No. 11-2210

In the

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA WILDLIFE FEDERATION,
CLEAN AIR CAROLINA, and YADKIN RIVERKEEPER,
Plaintiffs-Appellants,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; EUGENE CONTI, SECRETARY, NCDOT; FEDERAL HIGHWAY ADMINISTRATION; and JOHN F. SULLIVAN, DIVISION ADMINISTRATOR, FHWA,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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BRIEF OF PLAINTIFFS-APPELLANTS NORTH CAROLINA WILDLIFE FEDERATION, CLEAN AIR CAROLINA, and YADKIN RIVERKEEPER

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December 19, 2011

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 11-2210 Caption: NC Wildlife Federation, et al. v. NC Dept of Transportation, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Clean Air Carolina (name of party/amicus) who is appellant (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on Nov. 11, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Slusser, Scott Thomas
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Raleigh, NC 27699-9001

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No. 11-2210 Caption: NC Wildlife Federation, et al. v. NC Dept of Transportation, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

NC Wildlife Federation (name of party/amicus) who is appellant (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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No. 11-2210 Caption: NC Wildlife Federation, et al. v. NC Dept of Transportation, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Yadkin Riverkeeper (name of party/amicus) who is appellant (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

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JURISDICTIONAL STATEMENT

The plaintiffs, the North Carolina Wildlife Federation, Clean Air Carolina, and the Yadkin Riverkeeper (collectively, the "Conservation Groups"), filed suit in the United States District Court for the Eastern District of North Carolina under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70f, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, to challenge the actions of the defendants, the North Carolina Department of Transportation ("NCDOT") and the Federal Highway Administration ("FHWA"), in preparing the Environmental Impact Statement ("EIS") and issuing the Record of Decision ("ROD") for the proposed Monroe Connector/Bypass, a new-location toll highway (the "Toll Highway") near Charlotte.

On October 24, 2011, the District Court entered its order denying the plaintiffs' and granting the defendants' summary judgment motion. (J.A. 121). On October 31, 2011, the Conservation Groups filed their notice of appeal with the District Court. This is an appeal from a final judgment that disposes of all parties' claims. This Court has jurisdiction of this appeal. 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Was the defendants' NEPA review arbitrary and capricious by failing to analyze the environmental impacts of the proposed Toll Highway?

   (a) Did the defendants violate NEPA by creating a "No Toll Highway" baseline that assumed the existence of the Toll Highway and using that baseline to determine the growth-inducing impacts of the proposed Toll Highway?

   (b) Did the defendants violate NEPA by failing to account for the causes of future urbanization in the absence of the proposed Toll Highway?

   (c) Did the defendants violate NEPA by failing to explain their methodology and failing to use accurate inputs?

   (d) Did the defendants violate NEPA by failing to study the indirect impacts of multiple alternatives, including highway upgrades?

2. Did the defendants' analysis of alternatives to the proposed Toll Highway violate NEPA?

   (a) Did the defendants lack a reasonable basis to compare alternatives and violate NEPA by comparing "Build the Road" to "Build the Road"?

   (b) Did the defendants fail to consider a reasonable range of alternatives to the proposed Toll Highway?

3. Did the defendants violate NEPA by providing false and misleading information to the public, the Conservation Groups, and agencies during the administrative process?

4. Did the District Court err in refusing to allow the Record to be supplemented with further evidence of the defendants' bad faith?

STATEMENT OF THE CASE

On November 2, 2010, the North Carolina Conservation Groups brought suit under NEPA and the APA because the defendants had not analyzed or disclosed the environmental impacts of and alternatives to the Toll Highway. After briefing, the District Court denied the Conservation Groups' and granted the defendants' summary judgment motion.

STATEMENT OF FACTS

NEPA establishes landmark procedural safeguards that require an agency to take a "hard look" at the environmental impacts of its proposed actions and a full range of alternatives. Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174, 184 (4th Cir. 2005). The NEPA process also ensures that the public and other agencies are accurately informed about the agency's decision making, so that they may comment, provide input, and understand the basis for the final agency decision. Dep't of Transp. v. Public Citizen, 541 U.S. 752, 768-69 (2004). When a court reviews an agency's NEPA process, it "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), and ensures that the agency "has examined the relevant data and provided an explanation of its decision." Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009).

Under NEPA, the Environmental Impact Statement ("EIS") describes the decision making process, analyzes the effects of the proposed action, and compares a range of reasonable alternatives. The Record of Decision ("ROD") is thereafter required to disclose to the public and other agencies the basis for the decision to confirm the selection of the preferred alternative identified in the EIS and to address forthrightly public and agency comments and concerns.

The history of this Toll Highway is one of the defendants' consistent failure to take that hard look and to consider a reasonable range of alternatives. Instead, the defendants used the wrong data yielding misleading analysis – they have compared "Building the Toll Road" to "Building the Toll Road" – and have illogically concluded that building this expressway adjoining one of the nation's fastest growing metropolitan areas will have virtually no impact on growth.

This proposed controlled-access toll highway would run through Mecklenburg and Union Counties on Charlotte's east side. (J.A. 4864). A map in the Appendix illustrates the proposal. (J.A. 111). The Toll Highway would stretch almost twenty miles east to the metro area's rural fringe, from U.S. 74 near I-485 in Mecklenburg County to U.S. 74 between the towns of Wingate and Marshville in Union County. Id. Along the Toll Highway will be nine interchanges, one every two to three miles, through a suburban-to-rural landscape. (J.A. 4869, 3757).

The Toll Highway would result in 95 residential and 47 business relocations and the displacement of 499 agricultural acres, 450 acres of upland forest, 21,809 linear feet of jurisdictional streams, and 8.1 acres of jurisdictional wetlands. (J.A. 4868-69). At the time of the Final EIS ("FEIS"), it was estimated to cost more than $800 million; toll revenues will cover less than half of this cost. (J.A. 4856). North Carolina taxpayers will foot the remaining bill for the next forty years. (J.A. 4850, 4856).

NEPA False Starts

The NEPA process began with two failed starts. In the early 1990s, NCDOT began purchasing right of way for the Monroe Bypass, but that project came to a halt when the U.S. Fish and Wildlife Service ("USFWS") objected to the impacts of increased development caused by the Bypass on water quality and on an endangered species (the Carolina heelsplitter mussel). As a result, NCDOT could not obtain the required permit. (J.A. 4865, 1837).

In 1999, the defendants began the environmental review for the Monroe Connector. In 2003 that process concluded that the Connector in combination with the Bypass would lead to "substantial" new growth, including thousands of households, hundreds of acres of development, and associated impacts to water quality. (J.A. 3652, 700, 705). After a number of comments from agencies and organizations critical of the analysis of "indirect and cumulative effects" (or

"ICE"), the NEPA process was suspended and a Draft Environmental Impact Statement ("DEIS") was rescinded. (J.A. 1837; 4865; 1877-81; 1916).

The nature of this project and its NEPA process was significantly changed when in February 2005 the recently-created North Carolina Turnpike Authority ("NCTA" or the "Turnpike Authority") (which subsequently became a part of NCDOT) adopted the combined Monroe Connector/Bypass project as a candidate toll expressway. (J.A. 4866). The Turnpike Authority had been created in 2002 with the single purpose of pursuing up to nine toll highway projects at specified locations. N.C. GEN. STAT. § 136-89.

Like the defendants' NEPA process during the prior decade, the Turnpike Authority's subsequent NEPA process also drew public and agency objections and was just as problematic. This time, however, the new Turnpike Authority at each turn pushed aside the concerns of agencies and the public, conducted an inadequate NEPA process narrowly focused on its sole goal of a new location Toll Highway.

Alternatives

U.S. 74 is like many other North Carolina metro area highways. It has numerous traffic lights, is lined with strip malls, lacks turn lanes, and includes truck traffic, all contributing to congestion. Many well-established solutions were suggested for improving the U.S. 74 corridor during the NEPA process. Various strategies include consolidating access points and coordinating the remaining

traffic lights; closing median breaks to eliminate left turns; adding turn lanes; connecting secondary streets to take traffic off U.S. 74 for local trips; local transit improvements; and moving cargo traffic from trucks on U.S. 74 to rail on the line that parallels it.

Instead of analyzing alternatives like these, the defendants recycled and updated the analysis that had been prepared for the earlier versions of the now-combined projects. (J.A. 1851; 1861). Within less than three months of starting the NEPA process, they dismissed all alternatives to a new toll highway, including the economical options set out above or various combinations of these – without any meaningful analysis of their ability to address transportation needs. (J.A. 1936; 2981-85).

Indeed, in its DEIS the Turnpike Authority did not even mention a 2007 corridor study commissioned by NCDOT itself in response to congestion on the U.S. 74 corridor. (J.A. 1942, 2981-85). This study ("U.S. 74 Study"), performed by NCDOT's own consultant, Stantec, concluded that *just $13.3 million* in short and long-term improvements – such as conversion to a "superstreet",[1] closed-loop traffic signal systems,[2] and added turn lanes – could create an acceptable level of

[1] A "superstreet" incorporates "intersections that do not allow left turns from side streets, but require vehicles to turn right and then make a u-turn at an adjacent median opening." (J.A. 1979-80)

[2] Closed loop traffic signal systems "eliminate split-side street operation to allow side street movements to proceed under concurrent green indications." (J.A. 1950).

service by 2015 along the entire U.S. 74 corridor in Union County, with the exception of one intersection. (J.A. 1949-51). These improvements, even if expanded upon, would require a tiny fraction of the Toll Highway's cost and would dramatically reduce or avoid the new expressway's many environmental harms and human dislocations. By ignoring this common sense solution, the DEIS did not include actions to reduce existing congestion on U.S. 74, and no such improvements have been scheduled.

In reaching this result, the defendants fatally distorted the NEPA process by greatly exaggerating the future congestion on U.S. 74 in the event the Toll Highway was *not* built and making the U.S. 74 upgrade alternatives seem extremely undesirable. (J.A. 2965-66, 3009, 3016). The defendants' traffic forecasts for the "Build the Toll Road" and the "No-Build" scenarios were all based on a single set of land use inputs that assumed the Monroe Connector/Bypass *would be built*. (J.A. 4066-68). As a result, both forecasts included the additional traffic that would result from the Toll Highway, with the "No-Build" forecasts therefore predicting future traffic volumes generated by land use patterns and driving attributable to *both* U.S. 74 and the Toll Highway being squeezed onto U.S. 74 alone.

Having rejected all alternatives to a new-location toll highway based on this cursory and flawed analysis, the defendants' DEIS presented a draft list of 16

alternatives for detailed review. (J.A. 3010). In fact, they were 16 different combinations of segments along the same corridor, offering only two slightly different routes for the desired Toll Highway. (J.A. 3040). Each included nine interchanges across almost twenty miles of suburban-to-rural countryside, inviting rapid development. Id. Despite the concerns of resource agencies, with the exception of one exit, the environmental impact of their locations, including development-inducing impacts, was not specifically studied, and the DEIS did not consider alternatives with fewer exits. (J.A. 2014).

2009 Qualitative Impacts Study

Next, the defendants were required to analyze the direct, indirect, and cumulative environmental impacts of the Toll Highway and alternatives. Indirect effects include land development patterns, population density, and growth (J.A. 3196), and the resulting increase in impervious surfaces, water quality impacts, air quality impacts from more driving, and wildlife habitat fragmentation. 40 C.F.R. § 1508.8. Cumulative effects result from the incremental impacts when added to other past, present, and reasonably foreseeable actions in the project area, such as future road projects. Id.

The defendants' initial look at indirect and cumulative effects ("ICE") was a 2009 "Qualitative" ICE study ("2009 Study") based on interviews with local planners. (J.A. 3195, 4360). The defendants asked local planners whether the Toll

Highway would induce growth in their areas. Not surprisingly, many planners stated that the Toll Highway would indeed induce development. This sentiment was shared by planners from outlying locations such as Marshville (J.A. 4472-73), Wingate (J.A. 4478) and Unionville (J.A. 4482) and also planners closer to Charlotte such as those in Indian Trail (J.A. 4466) and Stallings (J.A. 4496-97).

The 2009 Study reached the same common sense conclusion as the defendants reached in 2003, that a new Toll Highway would likely result in more residential and commercial development in the central and eastern portions of the study area, and in Union County in general, due to the reduced travel time to Charlotte. (J.A. 4369). The shorter travel time, along with inexpensive land and water and sewer service, would make the area a prime target for residential development. (J.A. 4416-18). Improved access to Charlotte and I-485 could encourage new industrial development. (J.A. 4418). This accelerated growth would result in impacts to farmland, water resources, and terrestrial habitat. Id.

Thereafter on March 31, 2009, the defendants published the DEIS. (J.A. 2890). The Conservation Groups and federal and state agencies – including USFWS, the Environmental Protection Agency ("EPA"), the North Carolina Division of Water Quality ("DWQ"), and the North Carolina Wildlife Resources Commission ("NCWRC") – submitted extensive comments, objecting to the failure to examine a reasonable range of alternatives, including NCDOT's own

U.S. 74 Study; the greatly inflated U.S. 74 traffic forecasts for the "No-Build" scenarios; and the absence of an in-depth quantitative study of indirect and cumulative effects. (J.A. 3917-99). For example, EPA stated that the DEIS failed to explore a reasonable range of alternatives, including the combinations of U.S. 74 highway improvements, traffic management initiatives, and mass transit. (J.A. 3956).

The Final Environmental Impact Statement

In spite of these comments, in May 2010 the defendants published a FEIS which reconfirmed their selection of the Toll Highway, referred to as Detailed Study Alternative "D" ("DSA D"). The defendants were obligated to address comments on the DEIS, but the defendants responded only briefly by dismissing each comment and only changed some of the data presented in the FEIS without any new analysis. (J.A. 3911-4098).

In response to the Conservation Groups' comments, the defendants had to concede that the traffic volumes for the "No-Build" scenario and U.S. 74 upgrades were vastly overstated. In some cases, the forecasts were at least 100% higher than if the Toll Highway had not been included. (J.A. 3657). The defendants created limited new traffic forecasts for the "No-Build" scenario (J.A. 3660), but the underlying error which caused the flawed forecasts was never disclosed, and the conclusions were not revisited. Id.

More important, the defendants failed to perform any analysis with the new forecasts. (J.A. 3660-78). The defendants did not use the new forecasts to reconsider the early dismissal of project alternatives such as upgrades to U.S. 74, but rather confined the FEIS revision to a simple switch of figures in a table, buried in an appendix report entitled "DEIS errata." (J.A. 3904). The defendants continued to rely on the outdated inflated figures to justify their rejection of alternatives to a new location toll highway and did not incorporate data from the errata table into their analysis. (J.A. 4055-60).

After the Conservation Groups brought it to their attention, for the first time the defendants in the FEIS acknowledged NCDOT's own U.S. 74 Study. They mentioned it only briefly by offering reasons to eliminate the traffic management strategies because NCDOT's study – which had the original purpose of looking only at short term solutions – had focused on improving traffic up to 2015. The defendants did not analyze how these and similar effective strategies could be used for a longer term. (J.A. 3645, 3866-67).

To make matters worse, the defendants used the discredited inflated traffic forecasts which assumed the Toll Highway in the "No-Build" alternative. Thereby the defendants ignored their own "errata" table and incorrectly concluded that because traffic volumes along U.S. 74 would double in the next twenty years, "the amount of traffic projected . . . would overwhelm the effectiveness of [the traffic

management] concept and congestion would continue to be present along U.S. 74." (J.A. 3867). The NCDOT corridor study was summarily dismissed as "infeasible." Id.

2010 Quantitative Impacts Study

In response to comments from several agencies (including EPA, USFWS, NCDENR and NCWRC), the defendants in 2010 completed a quantitative study of the indirect and cumulative effects ("2010 Study"). In contrast to the 2009 Qualitative Study, the 2010 Study was designed to examine data and models to quantify the growth-inducing impacts of the Toll Highway. (J.A. 4545-46). This study, completed in 2010 shortly before the FEIS was published, reached the improbable conclusion that construction of the twenty mile long Toll Highway with nine interchanges on the suburban-to-rural fringe of Charlotte would have *less than a one percent impact*, in total, on growth and development in the study area and therefore almost no indirect and cumulative impacts to water quality, air quality, or other natural resources. (J.A. 4533).

This result, which contradicted the 2009 Qualitative Study and the defendants' 2003 analysis, was surprising – to say the least. The 2010 Study concluded that building a new freeway through rural and suburban areas, on the outskirts of one of the Southeast's largest and fastest growing metropolitan areas, would result in virtually no additional growth and development. This incredible

result, which runs counter to all earlier studies, predictions of planners, and concerns of a host of resource agencies, was obtained ostensibly by comparing a future "No-Build" baseline scenario, in which the Toll Highway was not constructed, with a "Build" scenario in which the Toll Highway was constructed.

However, much like with the flawed traffic forecasts, an erroneous fundamental assumption in the underlying data meant that the defendants actually compared the impacts of "Building the Highway" with "Building the Highway." The defendants used two separate processes for creating traffic forecasts and for analyzing indirect and cumulative impacts in the quantitative analysis. Both, in their own ways, resulted in "No-Build" scenarios which assumed construction of the Monroe Connector/Bypass.

Metrolina Regional Travel Demand Model

To create the 2010 Quantitative study, the defendants used data from the regional travel demand model produced by the local Metropolitan Planning Organization ("MPO"), the Mecklenburg-Union Metropolitan Planning Organization ("MUMPO"). (J.A. 4554-55). This model, the Metrolina Regional Travel Demand Model ("MRM"), includes projections of socioeconomic growth that were, as detailed below, based on an underlying assumption that *the Monroe Connector/Bypass would be built*. Thus, the Toll Highway was embedded in the MRM data before the defendants began their analyses.

As a basis for the projections, MUMPO used both a "top-down" and a "bottom-up" process. *Both assumed construction of the Monroe Connector/Bypass*. The first "top-down" stage assumes that a project like the Monroe Connector/Bypass will be constructed because it is based on the premise that accessibility and mobility will be maintained at constant historical levels. (J.A. 1519, 1535, 1554-55). By treating distance as a proxy for travel time, the methodology assumed that in the future there will be no increases in delay on roadways and that the region's transportation network, including new highway capacity such as the Toll Highway, will continue to build out to enable future growth and development always to travel the same distances at the same speeds. (J.A. 1554-55).

The second, "bottom-up" stage was used to determine where such growth would be located – i.e. would it be centralized or would it spread out more into rural areas. (J.A. 1648). The region was divided into small scale Traffic Analysis Zones ("TAZ"). Id. "Travel Time to Employment" was one of seven factors to determine where land would likely be developed in each TAZ in 2030 and constituted approximately 20% of the inputs. (J.A. 1656). The quicker the travel time to an employment center, the more attractive the TAZ would be for development. (J.A. 1649-50).

In fact, the travel time factor could have an impact much greater than 20%. If all other factors remained the same, then any change in travel time could constitute 100% of the change in development outcomes. Thus, the exclusion or inclusion of the Toll Highway in the data likely had a marked impact on the projections.

To calculate Travel Time to Employment, the bottom-up study looked at future road networks including the Toll Highway. (J.A. 1649). Thus, the study calculated Travel Time to Employment and consequent future development patterns *assuming specifically that the Monroe Connector/Bypass had been constructed*. The defendants used this data, without any adjustment, to create a "No-Build" scenario for their NEPA analysis. Thus, both "Build" and "No-Build" scenarios expressly assumed that the Toll Highway had been built.

In 2009 prior to publication of the FEIS, through conversations with MUMPO and others, the defendants knew that the TAZ data assumed the Toll Highway. (J.A. 3649, 3650). But they continued to use the data which assumed the Toll Highway to create a "No-Build" scenario, the baseline from which they analyzed the environmental impacts of the new road.

Publication of the Final EIS

After issuance of the FEIS on May 25, 2010 (J.A. 3680), the Conservation Groups commented that the defendants had not dealt with many objections to the

DEIS (J.A. 4896-900), including specifically the suspected problem that the TAZ data in the 2010 Study assumed construction of the Toll Highway and was inappropriate for a "No-Build" baseline. (J.A. 4899). Several agencies commented, with EPA stating that the defendants had not addressed problems in the DEIS. (J.A. 4936-39).

Endangered Species Act Concurrence and Record of Decision

Following publication of the FEIS, USFWS considered whether to issue a "concurrence" under the Endangered Species Act ("ESA"), a prerequisite to permitting under federal law, the denial of which had stopped the project only a few years earlier. USFWS asked the defendants about the reliability of the 2010 Study, specifically the suitability of the TAZ data for a "No-Build" scenario. (J.A. 4788).

Rather than admit to USFWS that the data assumed the Toll Highway, the defendants instead sent a questionnaire to some local government planners seeking their endorsement for using this TAZ data in the NEPA analysis. (J.A. 4806-08). The defendants did not describe the underlying concern about the inclusion of the Toll Highway in the "No-Build" analysis, but suggested to planners that they agree with the Turnpike Authority's assumption that TAZ forecasts could be used for a "No-Build" scenario.

Each e-mail asked: "Based on your understanding of the TAZ forecasting process that occurred from 2001-2004, would you agree with our assumption that these forecasts represent a future scenario without the Monroe Connector." (J.A. 4811). The defendants assured the planners – many of whom had no personal knowledge of the creation of the TAZ data and many of whom were not in their current positions when the data was produced – that all other planners had agreed with the assumption. Id.; (J.A. 4810-41).

The defendants sent USFWS the brief responses they received and a memorandum wrongly stating that the "TAZ projections do not account for the Monroe Connector/Bypass." (J.A. 4793, 4791, 4789-90). The defendants never explained the flaw in the TAZ data for the "No-Build" scenario – a flaw which they knew existed. Based on these assurances, USFWS issued the desired concurrence, removing the most significant regulatory impediment to the Toll Highway. (J.A. 4793, 4884-86).

On August 27, 2010, the defendants issued a Record of Decision ("ROD"), the final step in the NEPA process, confirming the new location Toll Highway as the chosen alternative. (J.A. 4860). The defendants dismissed each of the Conservation Groups' concerns with minimal comment. (J.A. 4901-13). In response to concerns about the TAZ data, the defendants did not admit the error they knew to be inherent in the data but instead published this false statement:

> *"TAZ socioeconomic forecasts for the No Build Scenario did not include the Monroe Connector."*

(J.A. 4906) (emphasis added). The fundamental mistake has therefore never been addressed, and the FEIS analysis remains the basis for other agencies to issue approvals for the Toll Highway.

STANDARD OF REVIEW

This Court's review is de novo. Hodges v. Abraham, 300 F.3d 432, 445 (4th Cir. 2002). The Court follows the standard of review under the APA. The Court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that was taken "without observance of procedure required by law." 5 U.S.C. §§ 706(2) (A), (D).

An agency decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 287-88 (4th Cir. 1999). In NEPA cases, courts must ensure that agencies have taken a "hard look" at the environmental consequences of their actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Courts must also ensure that agencies have adequately examined all reasonable alternatives – the

"heart of the environmental impact statement." City of South Pasadena v. Slater, 56 F. Supp. 2d 1106, 1121 (C.D. Cal. 1999) (quoting 40 C.F.R. § 1502.14).

SUMMARY OF THE ARGUMENT

The defendants acted arbitrarily and capriciously by using socioeconomic data that assumed the building of the Toll Highway both to create a baseline "No Toll Highway" scenario, against which to measure environmental impacts, and also to compare alternatives to the proposed Toll Highway. The defendants thus repeatedly compared "Building the Toll Highway" to "Building the Toll Highway" instead of analyzing the additional growth-inducing impacts of the Toll Highway and comparing "Build" alternatives to various alternatives that did not involve a new location Toll Highway. This fatal flaw led the defendants to conclude that a new toll expressway on the east side of the fast-growing Charlotte metro area would lead to virtually no additional development. It also distorted the defendants' comparison of alternatives, because it exaggerated the traffic flow on U.S. 74 in the absence of a new Toll Highway (by assuming that the added traffic of the new Toll Highway would be squeezed onto U.S. 74), and it understated the additional environmental impacts of building a new Toll Highway. The defendants failed to consider a number of reasonable alternatives, such as upgrades of U.S. 74 recommended by NCDOT's own consultant.

The defendants also violated NEPA by acting in bad faith and misleading the public and other agencies when they denied that the Toll Highway was assumed in the socioeconomic data at a time when the defendants knew better.

Finally, the District Court erred in denying the Conservation Groups' motion to supplement the Record with documents showing dramatically that the defendants acted in bad faith.

ARGUMENT

The resolution of this appeal will have a profound impact on the planning for North Carolina's transportation future. Over the next twenty to thirty years, the defendants plan to spend tens of billions of taxpayer dollars to build a number of major highways, including a series of Turnpike Authority toll highways. The defendants' NEPA review in this case will set the standard for the consideration and permitting of large highways which are proposed to crisscross North Carolina and be an important part of its environmental, energy, land use, demographic, and economic future for decades to come. If decision makers are not required to analyze carefully a range of alternatives and the impacts of various options, if agencies and the public do not have a meaningful chance to influence the process, and if the defendants can make important false statements about their analysis, then future generations will bear the consequences of a flawed process and bad decisions.

NEPA is the keystone environmental law designed to ensure careful decision making and a rational consideration of impacts and alternatives. It is the foundation of "a national policy of protecting and promoting environmental quality." Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996). NEPA requires that an Environmental Impact Statement ("EIS") be developed for all "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(c), "to sensitize all federal agencies to the environment in order to foster precious resource preservation." Nat'l Audubon Soc'y, 422 F.3d at 184, and to "ensure[] that the public and government agencies will be able to analyze and comment on the action's environmental implications." Id.

Courts do not merely "rubber-stamp" an agency's NEPA review. Id. at 185. Rather, the court must "make a searching and careful inquiry into the facts and a review of whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Alexandria v. Fed. Highway Admin., 756 F.2d 1014, 1017 (4th Cir. 1985) (internal citation omitted).

A "thorough, probing and in depth review" of the EIS is particularly important for large projects such as this Toll Highway. Sierra Club v. U.S. DOT, 962 F. Supp. 1037, 1041 (N.D. Ill. 1997). This one Toll Highway will cost approximately three quarters of a billion dollars. (J.A. 4856). It will be located in

an area with low density sprawling development, polluted air, and impaired water quality. Id.

Here, the defendants' NEPA analysis (1) lacks a coherent basis for analysis of the Toll Highway's growth-inducing impacts; (2) includes an invalid alternatives analysis that bases its comparison of alternatives on fundamentally flawed assumptions and limits its review to essentially one alternative; and (3) contains false and misleading information that violates the defendants' duty to inform the public and the agencies which rely on that information for permitting decisions.

I. The Defendants Did Not Analyze the Toll Highway's Environmental Impacts.

A. The Defendants Compared "Building the Road" to "Building the Road."

The defendants failed in the most fundamental of NEPA's requirements: they simply did not analyze the Toll Highway's environmental impacts. In order to determine the environmental impacts of the Toll Highway, the defendants had to create a scenario that showed the impacts of the Toll Highway being built, the "Build the Road" scenario, and a baseline scenario if no Toll Highway is built, the "No Build" scenario – and then identify the environmental effects of the Toll Highway by looking at the change in development patterns from the situation where no Toll Highway was built. Instead, the defendants used socio-economic

data for both scenarios that assumed the existence of the Toll Highway – thereby comparing "Build the Road" with "Build the Road."

This non-analysis resulted in the not surprising conclusion that when something is compared to itself, the comparison does not reveal much of a difference. In the FEIS, the defendants incorrectly presented this nonsensical comparison as proof for the improbable conclusion that the Toll Highway would have virtually no impact on growth and development patterns in this part of the Charlotte metropolitan area.

For this reason alone, the defendants' FEIS is legally defective, because NEPA specifically requires that a valid "No-Build" alternative be included in the EIS. An EIS "*shall*" include "the alternative of no action," 40 C.F.R. § 1502.14(d) (emphasis added), because it is necessary 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. The defendants' EIS is simply legally inadequate.

The District Court acknowledged that the defendants

> *have admitted that the socioeconomic data did, in fact, contemplate building the Monroe Connector/Bypass, and that they used the same data to analyze the growth-inducing impact of both the Build and the No-Build scenarios.*

(J.A. 134) (emphasis added).

1) Flawed Socioeconomic Data

Further, this concession eviscerates the validity of the FEIS analysis, because, among other things, both scenarios used socioeconomic data that assumed reduced travel times due to inclusion of the Toll Highway. The defendants have stated repeatedly in their 2009 Qualitative Study and their 2010 Quantitative Study that reduced travel time to employment yields induced development (see, e.g., J.A. 4365, 4369-70, 4418, 4435), and that "improving accessibility (as measured by travel time) to I-485 and the major employment centers in Mecklenburg County would be the main reason for changes in development patterns." (J.A. 4559). The conclusion is inescapable that if the "No-Build" scenario had ***not*** included the Toll Highway's reduced travel times, the "Build" scenario would have demonstrated much greater induced growth, development, and environmental impacts in the study area attributable to the road.

In fact, the conclusion of the defendants' 2010 FEIS and 2010 Quantitative Study is contradicted by the defendants' own prior studies. In 2003, the defendants' analysis of the Toll Highway's effects determined that it would have "substantial" indirect and cumulative impacts, including thousands of households and extensive development (J.A. 3652, 703), with subsequent effects on water quality from increased impervious surfaces. (J.A. 705).

Just one year before the 2010 Quantitative Study and the FEIS, the defendants' 2009 Qualitative Study determined that the Toll Highway would likely induce growth "in the central and eastern part of the [study area] and Union county in general" – the least developed areas. (J.A. 4369). The reduced travel time to the employment center of Charlotte would of course increase residential and accompanying commercial development. Id.

For Stallings and Indian Trail, "there would be moderate potential for accelerated growth and indirect impacts as a result of the New Location Alternative in this Area." (J.A. 4417). For areas farther east, the expressway would "improve access from this area . . . to [] Charlotte/Mecklenburg," they would become "very attractive for residential development," and the improved access "could also encourage additional industrial development." (J.A. 4418). This "high potential for accelerated growth" would result in "indirect impacts to sensitive resources" including "farmland, water resources, and terrestrial habitat." Id.

The defendants also tripped over their own toll revenue economic analysis, which predicted growth due to the Toll Highway. The defendants' study stated that "[f]uture economic growth potential is particularly important for the study of any new start-up toll facility." Proposed Monroe Connector Preliminary Traffic and Revenue Study (2006) at 3-1, incorporated by reference in the FEIS at 2-2

(J.A. 1841, 3758). "The population and employment forecasts" were "directly related to the growth rates of traffic predicted" by the study's model. Id. "Of particular importance is that the proposed Monroe Connector is included in the model and *influences the growth* forecasts therein." Id. (emphasis added).

Incredibly, the defendants did not consider the results of either the 2003 study or the 2009 Study when creating the invalid 2010 Quantitative Study, nor did they attempt to reconcile their predictions of practically no environmental impacts with their economic forecasts.

As a result, the FEIS itself is a schizophrenic and self-contradictory document. Because the 2009 Study is part of the NEPA process as much as the 2010 Study, both studies are presented in the FEIS. There is no explanation as to which one is correct and no way to tell which analysis should be believed. While the 2009 Study concludes that growth will be induced in the central and eastern parts of the area, the 2010 Study (based on faulty data) suggests that the road will induce virtually no growth. Without explanation, the 2010 results were adopted as the basis for the ROD, and the 2009 Study was disregarded. (J.A. 4873). For this reason alone, the FEIS and the ROD are arbitrary and capricious.

Moreover, the conclusion of the 2010 Study, the FEIS, and the ROD flies in the face of common sense. As the defendants themselves recognized, highway projects on a metro fringe generally induce growth and development there. More

people will choose to locate in outlying areas if an expressway reduces commute times. The results of the earlier studies show that the 2010 Study and the FEIS yielded a result that substantially departs from reality. The defendants did not even attempt to reconcile these fundamental contradictions.

The District Court replied to this defect in the defendants' analysis in two ways, first by suggesting that it is a "flyspeck," (J.A. 133), and second by concluding that reviews by the defendants' consulting firm, Baker Engineering, somehow made it acceptable to use data that assumed the building of the Toll Highway to create a baseline "No Toll Highway" scenario, (J.A. 134-36). These rationales are far from the required "searching and careful inquiry," Alexandria, 756 F.2d at 1017, of an agency's NEPA process – a process which is subject to de novo review on appeal.

First, the issue presented here is not a speck; it goes to the heart of NEPA. A basic function of NEPA is to identify and study the effects of a proposed project. That analysis cannot be done unless there is a baseline "No-Build" scenario against which to compare the "Build the Road" scenario. The essential prerequisite of the comparison – a "No-Build" baseline – was both fatally flawed and misleading, in that it was based on data that assumed the Toll Highway was built. No NEPA error could be more fundamental. 40 C.F.R. § 1502.14 (d) (requiring every EIS to

have a valid alternative of no action). The decision below made a molehill out of a mountain.

Second, the defendants' paid consultant, Baker Engineering, is not a magician or an alchemist; a consultant cannot make the underlying data something it is not. No matter how many times Baker Engineering examined it, the underlying socioeconomic data for the "No-Build" scenario wrongly assumed that the Toll Highway ***did*** exist in order to create the socioeconomic characteristics of the area if the Toll Highway did ***not*** exist.

Likewise, a paid consultants' report cannot substitute for the "hard look" required by NEPA. If, as the District Court did below, agencies and courts simply accept a consultant's report without looking at the methodology, rationales, and evidence supporting it, then consultants will in effect become the NEPA arbiters – regardless of whether the consultants' conclusions themselves are based on false assumptions, are fundamentally mistaken, or were themselves arbitrary and capricious. (J.A. 134-35). See 40 C.F.R. § 1506.5 (a) (agencies must "independently evaluate" contractor's work and "take responsibility for its scope and contents").

When the activities of Baker Engineering are examined through a "searching and careful inquiry," Alexandria, 756 F.2d at 1017, it is apparent that they do not

validate the use of one set of socioeconomic data for both a "Build" and a "No-Build" scenario and that they themselves were misleading.

The decision below notes, first, that for the 2009 Study, Baker Engineering interviewed local planners and MUMPO staff to ensure that the data was appropriate for both scenarios. (J.A. 134-35). What the decision below does not acknowledge is that these interviews did not establish that the data was appropriate for the "No-Build" scenario. The vast majority of local planners were unable to confirm whether or not the TAZ forecasts were appropriate for a "No-Build" scenario. See, e.g., J.A. 4627, 4634, 4637, 4646, 4652, 4655. Some planners said the TAZ forecasts were not appropriate for this use: the Union County planning board acknowledged that the TAZ forecast numbers "are now probably overstated," and planners from the Town of Mint Hill stated that the TAZ forecasts would not match future development. (J.A. 4649, 4643).

Moreover, the decision below fails to recognize that the outcome of the 2009 Qualitative Study was a direct contradiction of the FEIS, the ROD, and the 2010 Quantitative Study. As described above, in 2009 the conclusion - also based on interviews - was that the new Toll Highway would indeed induce growth "in the central and eastern part of the [study area] and Union county in general" (J.A. 4369), that eastern areas would become "very attractive for residential development" (J.A. 4418), and that the "high potential for accelerated growth"

would result in "indirect impacts to sensitive resources" including "farmland, water resources, and terrestrial habitat." Id.

Next, the decision below notes that, after completing the 2010 Quantitative Study, Baker Engineering provided a June 28, 2010 memorandum supposedly confirming the propriety of using data that assumed the Toll Highway. (J.A. 135). In fact, this memorandum falsely stated, in direct contradiction to the defendants' own knowledge, that "TAZ projections do not account for the Monroe Connector/Bypass." (J.A. 4789-90).

Finally, the decision below cites an email survey that the defendants had Baker Engineering perform after the 2010 Study and in response to a question from USFWS as to whether the Toll Highway was included in the data used for the "No-Build" scenario. (J.A. 135-36). In fact, the follow-up "interviews" were nothing short of a charade.

Each interviewee was sent a brief e-mail; the defendants did not describe the underlying concern. Each was asked to confirm the defendants' assumption that the TAZ forecasts were suitable: "Based on your understanding of the TAZ forecasting process that occurred from 2001-2004, would you agree with our assumption that these forecasts represent a future scenario without the Monroe Connector." (See, e.g., J.A. 4811). The defendants assured each planner that all others had agreed with the assumption: "[A]ll of the information . . . gathered

through interviews with local jurisdictions and MUMPO indicated that land use plans at that time did not incorporate expectations for development around the Monroe Connector." Id. While the defendants reported favorable results from this round of "interviews," these results – based on an inherently biased process – had no probative value.

Thus, all this consultant activity either confirmed that the Toll Highway would induce growth and therefore indicated that the defendants' "No-Build" scenario was unreliable (the 2009 Study); or inaccurately stated that the "No-Build" socioeconomic data did not include the Toll Highway (the 2010 memorandum); or was both unreliable in its design and inconclusive in its outcome (the 2010 email survey). Regardless, Baker Engineering could do nothing to change the clear, simple truth – now admitted by the defendants in briefing before the District Court, but denied by the defendants and Baker Engineering during the NEPA process: the socioeconomic data used to construct the scenario in which a Toll Highway ***was not built*** in fact assumed that the Toll Highway ***was built***.

2) Unanimous Precedents

As far as counsel for the Conservation Groups have been able to determine, every court that has faced similar circumstances has found that the transportation agency acted arbitrarily and capriciously and required that the agency redo the NEPA process.

When agencies – like the defendants – use socioeconomic data that assume construction of a major highway for both "Build" and "No-Build" scenarios, they fail to account for a highway's growth-inducing impact and, therefore, act arbitrarily and capriciously. Sierra Club, 962 F. Supp. at 1043-44. Sierra Club presents an almost identical situation. There, the defendant prepared an EIS for a proposed 12.5 mile suburban toll road by relying on a single set of socioeconomic forecasts to analyze all alternatives, including the "No-Build" alternative. Id. The court held that the EIS was flawed for its failure to account accurately for the proposed toll road's growth-inducing impacts. Id. at 1043.

When transportation agencies – like the defendants here – conclude that construction of a major highway will induce no additional growth, that conclusion is extremely counterintuitive and deserves careful judicial scrutiny. Highway J Citizens Group v. U.S. DOT, 656 F. Supp. 2d 868, 887-88 (E.D. Wis. 2009). "[O]ne need not be an expert to reasonably suspect that if [the highway] were not expanded development in the region would be constricted. Presumably, congestion on [the highway] would discourage development in the area, whereas expansion of the highway [system] would cause development to continue unabated." Id.

When transportation agencies – like the defendants – fail to take a "hard look" at growth that will follow a highway's construction and surprisingly

conclude that a highway will lead to little or no new growth, courts require the agencies to redo their NEPA analysis. In City of Davis v. Coleman, 521 F.2d 661, 679 (9th Cir. 1975), the Court of Appeals reinstated an injunction against the construction of one interchange (whereas there are nine along the Toll Highway) on an interstate highway in a rural area, in part because the EIS failed to examine the road's growth-inducing impacts. 521 F.2d at 675-82.

"[I]t is obvious that constructing a large interchange on a major interstate highway in an agricultural area where no connecting road currently exists will have a substantial impact on a number of environmental factors." Id. at 675. The Department of Transportation's own guidance provides that "[t]he improved access and transportation afforded by a highway may generate other related actions that could reach major proportion and which would be difficult to rescind. An example would be a highway improvement which provides access to a non-accessible area, acting as a catalyst for industrial, commercial, or residential development of the area." Id. (citing 2 Env. L. Rep. 46106, 46110, Aug. 24 1971).

With no analysis, the decision below brushed these cases and their reasoning aside. In response to Highway J Citizens Group, the District Court stated that the 2009 Study contained a detailed discussion of study design and demographic trends – without acknowledging that the 2009 Study found that the Toll Highway *would* induce substantial growth; and stated that the 2010 Study was detailed –

without explaining how any amount of detail can correct the fundamental, and denied, flaw in the underlying data. (J.A. 137).

In response to Coleman, the District Court commented that the defendants here "analyzed the project's growth-inducing effects," and in response to Sierra Club, the District Court merely stated that the record contains the "defendants' reasoned conclusions concerning alternatives and growth-inducing effects." (J.A. 138). The District Court did not explain how growth-induced effects can be validly "analyzed" when the baseline for analysis is invalid, or how it can be "reasoned" to use data that *assumes* a Toll Highway to create a socioeconomic baseline *without* a Toll Highway.

As other courts have held in notably similar situations, the defendants acted arbitrarily and capriciously when they used socioeconomic data that assumed the Toll Highway to create both a "Build the Road" scenario and a "No Road" baseline, and no consultant can change that fact.

B. The Defendants Failed to Account for Causes of Urbanization Other Than the Toll Highway.

The FEIS is fundamentally flawed because it assumes "that the area will continue to urbanize whether or not new highways are built." Highway J Citizens Group, 656 F. Supp. 2d at 887. The end result of comparing "Building the Road" with "Building the Road" was the implausible conclusion that the area is going to

urbanize in the same way and at the same rate whether the Toll Highway is built or not – without any explanation of how that can be.

If an EIS assumes future urbanization in the absence of a proposed highway, it must attempt to "determine the causes of urbanization itself." Id. The defendants' FEIS, like the EIS struck down in Highway J Citizens Group, simply assumes that because the area has recently been growing, growth will continue regardless of new infrastructure. (J.A. 4530). The defendants did not account for any of the causes. Id.

Transportation agencies act arbitrarily when they fail to "present any definitive evidence to support their claim that development would occur to the same extent or at the same rate absent construction of the [highway]." N.C. Alliance for Transp. Reform v. U.S. DOT, 151 F. Supp. 2d 661, 696 (M.D.N.C. 2001). In that case, the defendant agencies, like the agencies here, intended to construct a new-location bypass in North Carolina. Even if the area surrounding the highway was experiencing high growth, that fact "does not necessarily mean that the proposed project would have no effect on the amount or pace of development." Id. The defendants, like the agencies in that case, "neglected a statutory duty under NEPA" when they failed to study the growth-inducing impact of the highway and relied on unsupported analysis that the area would continue to develop regardless. Id. at 697; (J.A. 4530).

The decision below dismissed this fundamental defect in the FEIS by stating that the defendants conducted the 2009 Qualitative Study and the 2010 Quantitative Study and summarily concluding that the defendants had "conducted a study that proved [growth and urbanization with or without the Toll Highway]." (J.A. 138-39). The District Court, however, failed to acknowledge that neither Study accounted for the drivers of urbanization other than the Toll Highway.

C. The Defendants Failed to Explain Their Methodology and to Use Accurate Model Inputs.

Again by not correcting the fundamental flaw in the socioeconomic inputs, the defendants failed to perform an accurate NEPA analysis. "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). This 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 project's adverse environmental effects").

The *type* of models the defendants used in their FEIS analysis is not at issue; it may well be appropriate to adopt models from local jurisdictions. 23 C.F.R. § 771.111. In this case, however, wholesale adoption of the Metrolina Regional Travel Demand Model ("MRM") was inappropriate. While the socioeconomic

forecasts in the MRM may in general be accurate, it was arbitrary and capricious to use those forecasts to create a "No-Build" scenario because they assumed the existence of the Toll Highway.

Additionally, because the FEIS does not explain the methodology behind the Indirect and Cumulative Effects ("ICE") analysis, the defendants violated their duty under NEPA to "identify any methodologies used and . . . make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement." 40 C.F.R. § 1502.24. The FEIS states that details of the "top-down" and "bottom-up" processes that led to the creation of the socioeconomic forecasts are "outlined" in Sub-Appendix B to Appendix H. (J.A. 4556). In fact, Appendix H's Sub-Appendix B contains nothing but lists of parameters and figures, and nowhere in the FEIS is the methodology set out. (J.A. 4657-98).

The District Court's order entirely misses the point. The order responds to these FEIS defects by stating that methodology may be disclosed in an appendix and does not have to be described in the body of the FEIS. (J.A. 139). But the Conservation Groups *do not* and *did not* object to the *placement* of the methodology; it could be set out in the body, in the appendix, or anyplace else in the FEIS.

The fatal flaw is that the defendants' methodology does not appear *anywhere* in the FEIS. Contrary to the statement in the District Court's order, no

methodology is set out in Appendices G, H (including its Sub-Appendix B), and I of the FEIS. Instead, those appendices contain only the 2009 and 2010 Studies and rely upon Sub-Appendix B for the methodology – when B contains only a list of parameters and numbers. It is the *absence* of a description of the defendants' methodology, not its *placement*, which is another patent defect of the FEIS.

D. The Defendants Failed to Study the Growth-Inducing Impacts of Multiple Alternatives.

The analysis of indirect environmental impacts "forms the scientific and analytic basis" for comparisons between different alternatives. 40 C.F.R. § 1502.16. Not only does the defendants' analysis fail to provide any "scientific basis," it also fails to provide the basis for any comparison.

The 2010 Quantitative Study looks only at one alternative – the construction of the new Toll Highway. The Study does not analyze the indirect effects from any other alternative, such as upgrades to U.S. 74. This omission is particularly striking, because several resource agencies had specifically asked the Turnpike Authority to study the indirect and cumulative impacts of upgrading U.S. 74. (J.A. 2026). However, the FEIS itself, while it discusses upgrades to U.S. 74, does not analyze the different growth impacts that would be expected from such improvements.

The decision below makes no mention whatsoever of defendants' failure to examine upgrades to U.S. 74. The order merely notes that prior to 2010, the

defendants "already had narrowed the possible alternatives to sixteen build scenarios and one No-Build scenario" without examining whether that decision was in compliance with NEPA. (J.A. 140).

II. The Defendants' Alternatives Analysis was Arbitrary and Capricious.

The analysis of alternatives is the very "heart of the Environmental Impact Statement." 40 C.F.R. § 1502.14; see also City of South Pasadena, 56 F. Supp. 2d at 1121 (preliminarily enjoining highway construction due to an inadequate analysis of reduced-scale "functional" alternatives to a new location road). Agencies must rigorously explore and objectively evaluate all reasonable alternatives. 40 C.F.R. § 1502.14(a). Only those alternatives that are determined to be unreasonable can be eliminated. Id.

The defendants failed to explore alternatives rigorously (1) by using one socioeconomic forecast to analyze all future alternatives, and (2) by not examining a reasonable range of alternatives in location, scope, and project design, including "functional alternatives" such as traffic management, and the number and location of exits along the highway.

A. The Defendants Lacked a Reasonable Basis to Compare Alternatives.

NEPA requires agencies to present a full detailed picture of alternatives and their differing environmental impacts for the benefit of decision makers, including

permitting agencies and the public. 40 C.F.R. § 1502.14; Nat'l Audubon Soc'y, 422 F.3d at 185. This information forms the "clear basis for choice among options." 40 C.F.R. § 1502.14. The defendants, however, based their comparison of alternatives on forecasts which used a single set of socioeconomic assumptions, overstating the need for a new expressway and the supposed shortcomings of alternatives such as upgrades and functional alternatives.

It is simply not possible to make a reasonable choice between alternatives when the FEIS and ROD compared "Building the Road" with "Building the Road" and did not present a valid baseline against which to measure the various choices. In response to this NEPA defect, the District Court simply relied upon the earlier portions of its decision finding the use of a single set of socioeconomic data acceptable to create both a scenario for the Toll Highway and a scenario for no Toll Highway. (J.A. 144). For the reasons set out above, the defendants' use of a single set of data renders the FEIS and the ROD arbitrary and capricious, and the District Court's decision cannot survive de novo review.

1. Growth-inducing impact of the Toll Highway

The defendants used traffic forecasts to compare alternatives and confirm their choice of the proposed Toll Highway. The defendants' process for producing traffic forecasts was distinct from their effort to analyze indirect and cumulative effects, but both resulted in flawed outcomes. As with the analysis of indirect and

cumulative effects, the defendants produced traffic forecasts for a "Build" and a "No-Build" scenario. (J.A. 2979).

The defendants relied on the same socioeconomic data to create *both sets of traffic forecasts* – data which, as explained above, assumed the Toll Highway had been constructed. This flawed approach produced "No-Build" forecasts for U.S.74 which were dramatically overstated, almost double the true forecast. The defendants' model presented a situation in which the traffic generated by both the Toll Highway and existing U.S. 74 was squeezed onto U.S. 74 alone. (J.A. 2979; 3904).

Such an approach renders an EIS arbitrary and capricious. See, e.g., N.C. Alliance for Transp. Reform, 151 F. Supp. 2d at 690 (EIS for a highway project failed to account for traffic-inducing impacts by using the same statistical data to compare alternatives). Courts recognize the obvious – that a highway's very existence leads to travel and new development. Swain v. Brinegar, 517 F.2d 766, 777 (7th Cir. 1975). "[T]he increased [highway] capacity makes driving less burdensome, and as a result, motorists who otherwise would not have used the roads decide to make additional or longer trips." Highway J Citizens Group, 656 F. Supp. 2d at 888 n.10. And courts have required transportation agencies to redo their NEPA analysis when they have not identified traffic-inducing impacts of a

new highway and have not analyzed future scenarios both with and without new highways.

For example, a state transportation department acts arbitrarily and capriciously when it fails to consider the traffic that would be generated by population growth due to highway expansion. This failure biases the alternatives analysis in favor of proposed road construction. Conservation Law Found. v. Fed. Highway Admin, 630 F. Supp. 2d 183, 209-16 (D.N.H. 2007). "The idea that highway improvement can produce additional traffic . . . is based on the basic economic theory of supply and demand: if highway improvement significantly reduces the cost of travel by making it more efficient, and the demand for travel is elastic, the improvement can be expected to produce more traffic." Id. at 210.

As in this case, when transportation agencies use a single set of socio-economic forecasts to analyze alternatives for a new toll road, their alternatives analysis is arbitrary and capricious, just like their impacts analysis, because they fail to take account of the toll highway's traffic-inducing impacts. Sierra Club v. U.S. Dep't of Transp., 962 F. Supp. at 1043. Just like the defendants here, the transportation agencies in Sierra Club relied on a single socioeconomic forecast to analyze all alternatives and thus wrongly relied on "the implausible assumption that the same level of transportation needs will exist whether or not the tollroad is constructed." Id. As in this case, the EIS presented "a forecast of future needs that

only the proposed tollroad [could] satisfy," and "the final impact statement create[d] a self-fulfilling prophecy that makes a reasoned analysis of how different alternatives satisfy future needs impossible." Id.

The District Court labeled the analytical flaws in the traffic data "immaterial," in significant part because of its conclusion that "the population of the project area will likely continue to grow even absent construction of the project." (J.A. 145). As set out above, agencies may not assume rates of urbanization and growth absent the construction of a proposed highway without providing reasoned study and analysis for that conclusion – something the defendants did not do and the District Court did not examine or require. Further, under the alternatives analysis, the question is not only *whether* there will be growth, but *how* different alternatives will induce and distribute that growth and *what* their respective impacts (positive and negative) will be. 40 C.F.R. § 1502.14(a). By assuming the likelihood of future growth, the District Court entirely missed the basic rationale for the alternatives analysis.

2. Revised traffic forecasts

After the Conservation Groups objected to the overstated "No-Build" traffic forecasts in the DEIS, the defendants included in the FEIS some revised traffic forecast numbers. However, NEPA requires *analysis* of accurate data, not just

revision of inaccurate data, and the FEIS contains no analysis of alternatives in light of the revised data.

Indeed, the revision of the data was consigned to a simple switch of figures in the "errata" section of the FEIS appendices and was not incorporated into the FEIS text. (J.A. 3904). Contrary to all appearances, the District Court concluded that although the revised data was relegated to an appendix, the defendants "did not obscure the corrections from public view." (J.A. 146).

But the District Court missed the main point. The point of an EIS and the alternatives analysis is not just to report data or to correct errors. Especially at the critical stage between the draft and final EIS, the major purpose of NEPA is to *use* the data to *analyze* impacts and alternatives. After revising the traffic forecasts, the defendants did not revisit their cursory rejection of other alternatives; the conclusions concerning those alternatives remained based on the flawed data. The defendants continued to reject upgrades to U.S. 74 due to overstated traffic forecasts. (J.A. 3705, 4055). If the revised traffic forecasts for U.S. 74 were to have any meaning for the NEPA process, the defendants were required to revisit their analysis of alternatives, including upgrades to U.S. 74.

In fact, these revised forecasts were made just "for the file" (J.A. 3657), and only when the final EIS was being reviewed by FHWA. Less than a week before the FEIS was submitted to FHWA, one Turnpike Authority staff member advised

her colleague that, even if the defendants were required to make some additional forecasts, they could:

> *"rig up some responses in the document, still have it ready to go to legal next week, and have a month to get the forecast done while the document is being reviewed."*

February 25, 2010 Email. (J.A. 3657) (emphasis added). See also AR 024340 (E-mail from NCTA to FHWA, March 2, 2010 stating that the Final EIS would be sent "by the end of the day tomorrow"). The FEIS was being finalized before the defendants had even begun to calculate true traffic forecasts, something that should have been done at the outset.

Finally, the source of the error was never explained; the FEIS states only that the forecasts were "inadvertently overestimated." (J.A. 3904). A true corrected analysis would have explained the mistake and produced new "No-Build" numbers using the same model that was used for the "Build" forecasts. Without an explanation of the source of the error and how it was corrected, the remaining uncorrected numbers are not credible. Indeed, because no new socioeconomic data have been assembled, even the corrected traffic forecasts remain tainted by the same fundamental error as before – both the "Build" and "No-Build" scenarios are based on a single set of socioeconomic data. (J.A. 3904).

B. The Defendants Failed to Consider a Reasonable Range of Alternatives.

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. U.S. 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). In keeping with their single-minded focus, the defendants did not consider in detail *any* alternative other than a new toll highway in essentially one location.

First, the defendants failed to consider functional alternatives to manage the area's transportation problems. When the defendants began the NEPA process, NCDOT had commissioned the Stantec U.S. 74 Study. (J.A. 1942). Again, that study concluded that *for less than $14 million* short- and long-term traffic management solutions would yield dramatically reduced congestion and an acceptable level of service along the whole corridor in Union County, except for one interchange. (J.A. 1950-51).

Most remarkably, the District Court's opinion makes no mention whatsoever of the U.S. 74 Study and does not attempt to explain how the defendants acted reasonably in failing to consider this alternative seriously. Like the District Court, the defendants failed even to mention the U.S. 74 Study during consideration of

alternatives in the DEIS. After the U.S. 74 Study was brought to the defendants' attention during the DEIS comment period, the defendants' only response in the FEIS was to dismiss the Study by focusing on what they perceived to be its limiting aspects. (J.A. 3645, 3866-67).

Rather than examining how the solutions could work in the long term and how additional improvements could improve the one remaining interchange, the defendants used the 2015 horizon year as a pretext to dismiss the Study and all traffic management improvements. Even though the Study itself did not look past 2015, the defendants retained their NEPA obligation to consider how such solutions, and enhancements, could work over the longer term. Id.

Indeed, FHWA's own NEPA Guidance requires agencies to consider, when appropriate, functional alternatives to highways such as traffic management, mass transit, and build alternatives that address traffic flow on existing highways. FHWA, Guidance for Preparing and Processing Environmental and Section 4(f) Evaluations (FHWA Technical Advisory 6640.8A). Early in the process, the Conservation Groups raised these alternatives, including improved intersections, better connections to local street networks, curb cut controls, and increased transit service in the corridor to connect to future planned transit improvements closer to Charlotte along the very same highway corridor. (J.A. 4037).

Disregarding NEPA guidance, the defendants recycled the alternatives analysis from an earlier iteration of the Monroe Connector project and merely updated portions of the previously rescinded DEIS dismissing alternatives like traffic management, mass transit, connectivity of local road networks, and increased freight rail to reduce truck traffic. (J.A. 1851). In fact, as early as October 16, 2006 – several months before the defendants even issued the Notice of Intent for the EIS to study the Toll Highway – the defendants determined that they would not study these alternatives. (J.A. 1851-52). This premature conclusion was reached prior to any consideration of alternatives and was not based on a single piece of data. Id. The defendants thus violated the NEPA requirement that alternatives be affirmatively studied, not just listed and rejected. Rankin v. Coleman, 394 F. Supp. 647, 657-58 (E.D.N.C. 1975) (a new highway EIS was deficient, in part because it did not study reasonable alternatives including highway upgrade).

Agencies' failure to examine traffic management solutions has been held arbitrary and capricious. Davis v. Mineta, 302 F.3d 1104, 1122 (10th Cir. 2002). As in this case, in Davis there was nothing in the Administrative Record to establish that traffic management solutions, such as improving traffic signals and intersections, was "such a remote, speculative, impractical or ineffective alternative that it did not need to be studied as a viable alternative." Id. As in

Davis, here "there are no cost studies, cost/benefit analyses or other barriers advanced" that support the defendants' decision to eliminate this alternative prior to full study. Id. The only evidence in the record, NCDOT's own study, identifies this solution as a feasible option.

Most recently, the Court of Appeals held that a transportation agency acted arbitrarily when if failed to give "substantial treatment" to an alternative to building a proposed highway, as required by 40 C.F.R. § 1502.14 (b), and to provide adequate justification for its omission. Southeast Alaska Conservation Council v. FHWA, 649 F.3d 1050 (9th Cir. 2011).

Second and contrary to NEPA regulations, the defendants failed to consider how traffic management solutions, like those mentioned in NCDOT's Study, could in combination with other strategies solve the area's transportation needs. Id. at 1122 (failure to consider combinations of small scale improvements, such as traffic management and mass transit in combination, is arbitrary and capricious). Here, the defendants failed entirely to look at strategies such as widening U.S. 74 combined with traffic management improvements as a comprehensive alternative solution, and thus failed to study a reasonable range of alternatives.

Finally, rather than look at a range of new location highway alternatives, the defendants focused their study on only two slight route variations. (J.A. 3010, 3714). While the defendants claim to have studied 16 different alternatives, these

16 "alternatives" were in fact just slight variations along a single corridor all with nine interchanges in virtually the same locations. (J.A. 3040). As the District Court stated, "each alternative covered almost the exact same path, with only slight variations here and there." (J.A. 140). See map. (J.A. 111).

Thus, they amounted in reality to only one route and were so similar that the defendants produced only a single analysis of indirect and cumulative impacts. As a result, the defendants failed to analyze a "reasonable range" of alternatives and to "devote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14(b).

III. The Defendants Presented False and Misleading Information in the NEPA Documents, Violating their Duty to Inform the Public and Resource Agencies.

In response to questions from USFWS and the Conservation Groups and in the Record of Decision itself, the defendants published a false statement about the foundational data for the NEPA process – and a statement that they knew was false. The defendants told the public and agencies that the TAZ socioeconomic data did not include the Toll Highway, when it did and when they knew it did. This fact alone requires a remand to the defendants to allow for a meaningful NEPA process.

One of NEPA's core purposes is to guarantee that relevant information will be made available to "the larger audience that may also play a role in both the

decision-making process and the implementation." Methow Valley Citizens Council, 490 U.S. at 349. This "larger audience" includes both the public and "other governmental bodies" responsible for regulating the proposed action and issuing permits. Id. at 350. Accurate scientific analysis, informed expert agency comments, and public scrutiny are essential to NEPA. 40 C.F.R. § 1500.1(b).

Once it was brought to their attention, the defendants had a duty to identify and correct the flaw in the ICE analysis of growth-inducing impacts, which assumed the Toll Highway in the "No-Build" scenario. Lands Council v. U.S. Forest Serv., 395 F.3d 1019, 1032 (9th Cir. 2004) (agencies have a duty to fully investigate their analysis and provide a candid disclosure of inadequacies). The Administrative Record confirms that in 2009, more than a year before release of the FEIS, the defendants knew that the TAZ socioeconomic forecasts assumed construction of the Toll Highway, but they did nothing to address the flaw, nor did they acknowledge it. (J.A. 3649, 3650).

The defendants simply pushed forward to finish the NEPA process. To compound this NEPA violation, when federal agencies and the Conservation Groups questioned the data, the defendants did not admit the error, obfuscated, convinced the agencies to drop longstanding concerns, and published a false misleading statement in the ROD, directly contradicting the internally-recognized fact that the "No-Build" scenario in the ICE analysis assumed construction of the

Monroe Connector/Bypass. The defendants' actions are a glaring and fundamental NEPA violation. Glickman, 81 F.3d at 447-48 (accurate data in NEPA documents ensures "that members of the public have accurate information to enable them to evaluate the Project").

A. The Defendants Failed to Address the Flaw in the ICE Analysis in Response to USFWS's Concerns.

After publication of the FEIS and before the ROD, the defendants sought USFWS concurrence under the Endangered Species Act ("ESA"), a certification that the Toll Highway is "not likely to adversely affect" any species listed under the ESA. (J.A. 4884-86). This concurrence was necessary for the Toll Highway. 16 U.S.C. § 1531-1544. Earlier, USFWS's refusal to concur had put the Monroe Bypass on hold. (J.A. 1837).

The Toll Highway would not be built directly in the habitat of the endangered species at issue. As before, USFWS was primarily interested in an analysis of the indirect effects of development induced by the Toll Highway and had specifically asked for a quantitative ICE study. (J.A. 4545).

After the FEIS was issued with its conclusion that the Toll Highway would induce less than 1% growth, USFWS questioned the suitability of using the TAZ socioeconomic data for the "No-Build" scenario. Rather than admitting that the Toll Highway was assumed in the TAZ data, the defendants violated NEPA by taking whatever steps were necessary to sweep the issue under the rug.

"[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored." Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973). Rather, the lead agency must respond with a "good faith, reasoned analysis." Id. In failing to do so in this case, the defendants defeated NEPA's purpose to serve as an "environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project." Id.

In order to allay USFWS's concerns about the TAZ forecasts, the defendants first asked their consultant to produce a memorandum documenting why the use of the TAZ forecasts was appropriate for a "No-Build" scenario. This memorandum wrongly stated, in direct contradiction to the defendants' own knowledge, that the "TAZ projections do not account for the Monroe Connector/Bypass." (J.A. 4789). The defendants also told USFWS that they would re-interview all local planners and individuals involved in the creation of the TAZ forecasts to determine that it was appropriate to use those forecasts for a "No-Build" scenario.

It is curious that the defendants thought the approach of interviewing local planners would be productive. During the initial interviews, the vast majority of local planners had been unable to confirm whether or not the TAZ forecasts were

appropriate for a "No-Build" scenario. (See, e.g., J.A. 4627, 4634, 4637, 4646, 4652, 4655). Some planners had said the TAZ forecasts were not appropriate for this use: the Union County planning board acknowledged that the TAZ forecast numbers "are now probably overstated," and planners from the Town of Mint Hill stated that the TAZ forecasts would not match future development. (J.A. 4649, 4643).

As set out above, the 2010 email survey was biased and designed to obtain confirmation that the socioeconomic data used for the 2010 Study and the FEIS did not assume the Toll Highway – a conclusion that the defendants knew was untrue. For the NEPA process to be legitimate, the defendants were required to reply directly to their sister agency's question and tell the truth; instead, the defendants went through the pointless process of asking planners, who were not involved in preparing the FEIS or the underlying socioeconomic model, what data the defendants themselves had used – when the defendants already knew the answer to that question.

While the defendants reported favorable results from this round of "interviews" that were contrary to the facts as the defendants knew them, the results were in reality not conclusive. Despite the skewed questions, several planners could not confirm that the TAZ forecasts had been applied in a reasonable manner, (see, e.g., J.A. 4806-07), and others who replied in the affirmative were

the very same planners who earlier had stated they were unable to confirm such assumptions. (Compare J.A. 4806-07 with J.A. 4649, 4652, 4634).

Regardless of these "interviews," the important point is that the defendants failed entirely to respond candidly to USFWS that the TAZ data did in fact assume the Toll Highway. In this sense, the interviews were a smokescreen to distract USFWS and the general public, including the Conservation Groups, from discovering the true nature of the TAZ forecasts. (J.A. 3649, 3650).

B. The Record of Decision Presented Critical Misleading Information.

In their comments on the FEIS, the Conservation Groups specifically commented that the "TAZ forecasts are based on an assumption that the Toll Road will be built." (J.A. 4906). Again, the defendants did not acknowledge or address the flaw. Instead, despite the fact that the defendants knew the TAZ data did assume construction of the Toll Highway, they flatly denied this fact in the ROD.

The defendants made the unequivocal statement:

> *"TAZ socioeconomic forecasts for the No Build Scenario did not include the Monroe Connector."*

(J.A. 4906) (emphasis added). The defendants thereby violated their duty to present the FEIS in "objective good faith." Sierra Club v. U.S. Army Corps of Eng'rs, 614 F. Supp. 1475, 1516 (S.D.N.Y. 1985) (an EIS not prepared with "objective good faith" was arbitrary and capricious).

As the District Court stated, the defendants "have [now] admitted that the socioeconomic data did, in fact, contemplate building the Monroe Connector/Bypass, and that they used the same data to analyze the growth-inducing impact of both the Build and the No-Build scenarios." (J.A. 134).

By responding to the Conservation Groups' concerns with a false statement, the defendants did not "insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." 40 C.F.R. § 1502.24. Inclusion of the "materially false or inaccurate" statement in the ROD does not "satisfy the requirements of NEPA," in that the FEIS "cannot provide the basis for an informed evaluation or a reasoned decision." Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1030 (2d Cir. 1983).

Instead, "review of the [FEIS] and the ultimate decision to proceed on the project [was] reduced to a game of blind man's bluff." Silva, 482 F.2d at 285 (EIS was arbitrary and capricious for failing to discuss adequately objections that had been put forward); see also County of Suffolk v. Sec'y of Interior, 562 F.2d 1368, 1383 (2nd Cir. 1977) ("Where evidence presented to the preparing agency is ignored or otherwise inadequately dealt with, serious questions arise about the adequacy of the author's efforts to compile a complete statement.").

The defendants failed in their duty to respond honestly to public comments, 40 C.F.R. § 1502.9, and violated a key purpose of NEPA. Glickman, 81 F.3d at

446 (EIS presenting misleading information about the economic benefits of flood control project was arbitrary and capricious because it had potential to mislead the public); see also Johnston v. Davis, 698 F.2d 1088, 1095 (10th Cir. 1983) (EIS was arbitrary and capricious and was remanded to the agency for revision because it relied on misleading information and "fail[ed] to provide the public and the decision-maker with an informed comparison of alternatives"); Lands Council, 395 F.3d at 1032 (EIS was arbitrary and capricious because it did not fully disclose a model's known shortcomings).

The defendants' false and misleading statements to USFWS and their false statement in the ROD are in no sense "good faith compliance with the demands of NEPA." Save Our Invaluable Land (SOIL), Inc. v. Needham, 542 F.2d 539, 542 (10th Cir. 1976). When an agency decision is based upon conclusions in an EIS not arrived at in good faith or in a reasoned manner, "that decision is necessarily arbitrary." Sierra Club v. U.S. Army Corps of Eng'rs, 614 F. Supp. at 1516.

In response to these serious false statements that go to the heart of the reliability of the defendants' NEPA analysis, the District Court again leaned on the fact that the defendants had their consultant, Baker Engineering, prepare a June 2010 memo for USFWS and the fact that the defendants conducted the email survey of 12 planners. (J.A. 146-47). But these actions compounded the defendants' NEPA violations. The defendants did not straightforwardly

"respond[]" to USFSW's concerns, (J.A. 146); instead, the defendants evaded the question by having their consultant go through a flurry of pointless exercises.

The District Court also notes that the defendants "later retracted" these statements. (J.A. 148). What the District Court does not make clear is that these "retractions" occurred only in briefing before the District Court, not during the NEPA process when the "retractions" might have had some legal effect. See id. (citing memoranda filed by the defendants in the District Court during summary judgment briefing). The defendants cannot cure their NEPA violations by confessing to a U.S. District Court in order to salvage their credibility once they have been caught red-handed, and long after the Administrative Record has been closed and agency decisions have been based on these false statements.

Finally, the District Court concluded that these false statements about the key socioeconomic data were "not material" because the defendants' "investigations" – presumably the activities of the defendants' consultant – showed that it was proper to use data that assumed a Toll Highway to create a baseline scenario for no Toll Highway. (J.A. 148). What the District Court missed is that these "investigations" themselves were beside the point and that the defendants had done everything they could to avoid taking the most direct action: complying with NEPA and simply telling USFWS, the Conservation Groups, and the public the truth.

The District Court's nonsensical decision on this issue which ignores a fundamental NEPA purpose could not withstand any level of scrutiny by this Court, much less de novo review.

IV. The District Court Erred in Not Supplementing the Record with Further Evidence of the Defendants' Bad Faith.

The administrative record in NEPA cases can be supplemented. See, e.g., Ohio Valley Envtl. Coal., 556 F.3d at 201; see also Overton Park v. Volpe, 401 U.S. 402, 420 (1971). This is true where there exists "bad faith in the agency's decision process." Krichbaum v. U.S. Forest Serv., 973 F. Supp. 585, 589 (W.D. Va. 1997), aff'd without opinion 139 F.3d 890 (4th Cir. 1998).

The Conservation Groups moved before the District Court to supplement the Administrative Record with documents prepared soon after the ROD showing the defendants' bad faith, including an e-mail that bears directly on the defendants' false statements. E-mail from Jennifer Harris, Re: TAZ polling data file (September 28, 2010) (J.A. 112).

The e-mail was a reaction after an attorney for the Conservation Groups, Thomas Gremillion, questioned the statement in the ROD that denied the inclusion of the Monroe Connector/Bypass in the socioeconomic data for the No-Build Scenario. See (J.A. 112). Gremillion sent an e-mail to a Turnpike Authority official asking a straightforward question:

"Do the forecasts 'include' the Monroe Bypass?"

Id. The Turnpike Authority official did not respond to Gremillion's inquiry, but shortly after receiving the email, she forwarded it to another senior Turnpike Authority employee. The forwarded e-mail contained no written message, but instead employed the symbol:

;)

Id.

This symbol is a commonly-used internet shorthand indicating a "wink."[3] This e-mail further confirms that the Turnpike Authority was aware of the false statement in the ROD; and it strongly suggests that the Turnpike Authority intended to mislead the public and acted in bad faith when it published the misstatement.

The District Court erred by refusing to include this e-mail in the Administrative Record. The Court mistakenly relied on Nat'l Audubon Soc'y, 422 F.3d at 198-99, which cautioned against psychoanalysis of agency intent when reviewing core NEPA decisions, explaining that NEPA requires "good faith objectivity rather than subjective impartiality." (J.A. 119-20). The Conservation

[3] PCMag.com, http://www.pcmag.com/encyclopedia_term/0,2542,t=emoticon&i=42569,00.asp (last visited Dec. 14, 2011).

Groups do not wish to use the e-mail in an attempt to guess at why the defendants reached certain substantive outcomes, but rather to illustrate the defendants' bad faith both in failing to respond to public comment in the ROD and in affirmatively misstating the basis for the conclusions in the FEIS.

CONCLUSION

If NEPA is to have any meaning at all, agencies must use valid data to determine environmental impacts and to compare alternatives. Agencies must analyze all reasonable alternatives. And agencies must tell their fellow agencies and the public the truth.

This Toll Highway is one in a series of proposed projects costing tens of billions of dollars that will alter the landscape of North Carolina for generations. It is critically important that the NEPA process for this Toll Highway be done properly. The Conservation Groups ask that the Court reverse the District Court; order that the defendants withdraw the ROD; order that the defendants prepare and issue a supplemental draft EIS for public and agency review and comment prior to issuing a new ROD; and allow the Administrative Record to be supplemented by the email described above.

REQUEST FOR ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Fourth Circuit Rule 34(a), the Conservation Groups respectfully request oral argument in order to answer any questions the Court may have.

Respectfully submitted this 19th day of December, 2011

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-2210 **Caption:** NC Wildlife Federation et al. v. NC Dept. of Transp. et al

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Dated: December 19, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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