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

NORTHERN DIVISION

NO. _____

NORTH CAROLINA WILDLIFE FEDERATION and NO MID-CURRITUCK BRIDGE-CONCERNED CITIZENS AND VISITORS OPPOSED TO THE MID-CURRITUCK BRIDGE Plaintiffs, v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; JAMES H. TROGDON III, in his official capacity as SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; and EDWARD PARKER in his official capacity as ASSISTANT DIVISION ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION. Defendants.	**COMPLAINT** [Fed. R. Civ. P. 7]

NATURE OF THE CASE

1. The North Carolina Department of Transportation ("NCDOT") proposes to construct an unnecessary $600 million toll bridge across highly sensitive and important wildlife habitat in the Currituck Outer Banks. For decades, the Mid-Currituck Bridge project ("the Mid-Currituck Bridge," "Toll Bridge," "MCB," or "project") has failed to move forward as federal agencies raised concerns about the validity of the underlying need for the project, the magnitude

of environmental destruction the Toll Bridge would cause, and the availability of less damaging alternative solutions.

2. Nevertheless, the Transportation Agencies pushed forward with the Toll Bridge and, after decades of false starts, published a Final Environmental Impact Statement ("Final EIS" or "FEIS") in January 2012. The project then lost support in the North Carolina General Assembly and was stripped of its earmarked funding. Seven years later, without any demonstrated financial plan to pay for the project, and without any further review from the public during the intervening years, the Transportation Agencies published a Record of Decision ("ROD") on March 29, 2019 deciding that the Toll Bridge should be built.

3. Since the last public review of the project there have been a slew of changes to the proposed Toll Bridge and the region. Forecasts of future growth and traffic have significantly decreased. As such, there is now not only much less need for the Toll Bridge, but also serious concerns about its financial viability, as toll revenue projections have also diminished. Meanwhile, the cost of the Toll Bridge has increased, while the cost of the most viable studied non-bridge alternative has significantly decreased.

4. At the same time, the science behind sea level rise, storm surge, and climate change models has significantly advanced—with implications for the durability of the Toll Bridge, its utility as a hurricane evacuation route, and its financial viability as a toll revenue generating facility. Despite all these changes and more, the Transportation Agencies signed off on the project without allowing the public any opportunity for scrutiny or input.

5. The Transportation Agencies also ignored a new, viable alternative solution prepared by a transportation expert and presented to them by the Conservation Groups. Unlike the Transportation Agencies' outdated review, this alternative took account of the diminished traffic forecasts to propose a solution that was pragmatic and effective, with a lower cost and a lower impact to the environment.

6. The 2012 FEIS the Transportation Agencies continue to rely upon was fundamentally flawed even before the significant changes of the past seven years. The FEIS ignores entirely the impact the proposed Toll Bridge would have on induced growth and travel illegally evaluates each alternative under the assumption that traffic volumes in the Currituck Outer Banks will be the same regardless of whether the Toll Bridge is constructed or not.

7. The FEIS also fails to analyze a full range of reasonable alternative solutions, and discards a number of reasonable alternatives, including ferry service, bus transit service, and the concept of shifting the vacation rental house switch-over times—as well as combinations of these alternatives—without meaningful consideration.

8. Furthermore, the FEIS fails to meaningfully evaluate the indirect and cumulative impact of the proposed Toll Bridge, assuming the Toll Bridge will occasion no induced growth. The FEIS also brushes off concerns that increased access to the Currituck Outer Banks will increase beach driving, dune habitat destruction and stormwater runoff, and disregards the impact the project might have on development on the Currituck mainland.

9. The FEIS also fails to meaningfully consider direct impacts to waterfowl, wetlands, submerged aquatic vegetation ("SAV"), and fisheries.

10. The North Carolina Wildlife Federation ("NCWF" or "the Federation") and No Mid-Currituck Bridge-Concerned Citizens and Visitors Opposed to the Mid-Currituck Bridge

("No MCB") (together, "The Conservation Groups") bring this challenge and ask that the Court vacate FHWA's ROD and issue a declaratory judgment that the Transportation Agencies' analysis was unlawful; order the Transportation Agencies to prepare a Supplemental EIS ("SEIS") if they wish to proceed with the project; and enjoin the Transportation Agencies from taking further steps to move forward with construction of the Toll Bridge.

JURISDICTION AND VENUE

11. This action arises under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-47, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. This Court therefore has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel a federal officer to do his duty), and it may issue a declaratory judgment and grant further relief pursuant to 28 U.S.C. §§ 2201-02. The Conservation Groups are entitled to bring this action pursuant to the APA, 5 U.S.C. § 702.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this claim occurred in this judicial district and Plaintiff No MCB is based in this district.

PARTIES AND STANDING

Plaintiffs

13. Plaintiff North Carolina Wildlife Federation is the state's oldest and largest statewide non-profit conservation organization. Since 1945, NCWF has worked with citizens, outdoor enthusiasts, hunters and anglers, government, and industry to safeguard North Carolina's natural resources. NCWF's mission is to protect and promote

natural areas throughout the state—not only as habitat for native wildlife, but also as recreational, hunting, fishing, and wildlife observation areas for its dedicated and passionate members.

14. NCWF is headquartered in Raleigh, North Carolina, and works on wildlife and habitat issues throughout the state. NCWF has over four dozen affiliates, thirteen chapters, and more than a quarter million hunters and anglers subscribed to its Camo Coalition.

15. NCWF works collectively to preserve wild places and species through policy and protection work, research, education, and direct hands-on conservation projects.

16. NCWF has numerous members in Currituck County. NCWF has members who visit, recreate, fish and hunt, observe wildlife, photograph, and otherwise use and enjoy the Currituck Sound and Outer Banks.

17. NCWF and its members have been actively opposed to the proposed Mid-Currituck Bridge. NCWF and its members have participated in the NEPA process and submitted comments on the project through counsel.

18. Plaintiff No MCB, formed in 2009, is an organization made up of more than 50 Currituck County residents, visitors, and property and business owners opposed to the construction of the Mid-Currituck Bridge. No MCB is based in Currituck County.

19. The mission of No MCB is to protect the unique natural environment of the Currituck mainland and the northern Outer Banks, including the area's fish spawning habitat, migratory bird habitat, wetlands, and beaches. No MCB believes that there are more cost effective, and less environmentally damaging ways to addresses summertime traffic congestion that have been pushed aside in favor of this politically influenced project.

20. No MCB has members who live and work on both sides of the Currituck Sound in areas that would be affected by the proposed Bridge. No MCB has members who visit, recreate, photograph, and otherwise use and enjoy the Currituck Sound and Outer Banks.

21. No MCB and its members have been actively opposed to the proposed Mid-Currituck Bridge for over nine years.

22. No MCB and its members have actively monitored the project and convened multiple local meetings about the Bridge. No MCB members have travelled to Raleigh to express their opposition to the proposed Toll Bridge at the North Carolina General Assembly and to members of Defendant NCDOT. No MCB and its members have participated in the NEPA process and submitted comments on the project through counsel.

23. The Transportation Agencies' proposed Toll Bridge would destroy and degrade important coastal and wetlands habitat in Currituck Sound, harm species that depend on that habitat for survival, and spur further development in ecologically sensitive areas of Currituck County. The Toll Bridge would thereby directly, adversely, and irreparably injure NCWF, No MCB, and their members and staff.

Defendants

24. Defendant NCDOT is an agency of the state of North Carolina. NCDOT prepared the FEIS and ROD challenged in this action, and is relying on these NEPA documents to pursue construction of the Mid-Currituck Bridge.

25. Defendant James H. Trogdon III is the Secretary of NCDOT. He is sued in his official capacity.

26. Defendant FHWA is a subordinate federal agency within the U.S. Department of Transportation. FHWA was responsible for overseeing the completion of the EIS and ROD and for ensuring that these documents complied with federal law. FHWA is the federal agency that took most of the final agency actions challenged herein by issuing or adopting the inadequate NEPA documents that are challenged in this action. FHWA issued or adopted these documents through its North Carolina Division office in Raleigh, North Carolina.

27. Defendant Edward Parker is the North Carolina Division Assistant Division Administrator for FHWA, and is sued in his official capacity as the head of FHWA's North Carolina Division Office. Assistant Administrator Parker had the ultimate responsibility for FHWA's approval of the inadequate EIS and ROD challenged in this action, and for FHWA's decision to proceed with the challenged project despite the inadequate assessments.

FEDERAL STATUTORY AND REGULATORY BACKGROUND

National Environmental Policy Act ("NEPA")

28. NEPA requires a federal agency to prepare and adopt an EIS before undertaking a major action that would significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C).

29. To implement the requirements of the statute, the Council on Environmental Quality ("CEQ") has promulgated NEPA regulations that are applicable to all federal agencies. *See* 40 C.F.R. §§ 1500-1508. In addition, FHWA has established NEPA regulations for highway projects. 23 C.F.R. § 771.

30. The EIS requirement serves both internal and external functions. Internally, preparing an EIS ensures that the agency takes a hard look at the direct, indirect, and cumulative environmental impacts of the proposed action. It also guarantees that the agency will consider a

range of reasonable alternatives to accomplish the underlying goals of the proposed action—including options that may have fewer adverse impacts on the environment—before deciding whether to undertake the project as originally proposed. Externally, the EIS provides detailed public information about the proposed action, its impacts, and reasonable alternatives, so that the public and other government agencies may be informed participants in the decision-making process.

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

32. NEPA regulations require than an EIS contain a statement regarding the proposed action that "briefly specif[ies] the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." *Id.* § 1502.13.

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

34. This alternatives analysis is "the heart of the environmental impact statement" and should "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear

basis for choice among options by the decision-maker and the public." *Id.* § 1502.14. Only those alternatives that are deemed unreasonable can be eliminated from study. *Id.*

35. NEPA further requires that decisions be based on "high quality" information. *Id.* § 1500.1(b). "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id*. This requirement ensures that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Or. Natural. Res. Council*, 490 U.S. 360, 371 (1989). The broad dissemination of information mandated by NEPA is intended to allow the public to react to the effects of a proposed action at a meaningful time. *Id.*

36. The "effects" of the various project alternatives that must be discussed in an EIS include, among other considerations, direct, indirect, and cumulative effects. 40 C.F.R. §§ 1502.16, 1508.7.

37. The NEPA regulations define "direct effects" as effects "which are caused by the action and occur at the same time and place." *Id.* § 1508.8(a).

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

39. NEPA regulations define "cumulative impact" as the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other

actions. Cumulative impacts can result from individual minor but collectively significant actions taking place over a period of time. *Id.* § 1508.7.

40. FHWA NEPA regulations specifically provide that if major steps to advance the action have not occurred within three years after the approval of the FEIS the applicant must prepare a written reevaluation of the FEIS. 23 C.F.R. § 771.129(b). The purpose of this evaluation is to determine whether or not an SEIS, or new EIS altogether is needed. *Id.*

41. A federal agency's obligation to evaluate the environmental impacts of a proposed action using high-quality and up-to-date information continues through the NEPA review process, including after an EIS has been finalized. An agency must prepare an SEIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns" or if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i), (ii).

42. In determining whether to prepare an SEIS, the agency must take a "hard look at the proffered new information." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). When new information creates a "seriously different picture of the project from what was previously envisioned" an SEIS is required to allow the public and other government agencies time to react and comment. *Id.*

43. The agency must "prepare, circulate, and file a supplement to [an EIS] in the same fashion (exclusive of scoping) as a draft and final statement." 40 C.F.R. § 1502.9(c)(4).

Administrative Procedure Act ("APA")

44. The APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

45. The APA provides that a court shall set aside agency "findings, conclusions, and actions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA grants the reviewing court the authority to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

FACTS

46. This lawsuit concerns the environmental impacts of a proposed toll bridge in Currituck County, North Carolina. The proposed Toll Bridge would extend 4.5 miles across the ecologically sensitive Currituck Sound, connecting the Currituck Outer Banks with the mainland.

47. The Toll Bridge is being carried out by the Transportation Agencies. The project will require a permit under section 404 of the Clean Water Act from the U.S. Army Corps of Engineers ("the Corps"), a permit from the United States Coastguard, a 401 Certification from the North Carolina Department of Environmental Quality's Division of Water Resources ("NCDWR"), and a North Carolina Coastal Area Management Act ("CAMA") major permit from the North Carolina Division of Coastal Management ("NCDCM").

48. With an estimated cost ranging from $439.1 to $605.4 million, the Toll Bridge would be the most expensive bridge ever built in North Carolina. Despite its enormous cost, the benefits of the project would be minimal, and the environmental consequences would be enormous.

49. In 2013, the Toll Bridge was stripped of its earmarked statutory funding source. The Toll Bridge then later failed to score highly enough to merit either statewide or regional funding in NCDOT's data-driven scoring process. The Toll Bridge thus managed to receive only local funding from Transportation Division 1, where it has been allocated $172 million. The rest of the project cost must be made up by revenue generated from tolls, but the Transportation Agencies have yet to conduct an updated Traffic and Revenue study to determine the viability of toll funding.

50. One initial plan of finance prepared for NCDOT suggests that toll revenue must continue to be generated annually through 2073 in order to pay for the Toll Bridge. This plan ignores the fact that sea level rise will have significantly changed the North Outer Banks by 2073. Much of the development relied upon in NCDOT's models will be either underwater, or prone to frequent flooding, and the roads that lead to the Bridge will be equally vulnerable.

51. A bridge connecting a previously remote section of the Outer Banks is likely to have significant impacts on land use and development. And indeed, many local officials and realty companies have championed the Toll Bridge for the growth it will bring to the region. The additional development will place unprecedented stress on the area's natural resources.

52. By spurring additional growth and increasing visitation to the Northern Outer Banks, the Toll Bridge will also place more people and infrastructure on the vulnerable, hurricane and flood-prone barrier island, and will encourage development that limits marsh migration and natural adaptation to sea level rise.

53. The Toll Bridge would also have significant direct environmental effects and, according to the FEIS, would impact 22.8 acres of forest, 30.3 acres of farmland, 4.2 acres of wetlands, and 8.8 acres of shaded SAV. In addition, the Toll Bridge may impact four threatened and endangered species: the piping plover, West Indian manatee, loggerhead sea turtle, and rufa red knot.

Flawed Initial NEPA Review Process

54. In March 1994, NCDOT began drafting a formal NEPA Scoping document for the Toll Bridge.

55. In May 1994, during the scoping process, NCDCM commented that because of the wealth of natural resources in the Currituck Sound, and the secondary impacts of increasing development in the area, "the bridge should be the last alternative considered." NCDCM noted that the secondary impacts of increased development needed to be "carefully considered." Other agencies, including the United States Fish and Wildlife Service ("USFWS"), concurred with NCDCM's assessment.

56. In July 1995, FHWA published a Notice of Intent to prepare an EIS for the Toll Bridge.

57. In August 1995, USFWS stated that construction of the Toll Bridge would "adversely affect wetlands and shallow estuarine waters in the project vicinity."

58. In 1996, the Transportation Agencies prepared an initial Draft Environmental Impact Statement ("DEIS") for the project.

59. In February 1996, the Corps expressed concern that the "No-Bridge Alternative" was not being evaluated at the same level of review as the bridge alternatives. The Corps also expressed doubt about "hurricane evacuation" and reduction of traffic congestion being used as

purposes of the project because building a bridge would only increase the human presence on the Outer Banks and thus be counter-productive.

60. In 1997, NCDOT prepared a revised Purpose and Need Statement, which cited the project's primary purpose as reducing travel time and distance between the Currituck mainland and the Outer Banks. The revised statement designated the other three purposes—reducing traffic on NC 12 and US 158, providing access to public services, and increasing hurricane evacuation capacity— as "secondary purposes."

61. In May 1997, NCDOT, in response to a request by the Corps, released yet another revised Purpose and Need Statement which removed hurricane evacuation and potential traffic congestion reduction. The Corps then concurred with the Purpose and Need Statement, but in doing so reminded the Transportation Agencies that "avoidance and minimization of impacts to waters and wetlands must be undertaken to the maximum extent practicable."

62. Also in May 1997, the Toll Bridge was placed under North Carolina's Merger Process, through which a team of federal and state agencies were assembled to reach concurrence on the project's purpose and need, reasonable and feasible alternatives, preferred alternative, and avoidance and minimization of environmental impacts.

63. The State Division of Water Quality ("DWQ")[1] refused to concur with the statement of Purpose and Need, stating that a public need had not been demonstrated for the Toll Bridge, and, that, in regards to the environmental harms the project would cause, the Toll Bridge "would easily cause more problems than it could solve."

[1] DWQ is now known as the Division of Water Resources ("DWR").

64. The National Oceanic and Atmospheric Association ("NOAA") also refused to concur with the selection of the five bridge alternatives as the only feasible and practical alternatives, noting that construction of a bridge was "not the least environmentally damaging alternative."

65. EPA refused to concur and questioned the support of any alternative that would spur "levels of Outer Banks development incompatible with long-term environmental quality." EPA also noted that it was inconsistent that the DEIS included reduced travel costs as a purpose of the project while also intending to fund the project with tolls.

66. USFWS expressed similar concerns and emphasized that the DEIS "should present clear and compelling needs for a new bridge which are distinct from the effects of its construction." It also questioned the fact that the DEIS failed to consider the five dismissed non-bridge alternatives in combination.

67. The National Marine Fisheries Service ("NMFS") stated its concern that the DEIS did not include a detailed analysis of the no-build alternatives.

68. State agencies, including the NCDCM, the Division of Marine Fisheries ("NCDMF"), and the Division of Parks and Recreation all noted concerns about the purposes of the project.

69. NCDCM concluded that the Bridge would reduce traffic in the short-term only, stating that "[f]uture development that will be allowed by the bridge will result in congestion on NC-12 returning to or exceeding current levels by the year 2020."

70. NCDMF stated that it "continues to be concerned with the secondary and cumulative impacts associated with the bridge alternatives."

71. The Division of Parks and Recreation noted concerns about both primary and indirect impacts of the project, stating that the environmental costs of the project "far outweigh" the primary benefits of the project, and that therefore the Division "strongly support[s] either the No-Build or No-Bridge Alternative."

72. DWQ also raised strong objections to the Purpose and Need Statement and the Reasonable and Feasible Alternatives, and stated that the DEIS provided insufficient information to proceed to a FEIS, and that a Supplemental DEIS should be prepared to address the raised concerns.

73. Subsequent to this slew of concerns, in 1998, the Transportation Agencies completed a second DEIS for the Toll Bridge.

74. The 1998 DEIS cited four purposes for the 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.

75. The 1998 DEIS included alternatives consisting of no-build, nine bridge alternatives, and five no-bridge alternatives.

76. The 1998 DEIS for the proposed Toll Bridge stated that the Bridge would induce a significant increase in development along the Currituck Outer Banks and the rest of the project area. For example, the 1998 DEIS estimated that "the bridge would allow an estimated 2,473 additional homes along the Outer Banks." Nevertheless, the 1998 DEIS concluded that the indirect and cumulative impacts caused by the increased development "would be similar for the Bridge and No-Build Alternatives."

77. Despite continued overwhelming objections from resource agencies, the Transportation Agencies approved the DEIS without agency concurrence on reasonable and and feasible alternatives.

78. In August 1998, after public hearings were held in which 61 of 66 speakers spoke in opposition to the project, the Transportation Agencies decided to put the project on hold.

Development of the Current EIS and ROD

79. Two years later, a few powerful politicians led by Senator Marc Basnight began renewed efforts to push the project forward by re-emphasizing the hurricane evacuation and transportation purposes, and reaching out to state and federal agencies regarding the project.

80. On August 16, 2001, NCDOT announced that it was reactivating the Bridge project. It noted that it would restart the NEPA process with Scoping and would work towards preparing a Supplemental EIS.

81. In November 2003, after protracted debate about the inclusion of hurricane evacuation as a valid purpose and need for the project, the Transportation Agencies and project team agencies reached a tentative agreement on a new Purpose and Need Statement that included hurricane evacuation so long as its need was "supported by empirical data" from a hurricane evacuation model being prepared by the Corps.

82. In 2006, the North Carolina Turnpike Authority ("NCTA" or "Turnpike Authority") took over agency jurisdiction for the project. N.C. Senator Basnight stated this change was made to "remove obstacles that have delayed the bridge" because the Authority "has the ability to work with the private sector to expedite the project."

83. In April 2009, the Authority signed a Pre-Development Agreement with the Currituck Development Group, LLC, to design, build, help finance, operate, and maintain the

bridge. At the same time, Senator Basnight successfully championed legislation which earmarked $35 million to be allocated annually for the next 30 years to support funding of the Bridge.

2010 Draft EIS

84. The Transportation Agencies issued a third DEIS in March 2010. The 2010 DEIS identifies MCB4, a toll bridge across Currituck Sound, as the Recommended Alternative.

85. The 2010 DEIS identifies three needs that the project would address: (1) the need to reduce congestion along US 158 and NC 12; (2) the need to reduce travel times "between the Currituck County mainland and the Currituck County Outer Banks"; and (3) the need to reduce hurricane evacuation times from the areas along the Outer Banks currently accessible via US 158 and NC 12.

86. In support of the hurricane evacuation need, the 2010 DEIS cites North Carolina's 18 hour statewide hurricane evacuation clearance time standard, N.C. GEN. STAT. § 136-102.7. The DEIS stated that the state standard was already exceeded at 27 hours in 2007 for evacuees leaving the Outer Banks via NC 168 and US 158, and that traffic forecasts indicated clearance time would be 36 hours by 2035.

87. As evidence of the travel time and congestion needs, the 2010 DEIS cites traffic congestion projections for the year 2035. These projections assumed that traffic volume along NC 12 and US 158 would double by 2035 and produce serious delays during summer weekend days.

88. By contrast, and without explanation, the 2010 DEIS incorporates a 2007 Preliminary Traffic and Revenue Report which notes that traffic volumes along US 158

had "exhibited little growth in the most recent five year period" and that "[t]raffic levels on NC 12 between Southern Shores and Corolla appeared to be down," possibly indicating that "congestion along this road has reached a saturation point and become a deterrent to traffic growth." The DEIS included no analysis to resolve these inconsistent findings.

89. The 2010 DEIS relies on a 2035 Traffic Alternatives Report that depicts the same number of cars travelling through the project area to the Outer Banks under both the "Build" and "No Build" scenarios.

90. The 2010 DEIS concludes that "the extent of development on the Outer Banks by 2035 would be the same with or without the bridge." In the same document, the Transportation Agencies state that the "lack of transportation improvements and associated growing congestion could constrain development under the No-Build Alternative." No attempt is made in the document to resolve these inconsistent assumptions.

91. The 2010 DEIS includes five detailed study alternatives. One of these alternatives, Improve Existing Roads 2 or "ER-2", involves widening the Wright Memorial Bridge, US 158 and NC 12 and constructing an interchange between US 158 and NC 12 on the Outer Banks. The other four alternatives selected for detailed study were bridges, known as MCB2/C1, MCB2/C2, MCB4/C1, and MCB4C2. Bridge Corridor C1 would connect with NC 12 at the intersection approximately 2 miles north of the Albacore Street retail area, while bridge corridor C2 would connect with NC 12 approximately 0.5 miles south of this area.

92. The 2010 DEIS briefly considers alternatives including bus transit, ferry service, shifting rental times, and transportation system management alternatives, but then explains they were eliminated from detailed consideration because they would make only "a minimal reduction in congestion and travel time."

93. The 2010 DEIS eliminates the ferry service alternative from consideration based on the finding that it would be costly and ineffective and would require dredging of the Currituck Sound. The DEIS did not consider whether modern, shallow ferries could meet the project purpose.

94. The 2010 DEIS eliminates a bus transit service alternative after concluding that it would result in only "minimal" benefits.

95. This conclusion was based on the assumption that a bus, "under uncongested conditions takes longer to make this trip than an automobile under worst-case congested conditions." The DEIS does not include data supporting this assumption or consider the addition of bus lanes to certain road segments. The DEIS also did not consider a tram.

96. The 2010 DEIS eliminates the option of shifting vacation home rental switch over times after concluding that it only had a "minimal" impact on congestion.

97. The shifting rental times alternative would shift rental change-over-days from a distribution where 70% of turnovers are on Saturdays and 25% on Sundays to an even distribution on Fridays, Saturdays, and Sundays. The 2009 Alternatives Screening Report found that this change would result in a 28% reduction in summer weekend congestion.

98. The Transportation Agencies' conclusion that the shifting rental times alternative would only have a "minimal" impact on congestion was based on averaging the impact the alternative would have across all days and all seasons. This approach obscures the fact that the shifting rental times alternative was extremely effective for

addressing summer weekend congestion—the primary purpose of the project—but had negligible impact during weekdays when congestion is not a concern.

99. The Transportation Agencies eliminated a Transportation System Management ("TSM") alternative based on the finding that it would not provide substantial congestion relief. The Alternatives Screening Report supporting the 2010 DEIS noted that the TSM Alternative would provide a 5% reduction in overall congestion, would reduce summer travel time via the Wright Memorial Bridge by 11%, and would substantially reduce hurricane clearance times.

100. The Transportation Agencies failed to consider how elements of these alternatives could be considered in combination to meet the purpose and need of the project.

101. EPA commented on the DEIS stating that "ER2 should be designated as the environmentally preferred alternative and meets the proposed project's purpose and need by providing the appropriate balance of impacts to the benefits and costs."

102. NOAA and NMFS commented that "ER2 would damage less coastal habitat than any of the alternatives that require the construction of a new bridge. Alternative ER2 uses improvements to address the purpose and need for the project rather than relying upon a new bridge over the Sound. Alternative ER2 would have the least adverse impact to EFH and other NOAA trust resources."

103. NMFS also commented that "a new bridge is likely to increase the rate of development on the mainland and barrier island. NMFS is concerned that this result would further degrade water quality, including water quality in the Currituck Sound." NMFS further commented that over the last 20 years water quality in Currituck Sounds has degrade due to a number of factors, including rapid development of Currituck County beaches, and that "[f]urther degradation of water quality and its associated impacts to SAV should not be accepted."

104. NCDMF commented that "of all the alternatives listed the least environmentally damaging alternative is ER2 and [ER2] is the NCDMF recommended alternative."

105. The Corps also commented, pointing out that while the current DEIS states that "the extent of development in the Outer Banks by 2035 would be the same with or without the bridge[,]" the 1998 DEIS for the same project states that "without the bridge, traffic congestion would cause development on the Outer Banks to taper off at 60% of planned development . . . and in the road-accessible portion of the Currituck Outer Banks, 39% of planned development would occur." The Corps commented asking "why are the two analyses for the same project saying two different things?"

106. In addition, the Corps commented on the conclusion in the DEIS which states that the preferred alternative "reduces cost and environmental impact." The Corps noted that "even with 25 miles of improvements to NC 158 . . . alternative ER2 still costs less and has less environmental impacts than MCB4."

107. The Department of Interior ("DOI") commented expressing skepticism regarding the Transportation Agencies' conclusion that the preferred alternative would not drive development in the non-road-accessible Outer Banks. DOI stated that it "remains concerned that the Mid-Currituck Bridge may increase the residential build out of the roadless area at Carova, thereby stimulating public and political pressure for infrastructure improvements, including the extension of NC 12 northwards."

108. On June 7, 2010 SELC timely submitted comments on the 2010 DEIS on behalf of NCWF and other conservation groups. In these comments, the groups urged the Transportation Agencies to rectify its flawed alternatives analysis; analyze indirect and

cumulative impacts; explain its selection of MCB4 as the Preferred Alternative in light of the alternative's $600 million price-tag; and evaluate the proposed Bridge's impacts on waterfowl and fish habitat.

2012 Final EIS

109. The Transportation Agencies issued a FEIS in January 2012.

110. The FEIS confirms a Preferred Alternative that contains the components of MCB4/C1 with some refinements.

111. The FEIS acknowledges that ER2 meets the project purpose and need established for the project.

112. The FEIS nonetheless rejects ER2 from consideration because, unlike the Toll Road, it could not be financed through state gap funding and toll revenue bonds.

113. The FEIS estimates that the Selected Alternative would cost $502.4 to $594.1 million. The FEIS estimates that ER2 would cost $416.1 to $523.4 million.

114. The FEIS points to a July 2011 Traffic and Revenue Study. The Study estimates that the Bridge would generate approximately $12 million annually in toll revenue in the first year it operated (2015) and up to $37 million annually by 2065. To achieve this level of revenue, tolls would be up to $26 for a one way trip during peak season.

115. The FEIS states that the Bridge "would be a useful asset in reducing the impact of sea level rise on the project area's road system" because "under all sea level rise scenarios considered the entire barrier island would be inundated at the Dare/ Currituck County line, creating a breach in the island and making a Mid-Currituck Bridge the only way off the Currituck County Outer Banks."

116. The FEIS states that because the Toll Bridge would likely be replaced by the year 2100 it "would never experience the highest sea level rise."

117. The conclusions regarding sea level rise in the FEIS are based on an ICF International, Inc. Report issued in 2007 which relies on inundation level projections from EPA studies published in the mid-1990s and the United Nations Intergovernmental Panel on Climate Change's ("IPCC") Third Assessment Report published in 2001. The Transportation Agencies' Other Physical Features Technical Report, issued in 2011, relies on this same data.

118. The FEIS relies on a 2011 Indirect and Cumulative Effects ("ICE") Technical Report prepared by East Carolina University and Parsons Brinckerhoff. The ICE Technical Report concludes that the Toll Bridge would result in "negligible increase in permanent population" and "no reasonably foreseeable change in the demand for homes and businesses" in the Outer Banks.

119. In comments on the ICE Technical Report, a NCDOT employee noted that "[i]t can be argued that the higher percentages of build-out… are the induced changes of the study alternatives." This conclusion was not included in the FEIS or final ICE Technical Report.

120. In its analysis of traffic, however, the FEIS states that "the No-Build Alternative would result in congestion that could act to constrain practical development on the Outer Banks to 70 percent of maximum buildout."

121. The FEIS states that "the presence of the bridge could result in business development in proximity to the bridge's interchange with US 158… this development, however, is desired by Currituck County."

122. The FEIS analysis assumes "full build-out" of commercial and residential development for both the "Build" and "No-Build" scenarios despite the fact that "full build-out" is only expected to occur if the Bridge is constructed. Based on this baseline, the FEIS concludes that construction of the Bridge would result in no induced growth or development on the Outer Banks, but that failure to construct the bridge would inhibit development.

123. A variety of state and federal agencies submitted comments on the FEIS.

124. EPA commented stating that it continued to have concerns about the indirect and cumulative effects of the proposed project, including increased development pressure north of Corolla. EPA stated that it is "more than likely (reasonably foreseeable) that the Mid-Currituck Bridge once completed will encourage the further extension of a paved NC 12 through the undeveloped northern part of island and the Currituck National Wildlife Refuge."

125. NCDMF commented expressing a preference for ER2 because, unlike the proposed Bridge, ER2 would avoid all adverse impacts to SAV—a critical habitat for resident and migrating fish and invertebrates.

126. On March 12, 2012, SELC timely submitted comments on the FEIS on behalf of NCWF and other conservation groups. The conservation groups noted that the Transportation Agencies had not cured the flaws in the DEIS and requested that the Agencies decline to issue a ROD and instead reconsider the wisdom of moving forward with the Toll Bridge. In alternative, the conservation groups requested that the Agencies prepare an SEIS addressing the numerous shortcomings in the FEIS.

127. In their comments on the FEIS, the conservation groups highlighted the practicability and environmental benefits of selecting ER2; stressed the importance of establishing an accurate baseline "No-Build" scenario that did not obscure the impacts of

induced growth; and asked that the Transportation Agencies rectify its flawed ICE analysis to account for induced growth

Internal Reevaluation Process

128. In 2015, after the project had lain dormant for several years due to the loss of earmarked transportation funding, the Transportation Agencies began the internal reevaluation process required by FHWA when an EIS is more than three years old. This process did not provide any opportunity for public scrutiny or comment.

129. Having been shut out from the public process, throughout 2016 SELC submitted several requests to NCDOT and FHWA for public records related to the Toll Bridge.

130. In September 2016, SELC received records that included a half-finished draft of the Transportation Agencies' reevaluation of the FEIS ("Draft Reevaluation").

131. On December 21, 2016, SELC sent the Transportation Agencies a letter regarding the Draft Reevaluation on behalf of No MCB and NCWF. In the letter, the Conservation Groups noted the long history of pushback from environmental resource agencies that have consistently found non-bridge alternatives to be less environmentally damaging. The Conservation Groups addressed the loss of the project earmark and new increased flexibility to fund alternatives. The Conservation Groups discussed NCDOT's new traffic studies that appeared to indicate that traffic in the study area will be substantially less than previously anticipated. The Conservation Groups noted the Transportation Agencies' reliance on an arbitrary 18 hour hurricane evacuation standard to support the project's Purpose and Need; the inadequate consideration of other alternative solutions; and the failure to adequately consider the indirect and cumulative

effects of the Bridge on the environment. In light of these issues, the Conservation Groups requested that the Transportation Agencies prepare a public SEIS.

132. The Conservation Group's letter also asked that the Transportation Agencies consider "Improved ER2" an alternative developed by transportation expert Walter Kulash. Some of the improvements suggested in ER2 include:

a. Reconstructing US 158 between the Wright Memorial Bridge and the Home Depot (1.3 miles total) into a four-lane superstreet.

b. Modifying the US 158/NC 12 interchange to a simple flyover or a continuous flow intersection instead of a full interchange.

c. Converting signalized intersections on NC 12 to one-lane roundabouts to reduce congestion and improve through-flow.

d. Improving pedestrian safety and through-flow by considering overhead pedestrian walkways in Duck.

e. Identifying places to consolidate driveways along NC 12.

f. Employing manned traffic control at key intersections during key holidays and other days when there is a predictable pattern of extreme peak travel.

g. Conducting 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.

h. Developing a traffic advice app for visitors that shows profile of congestion, congestion alerts, estimated travel times, etc.

i. Instituting electronic keys for rentals to eliminate travel to and from rental agency offices and spread out check-in/out times.

j. Implementing policies to stagger check-in and check-out times at vacation rentals.

133. The Transportation Agencies did not provide any response to the Conservation Groups' letter.

134. Instead, the Transportation Agencies continued for several years with their internal review of 2012 FEIS, and in March 2019 concluded that no further public analysis was needed and issued a ROD finalizing selection of the Toll Bridge. On the same day, the Transportation Agencies released their internal Reevaluation Report and Reevaluation Study Report to the public.

135. The ROD includes several significant changes to the design and cost estimates of the Selected Alternative and ER2. The FEIS estimates the ER2 alternative would cost $416.1 to $523.4 million, while the ROD estimates a cost of just $277.9 to $288.1 million. The FEIS estimates the Toll Bridge would cost $502.4 to $594.1 million, but the ROD estimates a cost of $429.1 to $605.4 million.

136. The Reevaluation Study Report released with the ROD indicates that the projected environmental impacts associated with ER2—specifically impervious surfaces, wetlands impacted, and noise sensitive receptors—are significantly lower than previously projected. While the environmental impacts from the proposed Toll Bridge also decreased, these decreases are much less significant, and the wetland clearing figure actually rose from 25.5 acres to 32.9 acres.

137. The ROD and internal Reevaluation documents reveal that the Transportation Agencies prepared new traffic forecasts that differ significantly from

those used in the DEIS and FEIS because, in part, the "project area is experiencing slower growth rates both in terms of development and traffic than was assumed in the previous forecasts."

138. The new traffic forecasts predict significantly lower traffic growth than predicted in the FEIS. For example, by 2035 the FEIS predicted average annual vehicles at the US 158 Barco to Mid-Currituck Bridge as 45,400 if the Toll Bridge was not built. The new forecasts show only 26,100 vehicles. Similarly, summer weekday traffic volume at the US 158 Wright Memorial Bridge under the No-Build/ER2 scenario was forecast as 58,900 vehicles by 2035 in the FEIS, but the more recent forecasts show only 34,400 vehicles. All the updated predictions show significantly less traffic in the future than previously expected, less congestion, less need for the Toll Bridge, and diminished ability for the Toll Bridge to pay for itself.

139. New projections included in the Reevaluation Study Report also show that land use trends in Dare and Currituck County have slowed significantly in recent years and are lower than those included in the FEIS.

140. The Reevaluation Study Report acknowledges that multiple indicators of growth and development have slowed since the FEIS was issued in 2012. For example, the permanent population in Dare and Currituck County recently slowed from compound growth rates of approximately 3 percent per year between 1990 and 2006, to less than 1 percent per year since 2006. Furthermore, Gross Occupancy tax receipts, a key indicator for tourism trends in the Outer Banks, historically increased by 9% annually from 1994 to 2000, but have slowed to increases of 7.2 percent annually from 2001 to 2006, and 3.7% annually since 2006.

141. The Reevaluation Study Report acknowledges that "major new development" has occurred after preparation of the FEIS, including the land swap between Currituck County and USFWS; a new ordinance forbidding limiting beach house bedrooms; the creation of a new waterpark at Powell's point; and new development around the Currituck County airport. Nevertheless, the Reevaluation Study Report concludes that none of these changes affect the ICE conclusions reached in the FEIS.

142. The Reevaluation Study Report also acknowledges that there have been several significant changes related to national and state hurricane clearance policies since the 2012 FEIS. The National Hurricane Center warning timeframe, which was the basis of North Carolina's 18-hour clearance time goal, had been modified to 30 hours.

143. Furthermore, the Reevaluation Study Report demonstrates that new hurricane clearance models now favor ER2. Draft versions of the Reevaluation Study Report explicitly acknowledge this change and state that "ER2 would result in lower clearance time than the Preferred Alternative." The final version of the Reevaluation Study Report is less candid, stating that "either ER2 or the Selected Alternative would substantially improve clearance times."

144. The Reevaluation documents did not discuss recent advances in climate change science; up-to-date sea level projections; recent observed and projected increases in storm surge magnitude; intensifying hurricanes; or marsh migration.

Induced Development

145. The NEPA documents relied upon by the Transportation Agencies present a a confusing picture about the level of growth that can be attributed to construction of the road, road, largely downplaying the idea that the project will have any impact.

146. As noted above, the DEIS and FEIS both conclude that the level of development in the study area will be the same with or without the Bridge. Other documents, however, including the Traffic and Revenue study prepared for the Transportation Agencies suggest that the access occasioned by the Bridge will increase development.

147. The Reevaluation Study Report appears to suggest that the Toll Bridge is expected to have some impact on growth, development, and visitation, as it compares unconstrained growth (with the Toll Bridge in place) with constrained growth (without the Toll Bridge in place). But this information was not presented to the public. Moreover, internal documents show that preparers of the EIS attempted to obscure this new information as much as possible.

148. As noted above, environmental resource agencies repeatedly raised concerns about the impact the Toll Bridge would have on development, particularly in the roadless area north of Corolla, and on the Currituck mainland.

149. Outside of the NEPA process, local officials and groups continue to tout the Toll Bridge as promoting growth and economic development in the Currituck County mainland and Outer Banks.

150. In a December 5, 2014 press release, Peter Bishop, Currituck County's Economic Development Director stated that the Toll Bridge would be a "game changer" and that it would provide "a straight shot to our Outer Banks communities [and] eliminate much of the

apprehension visitors currently have about coming, and spending their vacation dollars, here in Currituck County."

151. In a November 30, 2015 news article, NCDOT spokesman Steve Abbot stated that the agency believed the proposed Toll Bridge would support tourism and create jobs in the Outer Banks.

152. In a May 27, 2016 news article, Mr. Bishop stated that the Toll Bridge would provide economic development opportunities in mainland Currituck County that are "quite significant" and would "enhance the desirability of [the] region as a business location, bringing more products, employment opportunities and additional economic development to Currituck County."

153. In a March 8, 2019 news article, State Representative Bobby Hanig, who represents Currituck County in the N.C. General Assembly, stated that the Toll Bridge would "change what the landscape of Currituck looks like in the not-too-distant future." In the same article, Paul Beaumont, a Currituck commissioner, stated that the Bridge "will transform [the] region."

154. In a March 12, 2019 news article, Bobby White, the Chair of the Currituck County Board of Commissioners stated that the Toll Bridge would "cause a shift in the housing market" on the mainland of Currituck County and "allow for some areas where people who work and support [the Outer Banks] can live closer to where they work."

155. An infographic posted in March 2019 by the Currituck Economic Development group, predicts that "benefits to mainland Currituck County could include a boom in restaurants, retail, and hospitality. The MCB could spur a mix of commercial

and mixed-use development similar to that in Dare County in the area surrounding the Bridge."

156. In a March 29, 2019 news release Coldwell Banker Seaside Realty stated that "[a]fter speaking with several of [its] agents, the consensus is that the largest impact of the Mid-Currituck Bridge will be on the vacation rental market first followed by the real estate market" and that it would encourage more visitors to the Northern Outer Banks.

Funding and Financing

157. The Transportation Agencies have failed to address and disclose how the proposed Toll Bridge will be funded and financed.

158. Despite this uncertainty, funding and financing concerns were used by the Transportation Agencies to eliminate ER2 in the FEIS. While ER2 had a lower cost, the Transportation Agencies concluded that it couldn't be built because it would not generate toll revenue and was not supported by earmarked "gap funding"

159. The 2012 FEIS relies on a July 2011 Traffic and Revenue Study. The Study estimates that the Bridge would generate approximately $12 million annually in toll revenue in the first year it operated (2015) and up to $37 million annually by 2065. The study was based on forecasts of traffic and growth that are now acknowledged to be outdated.

160. The 2011 Traffic and Revenue Study included toll rates of up to $28 for a one-way trip.

161. In 2013, the N.C. General Assembly repealed N.C. GEN. STAT. § 136-178-79, which provided an annual $35 million earmark to support the proposed Toll Bridge for the next thirty years. N.C. SESS. LAWS 183 § 4.9.

162. Also in 2013, the N.C. General Assembly passed the Strategic Transportation Investments ("STI") law, N.C. GEN. STAT. § 136-189, which subjected the Bridge to the state's

new data-driven scoring process and forced it to compete for transportation funding with other projects.

163. For the purposes of STI prioritization, NCDOT rounded down the estimated cost of the Toll Bridge to just $440 million. NCDOT represented, for purposes of prioritization, that the cost to the state would be just $172 million. NCDOT asserted that the remaining cost would be covered by toll revenue.

164. The Toll Bridge scored very poorly in the data driven STI process and did not qualify for "statewide" or "regional" transportation funding support (which accounts for 70% of state funding sources). As a result, only $172 million of funding is allocated to the Bridge, and all of that must come from local Division 1funds. All remaining funds necessary to construct the Toll Bridge must come from private contributions, a local match, or toll revenue.

165. In November of 2017, NCDOT submitted an Infra Grant proposal for the Toll Bridge to the federal government. The proposal stated that the total project cost for the Toll Bridge was $632,823,478.

166. The Transportation Agencies' internal Reevaluation documents and ROD, issued in March 2019, estimate the cost of the Bridge at $439.1 to $605.4 million.

167. Because the 2011 Traffic and Revenue study was out-of-date and based on projections of traffic and growth that have subsequently been determined to be overstated, NCDOT acknowledged that it must prepare a new Traffic and Revenue study to determine how much toll revenue the Bridge could generate.

168. Throughout 2017 and 2018, SELC acting on behalf of the Conservation Groups, repeatedly asked NCDOT if any new traffic and revenue studies had been

performed and to see the documents as they became available. SELC was repeatedly informed that no such studies had been completed.

169. Through public records requests, SELC obtained a draft Plan of Finance for the proposed Toll Bridge. The Plan of Finance was prepared on June 28, 2018 by the PFM Group, and relies on a May 2018 Traffic and Revenue forecast performed by Stantec.

170. The 2018 Traffic and Revenue study was never made available to SELC, the Conservation Groups, or the public.

171. The 2018 Traffic and Revenue study was initially mentioned in a draft of the Reevaluation document, however, an NCDOT representative asked that the reference to the report be removed in the final document.

172. The Plan of Finance anticipates that the Toll Bridge would be financed by toll revenue through 2073. The Plan of Finance anticipates NCDOT would provide $199 million in funding, and that $319 million would be generated through bond financing to be supported by revenue from tolls. Under this scenario, even if sufficient toll revenue could be generated to meet this assessment, there would continue to be a $17 million gap in funding.

173. In order to generate sufficient toll revenue to pay down $319 million in bond financing, the draft financial plan shows that the Toll Bridge must generate significant toll revenue through 2073.

174. After receiving a copy of this draft Plan of Finance through a public records request, the Conservation Groups sent a letter to NCDOT and the North Carolina Local Government Commission (the entity responsible for approving bond financing) noting, among other things, that under all realistic projections of sea level rise (discussed in more detail below), the Toll Bridge project area will look significantly different by 2073. Much of the development

in the area will be underwater or subject to frequent flooding and the Toll Bridge itself may be inaccessible.

175. Under the most likely sea level rise scenario, the base of the Toll Bridge on the mainland would be inundated or extremely vulnerable to flooding by 2050. Sea level rise projections further indicate that US 158 will be inundated by 2050, rendering the proposed Bridge inaccessible from the mainland.

176. Moreover, projections of sea level rise demonstrate that access to the Wright Memorial Bridge from the North Outer Banks is likely to be cut off prior to 2073. Under North Carolina state law, a road may be tolled only when there is a parallel alternative. N.C. GEN. STAT. § 136-89.197. The Transportation Agencies' NEPA documents fail to explain how the proposed Toll Bridge would comply with this mandate in the event that it becomes the only accessible route.

Sea Level Rise

177. The DEIS and FEIS analysis of sea level rise are based on an ICF International, Inc. Report issued in 2007 which relies on data from 2001. The technical supporting documents rely on the same data.

178. In 2010 the North Carolina Department of Environmental Quality's ("DEQ") Coastal Resources Commission's Science Panel issued a Sea Level Rise Assessment Report in North Carolina. The Science Panel's Assessment found that the North Carolina coast would experience one meter (39 inches) of sea level rise by 2100.

179. On March 31, 2015, DEQ's Coastal Resources Commission's Science Panel issued a 2015 Update to its 2010 North Carolina Sea Level Rise Assessment Report. The Update acknowledges that "since our original report, there have been

significant advances in climate science." The Update reassesses sea level rise projections for the North Carolina coast based on the IPCC's 2013 Climate Change Report and the U.S. Global Change Research Program's Third National Climate Assessment, which was published in 2014.

180. In 2017, the U.S. Global Change Research Program, which comprises thirteen Federal Agencies, including NOAA, issued Volume 1 of the Fourth National Climate Assessment, ("Fourth Assessment").

181. The Fourth Assessment concludes that surface air temperature has increased by 1.8 degrees Fahrenheit (1 degree Celsius), making today the warmest period in the history of modern civilization. The Fourth Assessment concludes that human activities, especially emissions of greenhouse gases ("GHGs") are the dominant cause of the observed warming.

182. The Fourth Assessment states that global sea level rise has already increased to the point where 25 Atlantic and Gulf Coast cities are experiencing increased daily tidal flooding.

183. The Fourth Assessment also predicts that global average sea levels are expected to continue to rise by at least several inches in the next fifteen years and by 1 to 4 feet by 2100.

184. The Fourth Assessment states that an 8 foot rise by 2100 "cannot be ruled out" and that sea level rise will be higher than the global average on the East and Gulf Coasts of the United States.

185. NOAA's Technical Report on sea level rise supporting the Fourth Assessment represents the most comprehensive study of sea level rise in the United States to date and provides localized projections for each tide gauge. These projections account for factors such as subsidence and ocean current, which significantly increases the rate of sea level rise along the Outer Banks relative to the global average.

186. In October 2018, the United Nations Intergovernmental Panel on Climate Change ("IPCC") released a landmark report concluding that the impacts of climate change have already begun to take hold and that absent aggressive action global temperatures will increase over 2.7 degrees Fahrenheit (1.5 degrees Celsius) between 2030 and 2052.

187. The Ninth Edition to the United Nations Environmental Emissions Gap Report released in November 2018 concludes that even if all nations meet their current commitments under the Paris Climate Agreement—which is highly unlikely—global warming will likely increase by around 5.4 degrees Fahrenheit (3 degrees Celsius) by 2100.

188. The Gap Report concludes that an increase in temperature of this magnitude would be catastrophic, especially for small islands and coastal areas, which are especially vulnerable to sea level rise and extreme storms.

189. Several assumptions the Transportation Agencies made in the FEIS regarding sea level rise are now significantly out-of-date and invalid.

190. The Reevaluation Study Report does not review or consider the Fourth National Climate Assessment and NOAA's Technical Report on Sea Level Rise.

191. The Reevaluation Study Report does reference the 2016 North Carolina Sea Level Rise Assessment Report, but does not reanalyze the effects of sea level rise on the project area based on the Report.

192. The Reevaluation Study Report states that "[a]ccelerated sea level rise characteristics have not changed since the preparation of the FEIS" in 2012.

193. The Reevaluation Study Report concludes that continued reliance on the outdated sea level rise data included in the 2012 FEIS is appropriate.

194. The Reevaluation Study Report notes that the FEIS considered up to 39.4 inches (1 meter) of sea level rise on the Bridge and 2.4 to 23.2 inches of sea level rise in the project area by the year 2100.

195. The Reevaluation Study Report then concludes that because the 2016 North Carolina Sea Level Rise Assessment Report anticipates only up to 10.6 inches of sea level rise in Duck, North Carolina by 2045, the FEIS conclusions regarding sea level rise in 2100 remain valid.

196. Specifically, the Reevaluation Study Report states that "the highest estimate in [the North Carolina Sea Level Rise Assessment Report] for sea level rise by 2045 was 10.6 inches. If that highest rate of sea level rise continued over 50 years, the sea level rise would be 17.7 inches, below the 23.2 inches and 39.4 inches discussed in the FEIS."

197. The Reevaluation Study Report does not consider more updated and localized data from NOAA's 2017 Technical Report on Sea Level Rise which predicts 11.4 to 42.1 inches of sea level rise in Duck by 2050 and 20.4 to 137 inches of sea level rise in Duck by 2100.

198. The latest research and trends indicate that NOAA's Intermediate-High sea level rise scenario, which predicts 28.3 inches of sea level rise by 2050 and 81.1 inches of sea level rise by 2100 in the Outer Banks, is the most likely to occur. Relative to the Intermediate-High scenario, the FEIS underestimates sea level rise by 2100 in the Outer Banks by almost 400%, or 52.8 inches.

199. Data from NOAA's 2017 Technical Report on Sea Level Rise indicates that the proposed Toll Bridge study area would likely experience significantly more sea level rise by 2050 than the FEIS anticipated by 2100 under the worst case scenario.

200. The Transportation Agencies' Reevaluation Study Report includes a brief discussion of how new developments impact the ICE analysis in the FEIS, but fails to account for the impacts of accelerating sea level rise upon development patterns in the Outer Banks. For example, in the ICE study, the Transportation Agencies assume that all zones south of the 13th Avenue/Sea Oats Trail intersection with NC 12 would be developed to maximum buildout by 2040. The maximum buildout potential has not been altered since the original 2012 analysis despite new sea level data indicating that a substantial amount of the land south of the 13th Avenue/Sea Oats Trail intersection will be flooded or extremely prone to flooding by 2040.

201. Recent studies show that coastal marshes, which provide numerous ecosystem services, including flood and storm surge protection, fish nursery habitat, water purification, erosion control and carbon storage, and recreational opportunities can "migrate" inland as sea level rise if there are no man-made barriers to prevent them.

202. Development along the shoreline, including roads and other impervious surfaces cuts off the marsh's evacuation route and over time can result in the loss of the marshland and its benefits.

203. The proposed Toll Bridge and the induced development it would trigger, including in the roadless area North of Corolla, and on the Currituck mainland would increase impervious surfaces along the coast and limit the space marshlands can migrate into, further degrading this important ecosystem and the many services is provides.

Hurricanes, Storm Surge, and Flooding

204. The Transportation Agencies characterize the proposed Toll Bridge as necessary to reduce hurricane clearance times.

205. Storm surge, the water that is pushed to shore by a hurricane, is the most dangerous part of a hurricane for coastal communities. Even a few inches of water on a road are enough to float a car, so even slightly flooded or washed out roads are unsafe.

206. The Transportation Agencies considered the impacts storm surge would have on the proposed Toll Bridge in the 2011 Other Physical Features Technical Report. For this analysis, the Agencies relied on historical storm surge data from 2000.

207. The FEIS and Other Physical Features Technical Report acknowledge that "portions of the Mid-Currituck Bridge interchange area of US 158 would be at risk during a storm surge" and states that the Preferred Alternative would bridge areas likely to be inundated along the bridge corridor.

208. The Other Physical Features Technical Report models storm surge risk by identifying "at risk" areas "that would be temporarily flooded as a result of the storm surge under a given sea level rise scenario." "At risk" areas are defined as "the areas that fall between the adjusted mean higher high water and NOAA's highest observed water level (in 2000) plus the additional sea level rise projected for the particular scenario."

209. The Report determines that the water elevations associated with the highest amount of sea level rise and storm surge was 23.2 inches (59 centimeters).

210. The Other Physical Features Technical Report states that "potential changes in storm intensity and resultant surge because of climate change were not considered."

211. Since 2011, scientific consensus has emerged that storm surges will worsen as storms continue to intensify due to climate change.

212. Recent observed storm surges substantially deviate from the historical storm surge data the Transportation Agencies rely upon. In September 2018, Hurricane Florence, a Category One Hurricane, caused Duck to experience a 1.8 foot storm surge as the eye of the storm made landfall 180 miles away. When Hurricane Michael passed through North Carolina as a tropical storm in October 2018, Duck experience a two foot storm surge.

213. Neither the ROD nor the Reevaluation or Reevaluation Study Report re-evaluate storm surge impacts upon the proposed Bridge in light of updated storm surge data and observed increases in storm surge during recent years.

214. Studies show that Currituck County will face chronic flooding on 12% of its usable land by 2030 and 75% of its usable land by 2100.

215. None of the Agencies' NEPA documents address how updated projections regarding storm surge and flooding impact the development assumptions in the ICE Technical Report and the FEIS.

Request for a Supplemental EIS

216. Following the issuance of the ROD, Plaintiffs submitted a letter on March 18, 2019 asking NCDOT to prepare an SEIS for the project and allow for public scrutiny and input prior to moving forward with a ROD selecting the Toll Bridge.

217. The Conservation Groups' letter addressed the significant new information and changed circumstances that are included in the internal Reevaluation and not presented to the public for public review and scrutiny.

218. The Conservation Groups highlighted the significant changes to traffic forecasts which call into question the need for and viability of a Toll Bridge. The Conservation Groups noted the significantly lower cost of alternative ER2, and the loss of earmark funding for the Toll Bridge. The Conservation Groups noted the significant changes in traffic forecasts, and the differences between alternatives once the growth-constraining impact of a non-Bridge alternative is taken into account.

219. The Conservation Groups also noted additional significant developments and new circumstances that have arisen since the 2012 FEIS that the Transportation Agencies altogether failed to consider in the Reevaluation. Chief among these new circumstances are recent dire climate change predictions which anticipate accelerating sea level rise and intensifying severe weather events which would impact the financial viability and effectiveness of the proposed Toll Bridge.

220. The Transportation Agencies have not responded to any of the concerns raised in the Conservation Groups' March 18, 2019 letter, and have not prepared an SEIS.

FIRST CLAIM FOR RELIEF

The Transportation Agencies violated NEPA by failing to prepare a Supplemental EIS in light of new information and changed circumstances

221. The Conservation Groups incorporate by reference all preceding paragraphs.

222. The Transportation Agencies' obligation to evaluate the environmental impacts of a proposed action using high-quality and up-to-date information continues through the NEPA review process, including after an EIS has been finalized.

223. The Agencies must prepare an SEIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns" or if "[t]here are significant new

circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1).

224. In determining whether to prepare an SEIS, the agency must take a "hard look at the proffered new information." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

225. When new information creates a "seriously different picture of the project from what was previously envisioned" an SEIS is required to allow the public and other government agencies time to react and comment. *Id.*

226. The Transportation Agencies failed to prepare an SEIS despite the presence of significant new circumstances and information relevant to environmental concerns since the 2012 FEIS. The Transportation Agencies failed to consider significant changed circumstances including:

a. New traffic forecasts that show a significantly diminished need for the project, and increased viability for ER2, or improved ER2.
b. New traffic forecasts that show the Toll Bridge has significantly less capacity to generate toll revenue.
c. New cost estimates which show that the difference in cost between the Selected Alternative and the less costly ER2 has further increased.
d. Legislative changes that stripped the Toll Bridge of its earmarked gap funding.
e. A new viable alternative, Improved ER-2, that was presented to the Transportation Agencies by the Conservation Groups and a transportation expert.
f. New statements by local experts noting that the Toll Bridge will result in increased growth and development in the project area.

g. New traffic forecasts based on constrained and unconstrained growth that show that ER2 or a non-build alternative will equal the Toll Bridge in terms of congestion relief.

h. New hurricane evacuation modeling that indicates that ER2 outperforms the Selected Alternative.

i. A new hurricane clearance time mandated by the National Hurricane Center.

j. New data about sea level rise and storm surge impacts on the project area.

227. Failure to evaluate significant new information in an SEIS violated NEPA and its implementing regulations, and was arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2); 42 U.S.C. § 4332.

SECOND CLAIM FOR RELIEF

The Transportation Agencies violated NEPA by relying on an arbitrary and capricious analysis of alternatives.

228. The Conservation Groups incorporate by reference all preceding paragraphs.

229. NEPA requires than an EIS include a "detailed statement" regarding "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii).

230. In preparing this statement, an agency must rigorously explore and objectively evaluate all reasonable alternatives that could achieve the underlying project purpose. 40 C.F.R. § 1502.14(a).

231. This alternatives analysis is "the heart of the environmental impact statement," and should "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public." *Id.* § 1502.14. Only those alternatives that are deemed to be unreasonable can be eliminated from study. *Id.*

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

233. The Transportation Agencies failed to evaluate a full range of reasonable alternatives to the proposed Mid-Currituck Bridge including more effective, less environmentally damaging alternatives. Specifically, the Transportation Agencies failed to consider:

a. Improved ER2, designed by a transportation expert and presented to the Transportation Agencies by the Conservation Groups.

b. Shallow draft ferry service.

c. Bus Transit Service.

d. Shifting check out times for vacation rentals.

e. Transportation System Management solutions.

f. A combination of these alternatives.

234. The Transportation Agencies' analysis of alternatives violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2); 42 U.S.C. § 4332.

THIRD CLAIM FOR RELIEF

The Transportation Agencies violated NEPA by failing to demonstrate how the Bridge will be funded despite relying on funding to reject less damaging alternatives.

235. The Conservation Groups incorporate by reference all preceding paragraphs.

236. NEPA requires than at EIS include a "detailed statement" regarding "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii).

237. In preparing this statement, an agency must rigorously explore and objectively evaluate all reasonable alternatives that could achieve the underlying project purpose. 40 C.F.R. § 1502.14(a).

238. This alternatives analysis is "the heart of the environmental impact statement," and should "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.* § 1502.14. This includes presenting a fair and realistic cost comparison of all alternatives.

239. The Transportation Agencies failed to fairly evaluate the relative costs of alternatives in accordance with NEPA.

a. The Transportation Agencies arbitrarily eliminated ER2, which met the purpose and need of the project, because ER2, unlike the Selected Alternative could not be financed through state gap funding and toll revenue bonds.

b. The Transportation Agencies failed to account for the fact that the Toll Bridge is eligible for only $172 million in state funding and lacks any plan to cover the remaining cost and have failed to prepare up-to-date Traffic and Revenue Study to demonstrate that toll Revenue will be sufficient to make the Toll Bridge financially viable.

c. The Transportation Agencies failed to consider and disclose how sea level rise will affect the ability of the Toll Bridge to generate sufficient toll revenue to make it financially viable.

d. The Transportation Agencies failed to score ER2 under the state's project prioritization scheme, or to disclose any financial plan for the alternative.

240. The Transportation Agencies' failure to consistently consider cost in evaluating alternatives violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2); 42 U.S.C. § 4332.

FOURTH CLAIM FOR RELIEF

The Transportation Agencies obscured the relative merit of ER2 from the public and from environmental resource agencies.

241. The Conservation Groups incorporate by reference all preceding paragraphs.

242. The purpose of NEPA documents is to "serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.12(g). To this end, NEPA requires that information be made available to "public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

243. NEPA requires that every EIS must be prepared with objective good faith and professional integrity. 40 C.F.R. § 1502.24. "NEPA procedures emphasize clarity and transparency of process over particular substantive outcomes." *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012).

244. The Transportation Agencies violated NEPA by failing to present a true, accurate, and transparent picture of the ER2 alternative to the public and to resource agencies including by:

a. Purposefully obscuring the fact that ER2 would better meet the stated purpose of improving hurricane evacuation times.

b. Purposefully obscuring the fact that when the growth constraining impact of ER2 is considered it equals the Toll Bridge in terms of congestion relief.

c. Failing to "score" ER2 in NCDOT's data driven scoring process and thus failing to present an assessment of the financial viability of ER2.

d. Failing to respond to public requests for information about the traffic and revenue studies performed for the Toll Bridge, and deliberately eliminating any reference of such studies from public documents, and thus failing to be transparent about the financial viability of the Toll Bridge and relative merit of ER2.

245. The Transportation Agencies' failure to be transparent about the relative merits of ER2 and the Toll Bridge violate NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2); 42 U.S.C. § 4332.

FIFTH CLAIM FOR RELIEF

The Transportation Agencies violated NEPA by relying on an arbitrary and capricious analysis of alternatives that failed to account for the growth inducing impact of the Toll Bridge.

246. The Conservation Groups incorporate by reference all preceding paragraphs.

247. NEPA requires than an EIS include a "detailed statement" regarding "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii).

248. In preparing this statement, an agency must rigorously explore and objectively evaluate all reasonable alternatives that could achieve the underlying project purpose. 40 C.F.R. § 1502.14(a).

249. This alternatives analysis is "the heart of the environmental impact statement," and should "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among

options by the decisionmaker and the public." *Id.* § 1502.14. Only those alternatives that are deemed to be unreasonable can be eliminated from study. *Id.*

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

251. The Transportation Agencies' alternatives analysis failed to comply with NEPA because it failed to provide a rational basis to compare the alternatives. Specifically:

a. The Transportation Agencies assumed in their alternatives analysis that the Toll Bridge would have no impact on induced development. As such, the traffic projections used by the Transportation Agencies to compare alternatives were arbitrary and capricious.

b. The Transportation Agencies assumed in their alternatives analysis that the Toll Bridge would have no impact on induced travel. As such, the traffic projections used by the Transportation Agencies to compare alternatives were arbitrary and capricious

c. The Transportation Agencies assumed in their alternatives analysis that the Bridge would have no impact on induced development. As such, the projections of land use and environmental impact used by the Transportation Agencies to compare alternatives were arbitrary and capricious.

d. The Transportation Agencies failed to consider how induced growth would impact the proposed project's ability to meet the hurricane clearance purpose.

252. The Transportation Agencies' analysis of alternatives violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2); 42 U.S.C. § 4332.

SIXTH CLAIM FOR RELIEF

The Transportation Agencies violated NEPA by relying on an arbitrary and capricious analysis of indirect and cumulative impacts.

253. The Conservation Groups incorporate by reference all preceding paragraphs.

254. NEPA and its regulations require that every EIS must fully and fairly discuss the adverse environmental impacts of the proposed action, including a proposed project's indirect impacts. 42 U.S.C. § 4332(2)(C),(E); 40 C.F.R. § 1502.16(b).

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

256. The FEIS fails to adequately asses and disclose the indirect impacts of the Toll Bridge, including all the induced development and associated environmental impacts that are likely consequences of constructing the new toll bridge. These failures include:

a. The Transportation Agencies based their analysis of indirect impacts on a flawed ICE Report that unreasonably concluded the Toll Bridge would result in no induced growth or development on the Outer Banks.

b. The Transportation Agencies unreasonably concluded that there would be no increase in beach driving, dune impacts, or stormwater run-off due to the Toll

Bridge based on the flawed assumption that the Toll Bridge would result in no induced growth in the Outer Banks.

c. The Transportation Agencies failed to reconcile their conclusion that the Toll Bridge will have no impact on levels of growth with numerous contradictory public statements of state, regional, and local planners, and with statements in the Agencies' own ICE Report indicating that the Toll Bridge would result in substantial development and increased day visitors in the project area.

d. The Transportation Agencies failed to consider the impact of the Toll Bridge on development North of Corolla in the "off road" section.

e. The Transportation Agencies failed to consider the impact of the Toll Bridge on development in mainland Currituck County.

f. The Transportation Agencies failed to consider how induced development would impact marsh migration and the ability for the project area to adapt to sea level rise and increased flooding.

257. The Transportation Agencies' analysis of indirect and cumulative impacts violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2); 42 U.S.C. § 4332.

SEVENTH CLAIM FOR RELIEF

The Transportation Agencies violated NEPA by relying on a deficient analysis of direct impacts to the natural environment.

258. The Conservation Groups incorporate by reference all preceding paragraphs.

259. NEPA and its regulations require that every EIS must fully and fairly discuss the adverse environmental impacts of the proposed action, including a proposed project's direct impacts. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.16(a)

260. NEPA regulations define direct effects as those effects that "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). The Transportation Agencies failed to adequately assess and disclose the direct effects of the proposed Mid-Currituck Bridge in the FEIS. These failures include:

a. The Transportation Agencies failed to include sufficient analysis of the Toll Bridge's impacts on SAV and designated fisheries in the Currituck Sound.

b. The Transportation Agencies failed to include sufficient analysis of the impact runoff from the Toll Bridge will have on water quality and the waterfowl, fish, and other species in the Currituck Sound.

c. The Transportation Agencies failed to include sufficient analysis of the Toll Bridge's adverse impacts on waterfowl in the Currituck Sound.

d. The Transportation Agencies failed to include sufficient analysis of the Toll Bridge's impact on the Currituck National Wildlife Refuge, Natural Heritage Areas, and other environmentally significant areas.

261. The Transportation Agencies' analysis of direct impacts violates NEPA and its implementing regulations and is arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2); 42 U.S.C. § 4332.

PRAYER FOR RELIEF

WHEREFORE, the Conservation Groups respectfully request that this Court:

A. Issue a declaratory judgment stating that the Defendants have violated the Administrative Procedure Act and the National Environmental Policy Act in the respects set forth above;

B. Order that the Record of Decision dated March 6, 2019 be vacated and set aside;

C. Grant appropriate preliminary and permanent injunctive relief to ensure that Defendants comply with NEPA and the ESA, and specifically to ensure that Defendants take no further actions towards proceeding with the challenged Mid-Currituck Bridge until they have complied with NEPA;

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

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

This the 23rd day of April, 2019.

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