property that can only be used to construct the Mid-Currituck Bridge has certainly served to further cement the Transportation Agencies' predetermined decision to construct the Bridge, even when a thorough, objective review of up-to-date, accurate data would show it to be no longer necessary or the best choice for the Currituck Outer Banks.

Moreover, documents show that rather than take the objective hard look NEPA requires, NCDOT was actively reaching out to proponents of the Bridge and asking that they contact local, state, and federal officials to support the project.³⁰⁹ This practice mirrored statements made by NC Transportation Secretary Tata during the STI process (which should also be objective), assuring citizens and leaders along the Outer Banks that the project would score well before the data driven process had even begun.³¹⁰

NEPA is an important process. It demands that the public, resource agencies, and all local and state decision-makers can be fully informed about a range of alternative solutions before any final decision is made. The attempt to fix traffic congestion on the Outer Banks provides a perfect example as to why this process is so essential. Numerous alternative solutions are available and each have their costs and their benefits. The Transportation Agencies must ensure that the merits of each are fully explored in a new, accurate, up-to-date document that takes a true, objective look at the best solution for the future.

And NEPA serves another role: it is a springboard for public comment. Here, a group of local citizens and visitors to the Outer Banks have worked with a transportation expert to look at how traffic congestion may be ameliorated for a low financial cost and with as little degradation as possible to the character of the Northern Outer Banks. We urge the Transportation agencies to take a hard look at this plan.

³⁰⁸ Memo from Calvin Legget, NCDOT, to Majed-Al Ghandour, NCDOT (Mar. 17, 2015) (Exhibit 75); Northeastern North Carolina Properties, LLC, Summary Statement/Contingent Offer to Purchase Real Property due to the Acquisition of Right of Way and Damages, (Feb. 17, 2015) (Exhibit 227).

³⁰⁹ See, e.g., Town of Duck, Update on the Mid-Currituck Bridge (Exhibit 228).

³¹⁰ Catherine Kozak, *Bridge projects still kicking, Proponents say*, Coastal Review Online (Apr. 18, 2013) (Exhibit 229).

Thank you for your consideration of these comments. We would be happy to meet with you to discuss these matters at your convenience.

Sincerely,



Kym Hunter
Staff Attorney



Colin Shive
Associate Attorney

CC (via e-mail and US mail):

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