BRIEF FOR DEFENDANTS-APPELLEES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 11-2210

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
BRIEF OF DEFENDANTS-APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
DEIS	Draft Environmental Impact Statement
DSA	Detailed Study Alternative
FHWA	Federal Highway Administration
FEIS	Final Environmental Impact Statement
FLUSA	Future Land Use Study Area
ICE	Indirect and Cumulative Effects
LDF	Land Development Factor
NEPA	National Environmental Policy Act
MPH	Miles Per Hour
MPO	Metropolitan Planning Organization
MRM	Metrolina Regional Travel Demand Model
MUMPO	Mecklenburg-Union Metropolitan Planning Organization
NCDOT	North Carolina Department of Transportation
NCTA	North Carolina Turnpike Authority
Project	Monroe Connector/Bypass
PSA	Preliminary Study Alternative
ROD	Record of Decision
TAZ	Traffic Analysis Zone
TDM	Transportation Demand Management
TSM	Transportation System Management

STATEMENT OF JURISDICTION

A. District Court Jurisdiction: Plaintiffs challenge the Federal Highway Administration's (FHWA) Record of Decision (ROD) authorizing the Monroe Connector/Bypass (Project). The district court had jurisdiction to review the ROD under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704.

B. Appellate Court Jurisdiction: Plaintiffs appeal the district court's grant of summary judgment in favor of defendants. Judgment was entered on October 25, 2011. (J.A. 15, Docket Entry 66). Plaintiffs filed a timely notice of appeal on October 31, 2011. (J.A. 15, Docket Entry 67). Jurisdiction to this Court is provided by 28 U.S.C. § 1291.

STATEMENT OF ISSUE

Whether the district court erred in granting summary judgment in favor of defendants.

STATEMENT OF CASE

On November 2, 2010, plaintiffs filed a complaint, pursuant to the National Environmental Policy Act (NEPA), that challenged the Monroe Connector Bypass Project. (J.A. 17-40). Defendants filed the administrative record and a supplemental administrative record on January 31, 2011, and February 25, 2011, respectively. (J.A. 80-85). On May 10, 2011, the district court denied plaintiffs' motion to supplement the administrative record. (J.A. 113-20). On October 24, 2011, the district court granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. (J.A. 121-48).

STATEMENT OF FACTS

I. Description of the Monroe Connector/Bypass.

The Federal Highway Administration (FHWA) issued a Record of Decision (ROD) on August 27, 2010, selecting the Monroe Connector/Bypass (Project) as a new location, controlled-access, toll facility in the US 74 corridor. (J.A. 4864). The Project will improve mobility and capacity in the corridor, providing an approximate 20-mile highway linkage from US 74 near I-485 (Mecklenburg County) to US 74 between the towns of Wingate and Marshville (Union County). (J.A. 4864).

Existing US 74 is a four-to-six lane roadway with twenty-six at-grade signalized intersections, many additional un-signalized intersections, and numerous commercial and residential driveway connections. (J.A. 3705). Average travel speeds currently range from approximately 20 to 30 miles per hour (mph) during the peak hour and are expected to decline to less than 20 mph by 2030. (J.A. 3705). Congestion is high, with one-third of the intersections currently operating at an unacceptable level of service during the peak hour. (J.A. 3705). Approximately two-thirds of the intersections are expected to operate at an unacceptable level of service by 2030. (J.A. 3705). The Project will "enhance mobility in the project study area by providing a higher capacity, more efficient and reliable route for the movement of goods and people." (J.A. 2987).

II. The NEPA Process and Alternatives Analysis.

In carrying out the analysis required under the National Environmental Policy Act (NEPA), 42 U.S.C § 4321 et seq., defendants[1] created a purpose and need statement; developed alternatives to satisfy the purpose and need; evaluated and screened those alternatives through a series of increasingly-refined analyses; as part of those analyses, evaluated the effects of the Project, including potential environmental effects, through qualitative and quantitative analyses; developed a Draft Environmental Impact Statement (DEIS) that selected a preferred alternative; received comments from the public and governmental agencies; issued a Final Environmental Impact Statement (FEIS) that adopted the preferred alternative; and issued a Record of Decision (ROD) making final the selection of the Project.

The Project's purpose is based on two primary underlying needs: 1) to remedy existing and projected roadway capacity deficiencies; and 2) to enable this segment of US 74 to serve high-speed regional travel consistent with the designations and goals of state and local transportation plans. (J.A. 3705). As explained in the ROD,

[1] Defendants include North Carolina Turnpike Authority (NCTA), which took the lead in evaluating alternatives for the Project, and FHWA, which, as lead federal agency, made the final decision pursuant to NEPA. Prior to 2009, NCTA existed independently from NCDOT. As of July 2009, NCTA is now within NCDOT and subject to the supervision of the Secretary of Transportation. See N.C.G.S. § 136-89.182(b).

defendants concluded that the Monroe Connector/Bypass[2] will, inter alia, improve mobility and capacity within the Project study area, provide high-speed regional travel along the US 74 corridor, and maintain access to properties along existing US 74. (J.A. 4864).

Development of the Project's purpose and need statement began on January 5, 2007. (J.A. 2950). Purpose and need was also discussed at coordination meetings with environmental resource and regulatory agencies on January 4, January 25, February 14, March 22, and April 18, 2007. (J.A. 2950). An entire report is dedicated to the effort, methodology, and procedures used to develop the Project's purpose and need statement. (J.A. 2066-134).

Pursuant to NEPA, defendants evaluated alternatives to satisfy the purpose and need. 40 C.F.R. § 1502.14. Defendants screened the alternatives three times, with each screening producing more refined results. (J.A. 2977-78; 3710). At each level of screening, Defendants also eliminated alternatives that did not meet the

[2] Defendants originally considered two separate projects called the "Monroe Bypass" and "Monroe Connector." Both projects were at different levels of environmental study when, on September 20, 2006, the Mecklenburg-Union Metropolitan Planning Organization (MUMPO), the lead transportation planning agency in the area, adopted a resolution recommending that the Monroe Bypass and the Monroe Connector be combined into a new single environmental study under the administration of the North Carolina Turnpike Authority (NCTA). (J.A. 1839, 3696). As a result, in January 2007, the two projects were combined under one environmental study. (J.A. 3695).

statement of purpose and need. (J.A. 3710); see also (J.A. 2812).[3] These reviews included two qualitative reviews and one quantitative screening. During this process, the Defendants throughly analyzed the potential environmental effects of each of the alternatives.

A. The First Qualitative Screening.

The first qualitative screening considered five alternative concepts and whether those concepts could meet the Project's purpose and need. (J.A. 3710). Those alternative concepts were: (1) No Build or no-action Alternative; (2) Transportation Demand Management (TDM) Alternative; (3) Transportation System Management (TSM) Alternative; (4) Mass Transit/Multi-Modal Alternative; and (5) Build Alternatives, which included improving existing roadways and new location alternatives. (J.A. 3710).

Defendants applied three primary criteria in assessing the alternative concepts in this first screening: (1) "Does the alternative address the need to improve mobility and capacity in the US 74 corridor?"; (2) "[D]oes [the alternative] allow for high-speed regional travel . . . ?"; and (3) "Does the alternative maintain access to properties along existing US 74?" (J.A. 3711).

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[3] Due to an error in communication, only two pages of a lengthy report regarding the alternatives analysis was included in the Joint Appendix. Alternative Development and Analysis Report (PBS&J, April 2008). The entire report is located in the Administrative Record #8444-8586. Defendants will provide the Court with a hard copy if it so desires.

Defendants eliminated three alternative concepts from further consideration because they would not meet the Project's purpose and need. (J.A. 2984-88). Defendants eliminated the Transportation Demand Management (TDM) Alternative, which contemplates strategies such as promoting carpooling and staggered work schedules in a given area, because the alternative (a) would provide only minor improvements to high-speed regional travel, (b) would provide only minor improvements to mobility and increased capacity for most travelers on US 74, and (c) would not be consistent with the North Carolina State Highway Corridor program or the North Carolina Intrastate System program. (J.A. 2981-82).

Defendants eliminated the Transportation System Management Alternative (TSM)—which employs low-cost minor transportation improvements such as turn prohibitions, traffic signal timing optimization, and High Occupancy Vehicle lanes—because it failed to meet key components of the Project's purpose and need (J.A. 2982-84). Specifically, it would not serve high-speed regional travel. (J.A. 2984). To the extent any TSM plan would provide "minor improvements to mobility and capacity[,]" those improvements would be overtaken by projected increased traffic. (J.A. 2984). Additionally, although the TSM would maintain access to properties along existing US 74, it would not be consistent with the State Highway Corridor program or Intrastate System programs. (J.A. 2984).

Defendants also eliminated the Mass Transit/Multi-Modal Alternative, which contemplates bus or rail passenger service. (J.A. 2984). Although this concept would likely improve mobility for county-to-county and intracounty travelers, it would not divert enough vehicular traffic so as to improve mobility and capacity. (J.A. 2985). This alternative also would not be consistent with the State Highway Corridor or Intrastate System programs. (J.A. 2985).

During the initial qualitative screening, Defendants retained the Build Alternative concept, but Defendants eliminated several of its variants involving the "improve existing US 74" Build Alternative. (J.A. 2985-87). Defendants eliminated Standard Arterial Widening because the numerous traffic signals along the road would prevent significant improvement to mobility and would not allow the corridor to provide high-speed travel. (J.A. 2986). Defendants also eliminated the superstreet concept, which envisioned eliminating left-turns and through movements from cross streets, because only minor improvements in capacity and mobility were anticipated. (J.A. 2986). The superstreet would also not be able to provide high-speed regional travel. (J.A. 2986). Defendants, however, did not eliminate the possibility of improving existing US 74 as a Controlled-Access Highway. (J.A. 2986-87, 3711).

Thus, after the first qualitative screening, two of the major alternative concepts remained: the No Build Alternative and some of

the Build Alternatives. The remaining Build Alternatives included: (1) Improve Existing US 74; (2) New Location Roadway; and (3) New Location/Improve Existing Roadways Hybrid. (J.A. 3711). Defendants then analyzed these Build Alternatives in the second screening.

B. The Second Qualitative Screening.

For the second screening, the Defendants developed more specific Build Alternatives. To develop New Location and Hybrid Alternatives, Defendants developed 1000 foot wide corridor segments on new locations and on existing roadways. The Defendants then qualitatively assessed and compared those segments based on their potential impacts to the human and natural environments, as well as with respect to their reasonableness and practicability. (J.A. 3712). Defendants eliminated segments that failed to provide continuity with US 74 and those segments that had greater impacts or potential impacts on the human environment (such as neighborhoods, community facilities, businesses, and residences) and on the natural environment (such as wetlands, streams, and floodplains). The segments remaining after this second screening were then combined to form 25 end-to-end preliminary study alternatives (PSAs). (J.A. 3712); (J.A. 3029) (map of PSAs). Defendants carried those 25 PSAs forward into the third screening.

C. The Quantitative Screening.

During the third screening (which was quantitative in nature), conceptual designs were prepared for the 25 PSAs in order to

estimate impacts to the human and natural environments. (J.A. 3712). Of the 25 PSAs studied in the third screening, 9 were eliminated initially and 16 were recommended for further study as detailed study alternatives (DSAs). (J.A. 3712); see also (J.A. 3749-51) (maps of DSAs).

One of the PSAs eliminated at this initial stage was the proposed improvement to existing US 74, which was designated as "PSA G and Revised PSA G." (J.A. 3003). An entire report was dedicated to this alternative. (J.A. 3540-643). Defendants determined that, in order to upgrade existing US 74 to meet the purpose and need of the Project, a ten-lane facility (six toll lanes for through traffic and four non-toll lanes for local traffic) would be needed. (J.A. 3003). This ten-lane configuration would require awkward and unusual traffic maneuvers in order to allow motorists to reach businesses on both sides of the road. (J.A. 3004).

Moreover, defendants determined that the four non-toll lanes would operate at an unacceptable level of service by the year 2035. (J.A. 3005). PSA G and Revised PSA G would also have greater impacts on the human environment. It would require the relocation of approximately 235-499 businesses along US 74. (J.A. 3006-09).

The construction would take 6-10 years to complete due to the need to maintain traffic on US 74 during construction, and it would cost approximately 20 to 23 percent more than the new location alternatives. (J.A. 3008). After such consideration, Defendants

eliminated PSA G and Revised PSA G as an alternative for further study. (J.A. 3008-10).

D. Analysis of the 16 DSAs and No-Build Alternative.

Defendants then prepared functional designs and a thorough, detailed study of the potential impacts to the human and natural environments for each of the remaining 16 DSAs. (J.A. 3010-23). Defendants also analyzed the No-Build Alternative to provide a baseline for comparison of the 16 DSAs, though the No-Build Alternative would not meet the project's purpose and need because it would not provide for high-speed regional travel, enhance mobility, or increase capacity.

Defendants thoroughly considered the potential impacts of all of the alternatives to the human and natural environment. Among other factors, defendants analyzed the potential impacts of the various DSAs to the human environment, the physical environment, cultural resources, various natural resources, and the potential indirect and cumulative effects (ICE). Because plaintiffs challenge the ICE analysis (and specifically the quantitative ICE analysis' consideration of socioeconomic data and potential induced growth), defendants detail that analysis here.

1. Defendants' Three ICE Assessments.

Defendants conducted three separate ICE assessments, each with its own level of detail. The engineering firm HNTB completed a

qualitative ICE assessment in January 2009.[4] (J.A. 4358-524). Baker Engineering (Baker) completed a quantitative ICE assessment in April 2010. (J.A. 4527-711). Furthermore, because of the presence of the endangered Carolina Heelsplitter mussel in the Goose Creek and Six Mile Creek watersheds, defendants arranged for the engineering firm PBS&J to prepare a quantitative ICE Assessment on Water Quality which was completed in April 2010. (J.A. 4712-787). These studies were performed pursuant to established guidance and practices. (J.A. 4529, 4371, 4721).

A qualitative and quantitative screening serve different purposes. In 2001, North Carolina Department of Transportation and North Carolina Department of Environment and Natural Resources issued Guidance for Assessing Indirect and Cumulative Impacts of Transportation Projects in North Carolina. (J.A. 359-666). The Guidance detailed eight steps used in an ICE assessment. The steps include:

Step 1 - Define the Study Area Boundaries;
Step 2 - Identify the Study Area's Direction and Goals;
Step 3 - Inventory Notable Features;

Step 4 - Identify Impact Causing Activities of the Proposed Action and Alternatives;
Step 5 - Identify Potential Indirect/Cumulative Effects for Analysis;
Step 6 - Analyze Indirect/Cumulative Effects;
Step 7 - Evaluate Analysis Results; and

[4] It appears that the Conservation Groups mistakenly believe that Baker Engineering performed both the Qualitative (2009) and Quantitative (2010) ICE reports. (Brief at 39).

> Step 8 - Assess the Consequences and Develop Appropriate Mitigation and Enhancement Strategies.

(J.A. 4546).

The qualitative ICE consists of Steps 1-5, and the quantitative ICE consists of Steps 6-7. (J.A. 4546). As a result, the qualitative ICE uses a high level of review to generally determine impacts, while the quantitative ICE uses a more detailed level of review to attempt to quantify impacts.

Because the quantitative ICE attempts to quantify anticipated growth, defendants needed to develop numerical socioeconomic projections of growth to compare the Build and No-Build Alternatives. Only the quantitative ICE analyses relied on the disputed socioeconomic numerical projections. (J.A. 4592).

2. Use of Socioeconomic Projections to Assess ICE.

In order to study the indirect and cumulative effects of the Project, defendants began with the local metropolitan planning organization's (MPO) 2030 socioeconomic projections to represent the No-Build scenario. (J.A. 4531). Using those projections as a baseline, defendants then created their own Build scenario socioeconomic projections. (J.A. 4558). In order to determine indirect impacts, defendants then compared the No-Build scenario with the newly-created Build scenario to predict development that may be induced by the Project. (J.A. 4533).

a. No-Build Scenario.

The Mecklenburg-Union Metropolitan Planning Organization (MUMPO) is the federally-mandated MPO relevant to this matter. (J.A. 4866).[5] MUMPO uses its Metrolina Regional Travel Demand Model (MRM) as a major planning tool. (J.A. 1728). MUMPO began the process of developing its MRM in the early 2000s. (J.A. 1519). "The travel demand model projects the number of trips and vehicle miles that may be produced in the region, based on projected population, household, and employment figures and on the region's anticipated road, highway, and transit network." (J.A. 1723). The travel demand model has been used to help determine population and traffic needs for future transportation planning in the Greater Charlotte Area. (J.A. 1728). A component of the model includes socioeconomic projections for the years 2010, 2020, and 2030. (J.A. 1723). Importantly, MUMPO did not create the MRM for a specific highway project. (J.A. 1728).

In order to create socioeconomic projections for use in the MRM, MUMPO used a "top-down" - "bottom-up" process. (J.A. 1723). MUMPO hired economist Thomas R. Hammer, Ph.D., to perform the top-down process. (J.A. 1519). The top-down process creates projections of socioeconomic data for a particular area under the

[5] Pursuant to 23 U.S.C. § 134, a metropolitan planning organization (MPO) must be designated for each urbanized area with a population of more than 50,000 individuals. The MPO is required to develop long-range transportation plans and transportation improvement programs for metropolitan planning areas of the State. Id.

"assumption that long term demographic trends are economically driven [and that] population and household changes are ultimately determined by what happens to employment." (J.A. 1525). The top-down process expressly states that "[l]arge-scale transportation projects" was a growth factor that was omitted from the study. (J.A. 1535). Dr. Hammer forecasted the socioeconomic data for the Charlotte region for every 5 years between the years 2000 and 2035. (J.A. 1618). Dr. Hammer used established census and employment projection data to forecast socioeconomic conditions at the county and sub-county district level for future years.[6] (J.A. 1525, 1530). Dr. Hammer completed the top-down process in December, 2003. (J.A. 1519).

The results of the top-down method became the control data for the bottom-up process. (J.A. 1525, 1724, 1730, 1785). In other words, the forecasted socioeconomic data from the top-down process became the maximum number of households, population and employment that could be allocated among the applicable local jurisdictions during the bottom-up process. (J.A. 1724, 1732).

MUMPO hired Paul Smith, Technical Director for the Center for Applied GIS at UNC Charlotte, to prepare the bottom-up forecasting model for socio-economic data. (J.A. 1634). The bottom-up process utilized the expertise of local planners from each affected local

[6] Union County was divided into four districts. (J.A. 1542).

jurisdiction to allocate, amongst themselves, the projected growth resulting from the top-down process by using many factors, such as local land use plans and utility (water and sewer) availability. (J.A. 1656, 1732). During the bottom-up process, the entire region covered by the MRM was divided into traffic analysis zones (TAZs). (J.A. 1723). A TAZ is a standard geographical unit used for traffic forecasting and is much smaller than the sub-county districts utilized in the top-down process. (J.A. 1723). For instance, in this case, there are 571 TAZs in the Project's future land use study area (FLUSA). (J.A. 4657-4697); see also (J.A. 4698) (TAZ map). By using TAZs, the transportation planners attempt to forecast socioeconomic data for small geographic areas. (J.A. 4563-64).

When Paul Smith designed MUMPO's bottom-up socioeconomic forecasts, he used eight land development factors (LDFs) for Union County and gave each factor a relative weight. (J.A. 1656). "Travel Time to Employment" was one of those eight LDFs. (J.A. 1656).

Travel Time to Employment included MUMPO's long-range transportation plan roadway network to determine travel time to certain specific employment locations in Union County. (i.e., those areas with "5000 jobs within ½ mile"). (J.A. 1651, 1720). The Project was in MUMPO's long-range transportation plan roadway network. Notably, the only LDF that included the anticipated long-range transportation plan roadway network was the Travel Time to

Employment factor. (J.A. 1651-52). Most importantly, the majority of the Union County TAZs gave Travel Time to Employment little to no weight. (J.A. 1720) (map).[7]

Before using MUMPO's socioeconomic projections for the 2010 quantitative ICE, however, Baker first had to determine whether these socioeconomic projections were appropriate for use in this study. Baker interviewed local planners and MUMPO staff as part of this initial investigation. (J.A. 4619-56). Baker took these steps to determine the extent, if any, the local jurisdictions considered the Project in their land use plans and growth projections. (J.A. 4619-56) (questions 9 and 13 of each interview). The interviews also helped Baker determine whether it was reasonable to assume MUMPO's socioeconomic projections represented the No-Build scenario, as opposed to the Build scenario. (J.A. 4619-56). After this investigation, Baker determined that it was reasonable to assume the MUMPO socioeconomic projections represented the year 2030 No-Build scenario. (J.A. 4531).

b. Comparison to Build Scenario Reveals Minimal Induced Growth.

Baker then used the MUMPO projections as a baseline in the quantitative ICE analysis to generate new socioeconomic projections

[7] Despite plaintiffs' allegations, the Travel Time to Employment factor at issue in this case did not pertain to Mecklenburg County (i.e., Charlotte) but only to those areas in Union County with 5000 jobs within one-half mile which was only represented by the City of Monroe. (J.A. 1720).

for the 2030 Build scenario. (J.A. 4531-4532, 4557-4558). As a result of the ICE analysis, defendants determined that there would be little induced growth (approximately 1 percent) as a result of the Project. (J.A. 4592); see (J.A. 4616-17) (showing comparison of the induced growth between the No-Build and Build scenarios).

The finding of insignificant induced growth is mainly attributed to the expansive growth that has already occurred and is likely to continue to occur in Union County. (J.A. 4533). Union County was the fastest growing county in North Carolina from 2000-2008, and the 17th fastest growing county in the United States.[8] (J.A. 2956, 2957). Union County grew 56 percent between 2000-2008 and is expected to grow an additional 36 percent by the year 2030. (J.A. 2957). Union County has grown and is likely to continue to grow, whether or not the Project is built. (J.A. 4533). Despite this growth, there are also growth-prohibiting factors that are in place that limit additional growth beyond what will inevitably occur. For instance, lack of water availability, a moratorium on new sewer connections, environmental regulations requiring 200 foot buffers on streams, and poor soil conditions are a few of the growth-prohibiting factors. (J.A. 4412-13, 4496, 4490, 4482, 4466, 4506, 4530).

[8] Current Census data shows that Union County is the 14th fastest growing county in the U.S. and has grown 60.5 percent from April 1, 2000, to July 1, 2009. (J.A. 4909).

Additionally, Dr. David T. Hartgen, who conducted an independent study specific to North Carolina, concluded that "[t]ransportation investments are a generally blunt and inefficient means of spurring development or preventing it. Even a major road investment is likely to have only modest effect on the growth of a tract compared to zoning limits or exemptions." (J.A. 908). Dr. Hartgen also concluded that "[m]ost growth will occur in the absence of road improvements . . . ." (J.A. 909).

c. Confirming Accuracy of No-Build Scenario.

After the quantitative ICE was completed, the U.S. Fish and Wildlife Service (USFWS) asked defendants to clarify "if MUMPO's TAZ's are the basis for the no-build scenario and they contain the project, how is this a true characterization of [the] no-build?" (J.A. 4788). Baker responded to the USFWS request with a memorandum dated June 28, 2010, whereby it detailed the "land use assumptions" contained in the Build and No-Build scenarios. (J.A. 4789-4790). Baker confirmed the assumption with local expert planners who took part in the bottom-up process that MUMPO's socioeconomic projections "are a reasonable basis for the No-Build level of build out as the TAZ projections were developed based on land use plans as of 2004[.]" (J.A. 4790). Baker found that:

> Based on interviews with local jurisdictions and with MUMPO staff as well as the documentation provided by MUMPO of their process of coordination, it is clear that the land use plans at the time the projections were developed (2001 to 2004) did not include

> higher densities or more intense uses at the interchange areas as they did not anticipate the Monroe Connector/Bypass being built. Therefore, these household and employment projections are an accurate reflection of the expected growth in a No-Build Scenario.

(J.A. 4790).

After the June 28, 2010, memorandum was sent to USFWS (J.A. 4791), USFWS wanted to "be doubly sure about this assumption." (J.A. 4792). As a result, defendants agreed again to "contact MUMPO and localities in the project area to reconfirm the assumption that the Monroe Connector/Bypass was NOT included in socioeconomic projections projected to MUMPO for development of TAZ data." (J.A. 4792) (capitals in original). After conducting this additional investigation, Baker found:

> Of the twelve persons contacted, eight were able to directly confirm, two were unsure but provided information that partly confirms and one deferred to the judgment of another who directly confirmed Baker's assumption. Two were unable to provide any information to confirm or refute the assumption and one did not provide a response. Most importantly, the one individual most involved in the development of the TAZ forecasts gave substantial information that confirmed the reasonableness of the assumption. Therefore, it appears credible and defensible that the TAZ socioeconomic forecast is a reasonable basis for the No Build Scenario in the Quantitative ICE.

(J.A. 4808).

E. Correction of Traffic Forecasts in FEIS.

During the NEPA process, defendants conducted several traffic forecasts. As part of the FEIS, defendants corrected one traffic forecast–the 2035 No-Build forecast-that was "inadvertently overstated." (J.A. 3903-04). During the NEPA public involvement process, the error in the 2035 No-Build traffic forecast was brought to defendants' attention. (J.A. 4066-67). As a result, defendants commissioned a new 2035 No-Build traffic forecast report to correct the previous 2035 No-Build traffic forecast. (J.A. 3660).[9]

Notably, the purpose and need of the Project was based on the 2030 No-Build traffic forecasts and not the corrected 2035 No-Build forecasts. (J.A. 2139). Once the error in the 2035 No-Build forecast was brought to defendants' attention, they prudently reviewed and verified all other traffic forecasts to make sure their analysis and conclusions were correct. (J.A. 3903-04). After the 2035 No-Build was corrected and all other traffic forecasts were verified, defendants determined that "[n]o additional corrections are needed to the Draft EIS" and "all other conclusions and discussions remain valid." (J.A. 3904).

[9] Despite this level of effort, it is important to note that the 2035 No-Build served simply to verify assumptions contained in the 2030 No-Build forecasts. (J.A. 2811). In both the original and corrected 2035 No-Build forecasts, the traffic volumes were still greater than the 2030 No-Build volumes. For instance, compare the "2030 Model" traffic volumes for "AADT Location[s]" labeled F & I (J.A. 2856), to the second and third segments in DEIS Table 2-7 (J.A. 3904), respectively.

F. Consideration of the Stantec Study.

As discussed supra at II.C., the DEIS and FEIS considered improving the existing US 74 corridor. The FEIS also considered a study (Stantec study) commissioned to consider this alternative. (J.A. 3865-67). FEIS Section 3.3.2 specifically discusses the Stantec Study. (J.A. 3866-68). The Stantec Study states:

> This study was a direct result of continued delays to the Monroe Bypass project. . . . These delays have resulted in the immediate need to address traffic operational issues along the highly congested US 74 corridor with the goal to improve safety and efficiency of the existing roadway infrastructure until construction of the Monroe Bypass can begin.

(J.A. 1947) (emphasis added). The considered measures were projected to cost at least $13 million dollars and would result in an acceptable level of service for US 74 through the year 2015. (J.A. 1953, 1979-80). Defendants considered the results of the Stantec Study (J.A. 3866-68) and concluded that such improvements "would not result in high speed travel through the corridor in 2015" and would only allow average speeds of 30 mph. (J.A. 3867). Defendants also concluded that traffic in the year 2035 along US 74 would "more than double the 2015 traffic volumes," resulting in unacceptable levels of service. (J.A. 3867). As defendants determined that the improvements suggested by the Stantec Study would not meet the Project's purpose and need, they did not select it as a detailed study alternative. (J.A. 3867).

G. Public Participation.

In addition to the study of environmental impacts, defendants conducted numerous public meetings and outreach activities to inform and receive feedback from the public concerning the impacts of the Project. (J.A. 3222, 3854, 3744). Likewise, defendants developed an agency coordination plan pursuant to Section 6002 of SAFETEA-LU, 23 U.S.C. § 139 et seq., to inform and receive feedback from all necessary resource and regulatory agencies concerning the impacts of the Project. (J.A. 3307). As a result of the agency coordination plan, NCTA conducted a total of 22 turnpike environmental agency coordination meetings during the course of the environmental study. (J.A. 3231, 3856).

Defendants issued a DEIS on March 31, 2009. (J.A. 2890-3539). The DEIS contained discussions, inter alia, of the purpose and need of the Project (J.A. 2947-75), the alternatives considered (J.A. 2977-3074), the analyses performed to evaluate those alternatives (J.A. 2980-3010, 3195-216), and the recommended alternative (J.A. 3020-23). In the DEIS, defendants identified one of the DSAs (DSA D) as the recommended alternative. (J.A. 3021).

Defendants issued a FEIS on May 25, 2010. (J.A. 3680-4787). In addition to identifying DSA D as the recommended alternative (J.A. 3757), the FEIS contained, inter alia, updates and clarifications to the DEIS, (J.A. 3704), errors contained in the DEIS, responses to comments to the DEIS, a summary of impacts, and environmental assessments. (J.A. 3690).

FHWA issued a ROD on August 27, 2010. The ROD selected DSA D as the selected alternative (J.A. 4864). The ROD also contained, inter alia, errata and changes to the FEIS and responses to comments on the FEIS. (J.A. 4862). The ROD found that DSA D would fulfill the purpose and need of the project by improving mobility and capacity and allowing for high-speed regional travel, while maintaining access to properties along existing US 74. (J.A. 4864). The ROD explained that DSA D was selected over other alternatives for a variety of reasons including, among others, that: (1) it was one of the shortest alternatives; (2) it would not require relocation of Rocky River Road and the associated impacts to wetlands; (3) it had relatively fewer impacts to parts of the human environment such as residences, schools, and church property; (4) it impacted fewer agricultural lands and hazardous material sites; (5) it avoided impacts to a future public park; and (6) it impacted relatively few ponds, perennial streams, intermittent streams, and 303(d)-listed streams. (J.A. 4867-69).

III. District Court Proceedings.

Plaintiffs filed the initial complaint in this matter on November 2, 2010. (J.A. 17-40). Plaintiffs alleged that defendants violated NEPA "in connection with [their] decision to authorize, fund, seek permits for and otherwise advance construction of the Monroe Connector/Bypass." (J.A. 17). Specifically, plaintiffs alleged that defendants violated NEPA by conducting a flawed

analysis of alternatives (J.A. 34-37), failing to analyze the environmental impacts of the Project (J.A. 37), and presenting false and misleading information to the public. (J.A. 38-39). Throughout their complaint, plaintiffs alleged that defendants improperly constructed a No-Build scenario that assumed the construction of the Project. (J.A. 19, 29, 36, 38)

Defendants filed the administrative record–consisting of 30,102 pages–with the district court on January 31, 2011 (J.A. 80-82) and filed a supplemental administrative record–consisting of an additional 580 pages–on February 25, 2011. (J.A. 83-85).

Plaintiffs filed a motion to complete and supplement the administrative record on March 4, 2011. (J.A. 86-110). Among other things,[10] plaintiffs sought to add three e-mails sent after the ROD was signed. Plaintiffs sought to add the e-mails as evidence of "bad faith" on the part of defendants. (J.A. 106-07). The district court denied plaintiffs' motion on May 5, 2011. (J.A. 113-120). The court noted the presumption of regularity that follows from an agency's designation of an administrative record (J.A. 114-15) and held that the e-mails that plaintiffs highlighted failed to make the required "strong showing" of defendants' bad faith. (J.A. 120).

After the parties filed competing motions for summary judgment, the district court granted summary judgment on October 24, 2011, in

[10] Although plaintiffs sought to complete and supplement the record with other materials, they have not appealed the district court's ruling on those other items.

favor of defendants. (J.A. 121-48). After recognizing the deferential standard of review applicable in NEPA cases (J.A. 131-32, 133-34), the district court rejected each of plaintiffs' arguments.

In response to plaintiffs' first claim that defendants failed to conduct a sufficient environmental analysis, the court held that defendants "took extensive steps to ensure that the socioeconomic data constituted an appropriate baseline for constructing the No-Build scenario." (J.A. 134). The court particularly highlighted the multiple analyses defendants conducted to determine the appropriateness of using the socioeconomic data. (J.A. 134-36).

In response to plaintiff's second claim that defendants failed to conduct a sufficient alternatives analysis, the court held that defendants constructed a statement of purpose and need and considered a reasonable range of alternatives. (J.A. 141-46).

In response to plaintiff's third claim that defendants failed to respond to USFWS's comments and provided false and misleading information, the district court noted that defendants repeatedly responded to USFWS's comments (J.A. 146-47). Although the court held that the ROD included an incorrect statement that data used in the No-Build scenarios did not contemplate construction of the Project, it concluded that the response was not material. (J.A. 148). The court reached this conclusion because the statements were accompanied by "an assurance that using the socioeconomic data to

project traffic volumes and to forecast the growth-inducing impact of the Build and No-Build scenarios was proper." (J.A. 148). The court also noted that defendants had undertaken "several ample investigations into the propriety of using the data." (J.A. 148).

Judgment in favor of defendants was entered on October 25, 2011. (J.A. 15, Docket Entry 66). Plaintiffs filed a timely notice of appeal on October 31, 2011. (J.A. 15, Docket Entry 67).

SUMMARY OF ARGUMENT

Courts review agency action pursuant to NEPA under a deferential standard that respects the expertise of the agency. As shown in the Statement of Facts, defendants identified a reasonable purpose and need statement for the Project and conducted a thorough analysis of the environmental impacts of the various alternatives that satisfied the Project's purpose and need. Throughout this process, defendants have accepted comments from the public and other agencies and have shown a willingness to amend and revisit their analyses. Additionally, the district court did not err in denying plaintiffs' effort to add an e-mail to the administrative record. As defendants have complied with NEPA by taking a hard look at the environmental consequences associated with the Project, the Court should affirm the judgment of the district court.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS.

A. Standard of Review.

This Court "review[s] de novo a district court's findings on an administrative record. This de novo standard applies to questions of both law and fact." Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 189 (4th Cir. 2009) (internal citation omitted).

The Court reviews for abuse of discretion a district court's denial of a motion to supplement the administrative record. B&B Partnership v. United States, No. 96-2025, 1997 WL 787145, *3 (4th Cir. 1997) (unpublished) (citing Inland Empire Public Lands Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996)); see also Fort Sumter Tours, Inc. v. Babbitt, 66 F.3d 1324, 1336 (4th Cir. 1995) (inter alia, affirming district court's decision not to supplement the administrative record after concluding that the district court did not abuse its discretion); Novartis Pharmaceuticals Corp. v. Leavitt, 435 F.3d 344, 348 (D.C. Cir. 2006) ("We review the district court's refusal to supplement the administrative record for abuse of discretion."). "A court abuses its discretion when its ruling is based 'on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" United States v. Cabiness, 284 F. App'x 77, 79 (4th Cir. 2008) (unpublished) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)).

B. This Court Reviews Agency Action Under the APA's Deferential Standard of Review.

NEPA requires "federal agencies [to] take a 'hard look' at the potential environmental consequences of their actions." Ohio Valley Envtl. Coal., 556 F.3d at 191 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)). "[I]t is well settled that NEPA does not mandate that agencies reach particular substantive results. Instead, it simply sets forth procedures that agencies must follow." Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996); Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 184 (4th Cir. 2005) ("NEPA is a procedural statute; it does not force an agency to reach substantive, environment-friendly outcomes.").

"Because NEPA is a procedural and not a results-driven statute, even agency action with adverse environmental effects can be NEPA-compliant so long as the agency has considered those effects and determined that competing policy values outweigh those costs." Ohio Valley Envtl. Coal., 556 F.3d at 192; see also City of Los Angeles v. FAA, 138 F.3d 806, 807 (9th Cir. 1998) ("Drafting a[n Environmental Impact Statement], one hopes, will force an agency to consider a project's effects on the environment. If the agency discusses the main environmental effects reasonably thoroughly, that's enough.").

Courts review Federal actions pursuant to NEPA under the Administrative Procedure Act's deferential "arbitrary and

capricious" standard. Ohio Valley Envtl. Coal., 556 F.3d at 192. Under this standard, a court "presume[s] the validity of Agency action" and simply determines "whether the record reveals that a rational basis exists for the Agency's decision." Reynolds Metals Co. v. EPA, 760 F.2d 549, 558 (4th Cir. 1985); Ohio Valley Envtl. Coal., 556 F.3d at 192 (according deference when an agency's explanation for its decision "includes a rational connection between the facts found and the choice made") (internal quotation marks and citations omitted).

A court undertakes "only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." Hodges v. Abraham, 300 F.3d 432, 449 n.17 (4th Cir. 2002) (internal quotation marks omitted); see also Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989) (holding that, in reviewing whether an agency decision was arbitrary or capricious, a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment") (internal quotation marks omitted).

A court using the arbitrary and capricious standard does not simply "rubber-stamp" an agency's decisions but instead engages in a "searching and careful inquiry of the record." Ohio Valley Envtl. Coal., 556 F.3d at 192 (internal quotation marks and citation omitted). That searching inquiry, however:

> is meant primarily to educate the court so that it can understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made.

Id. at 192-93. (internal quotation marks and citation omitted).

Simple errors or differences in opinion do not amount to such a clear error in judgment. Nat'l Audubon Soc'y, 422 F.3d at 199 ("We reemphasize that 'NEPA merely prohibits uninformed-rather than unwise-agency action.'") (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989)). This Court has held that it has found agency decisions arbitrary and capricious:

> only "if the agency relied on factors that Congress has not intended it to consider, 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."

Shenandoah Ecosystems Defense Group v. U.S. Forest Service, No. 98-2552, 1999 WL 760226, *2 (4th Cir. 1999) (emphasis added) (quoting Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 287-88 (4th Cir. 1999)).

Importantly, in conducting a NEPA review, a "court is not empowered to substitute its judgment for that of the agency." Hughes River, Id. at 288. For example, "[a]gencies are entitled to select their own methodology as long as that methodology is

reasonable. The reviewing court must give deference to an agency's decision." Id. at 289. "Especially in matters involving not just simple findings of fact but complex predictions based on special expertise, 'a reviewing court must generally be at its most deferential.'" Ohio Valley Envtl. Coal., 556 F.3d at 192 (quoting Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983)).

"NEPA allows the agency the discretion of what methodology to use and does not require the use of the best scientific methodology available." Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior, 731 F. Supp. 2d 15, 35 (D.D.C. 2010). "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Marsh, 490 U.S. at 378; Committee to Preserve Boomer Lake Park v. Dep't of Transp., 4 F.3d 1543, 1553 (10th Cir. 1993) ("A disagreement among experts or in the methodologies employed is generally not sufficient to invalidate" an agency's rulemaking).

Additionally, "a court reviewing an EIS for NEPA compliance must take a holistic view of what the agency has done to assess environmental impact." Nat'l Audubon Soc'y, 422 F.3d at 186. That is, "the court will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." Nevada

v. Dep't of Energy, 457 F.3d 78, 93 (D.C. Cir. 2006). "Allowing courts to seize upon any trivial inadequacy in an EIS as reason to reject an agency decision would permit undue intrusion into an agency's decisionmaking authority." Nat'l Audubon Soc'y, 422 F.3d at 186. Thus, a reviewing court must "examine all of the various components of an agency's environmental analysis in order to determine, on the whole, whether the agency has conducted the required 'hard look.'" Id. (emphasis added).

C. Defendants' Environmental Impacts Analysis Complied with NEPA.

In criticizing defendants' environmental analyses, plaintiffs repeatedly assert that defendants used data that "compar[ed] 'Build the Road' with 'Build the Road.'" (Brief at 24). First, as explained supra in Facts Part D.2(b), defendants did not simply use the exact same socioeconomic projections to represent both the No-Build and Build alternatives. (J.A. 4533, 4558). Instead, defendants took the No-Build data and used it as a baseline to create a separate set of projections for the Build model. (J.A. 4558). Second, plaintiffs' argument that defendants erred in using MUMPO's socioeconomic data to model the No-Build alternative "flyspecks" the methodology by ignoring the overall analysis that created MUMPO's data. The argument also exaggerates the impact of one factor–Travel Time to Employment–that was used only in the bottom-up stage of the analysis. Plaintiffs also ignore the numerous steps defendants took to ensure that the data was

appropriate to use. Defendants complied with NEPA by taking a "hard look" at the potential environmental impacts of the alternatives, including the possibility of indirect effects through induced growth.

1. Defendants Carefully Considered the Issue of Potential Induced Growth and Reasonably Modeled the No-Build Scenario.

In creating the No-Build scenario–as well as other projections–defendants incorporated numerous data sets and factors from various sources. (J.A. 4565-72) (discussing the methodology used regarding land use); (J.A. 4789-90) (discussing assumptions in Build and No-Build scenarios). Reliance on existing transportation planning studies and tools–such as the information provided by MUMPO–is encouraged by regulation. See 23 C.F.R. § 450.212 (stating that results of MPO planning "may be used as a part of the overall project development process consistent with the NEPA,"); 23 C.F.R. Part 450, app. A (referring to population and employment projections as "valuable inputs to the discussion of the affected environment and environmental consequences"); 23 C.F.R. § 771.111 (stating that "information and results produced by, or in support of, the transportation planning process may be incorporated into environmental review documents").

In arguing that defendants have compared building the road to building the road, plaintiffs overstate the importance of one factor–Travel Time to Employment–in the overall creation and

analysis of the No-Build model. For example, the socioeconomic forecasting model used for MUMPO treated travel time to employment as one factor among eight that were considered. (J.A. 1654). Moreover, as explained supra, this one factor was given little or no weight in analyzing the majority of the Union County's TAZs. (J.A. 1720) (map).

In creating, using, and interpreting these models, defendants applied the kinds of "complex predictions based on special expertise," that require "'a reviewing court [to] generally be at its most deferential.'" Hughes River, 165 F.3d at 289 (quoting Baltimore Gas & Elec. Co., 462 U.S. at 103). The issue regarding inputs for the TAZ socioeconomic predictions "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." Marsh, 490 U.S. at 376. A federal court does not sit "as a super professional transportation analyst or decide which party utilized the better methodology in conducting its . . . analysis. Rather, [a court] simply [must] determine[] whether the appellees' choice of methodology had a rational basis, consistently applied, taking relevant considerations into account." Druid Hills Civic Ass'n v. Fed. Highway Admin., 772 F.2d 700, 711 (11th Cir. 1985) (internal quotation marks omitted).

Moreover, defendants took additional steps to determine whether to use this challenged socioeconomic data in ICE analyses. Defendants, through their consultants, interviewed relevant staff

and planners to determine the appropriateness of using the socioeconomic data for the Build and No-Build models. (J.A. 3796-98).

Notably, when parties raised questions regarding the assumptions contained in the No-Build models, defendants considered the issue, investigated further, and responded to the concerns. Indeed, defendants, through Baker Engineering, prepared a memorandum that explained in detail how the No-Build scenario was created and how any assumptions regarding the Project were reflected in the data. (J.A. 4789-90).

Baker also conducted a survey of the localities that contributed data to the TAZ socioeconomic data set. (J.A. 4796-97). In a memorandum summarizing that survey, Baker described (J.A. 4800-02, 4806-08) the responses received from each of the 12 individuals contacted and concluded that "it appears credible and defensible that the TAZ socioeconomic forecast is a reasonable basis for the No Build Scenario in the Quantitative ICE." (J.A. 4802, 4808).

Consequently, defendants were aware of this issue and considered it as part of the NEPA process. Furthermore, defendants' determination that the build alternative would result in only approximately one percent more development than the no-build alternative is supported by the Hartgen report discussed supra, Facts Part D.2(b).

2. Plaintiffs Have Failed to Establish That Defendants' Model of the No-Build Scenario was Arbitrary and Capricious.

Despite defendants' efforts, plaintiffs challenge both the means of performing the ICE analyses and the conclusions defendants reached regarding the ICE impacts. (Brief at 23-40). At base, however, plaintiffs simply disagree with the substantive decisions and analysis defendants undertook regarding the ICE impacts.

Indeed, plaintiffs "flyspeck" defendants' analyses to the point of even criticizing specific questions asked as part of the TAZ survey discussed previously. (Brief at 31) (referring to the interviews as a "charade"). As this Court has held, "'[a]gencies are entitled to select their own methodology as long as that methodology is reasonable,' and we must defer to such agency choices." Ohio Valley Envtl. Coal., 556 F.3d at 201 (quoting Hughes River Watershed Conservancy, 165 F.3d at 289).

Plaintiffs' argument that the quantitative ICE analysis "contradicted" other studies (Brief at 13) ignores the difference between a qualitative study and a quantitative study. Furthermore, the 2009 qualitative ICE study and 2010 quantitative ICE study do not contradict each other. Compare, (J.A. 4369-70) (conclusions of qualitative study), with (J.A. 4560-4562) (conclusions of quantitative study). Plaintiffs also overstate one quotation from the 2009 qualitative ICE study. Although plaintiffs assert that this study concluded "that a new Toll Highway would likely result

in more residential and commercial development in the central and eastern portions of the study area" (Brief at 10) (emphasis added), the study actually stated that the proposed alternatives "may influence residential development in the central and eastern part of the" study area. (J.A. 4369) (emphasis added). Obviously, "may" and "likely" are distinct.

3. This Case Bears no Similarity to Those Where the Agency Failed to Analyze Induced Growth and Where There was no Present, Existing Need.

Plaintiffs cite City of Davis v. Coleman, 521 F.2d 661, 679 (9th Cir. 1975), North Carolina Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp., 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001), Highway J Citizens Group v. U.S. Dep't of Transp., 656 F. Supp. 2d 868, 887-88 (E.D. Wis. 2009), and Sierra Club v. U.S. Dep't of Transp., 962 F. Supp. 1037, 1043-44 (N.D. Ill. 1997) in support of their arguments. (Brief at 32-36). These cases, however, do not apply to the circumstances here. First, in contrast to those cases, defendants have engaged in a thorough analysis of potential induced growth and other potential indirect effects. Second, defendants have adopted this proposal to address both future needs and the present, existing need to increase capacity and provide high-speed regional travel.

In City of Davis, the courts overturned FHWA's conclusions–made without an EIS–that the projects would cause no significant impact. Although plaintiffs indicate that the Ninth Circuit imposed an

injunction in City of Davis because defendants' "EIS failed to examine the road's growth-inducing impacts" (Brief at 43), the defendants in that case actually did not prepare an EIS. 521 F.2d at 673 (referring to the "decision not to prepare an EIS"). In this case, however, defendants acknowledged the project would create a significant impact and evaluated the project with a full EIS rather than a more modest EA.[11]

This matter is also distinct from City of Davis based on the purposes of the project. In City of Davis, the court noted the record contained evidence that economic development was an underlying need for building the interchange in its proposed rural location. Id. at 667, 675 (noting that the "growth-inducing effects of the Kidwell Interchange project are its raison d'etre"). Where the driving purpose and need of a project is to stimulate development, it is difficult to suggest that any chance of development resulting from the project is too speculative to warrant further study. Here, however, the stated need of the project is not to stimulate development but to relieve existing and projected congestion and to provide high-speed regional travel consistent with the goals of state and local transportation plans. (J.A. 3705).

[11] "An EA is a brief report, without detailed descriptions or data, indicating possible environmental consequences that can help determine whether a more extensive Environmental Impact Statement ('EIS') is necessary pursuant to NEPA." Arkansas Game & Fish Comm'n v. United States, 637 F.3d 1366, 1370 (Fed. Cir. 2011).

In contrast with the facts here, the district courts in North Carolina Alliance and Highway J criticized the defendant agencies for not conducting any sort of meaningful environmental assessment. In North Carolina Alliance, the court held that "the FEIS does not discuss any of the potential environmental effects resulting from prospective induced growth." Id. at 697 (emphasis added). Although the court noted that it "hesitates to find that induced traffic must always be considered for a FEIS to adequately evaluate and compare alternatives," it held that FHWA failed to justify omitting induced traffic from the FEIS. Id. at 691. Likewise, the district court in Highway J criticized the agency for offering "not a discussion" of environmental impacts but simply "a summary of land use plans and survey responses followed by a bare conclusion." 656 F. Supp. 2d at 886.[12]

[12] In Highway J, the Court also held that FHWA's indirect and cumulative impacts assessment was flawed because FHWA reached a prediction regarding future growth that was countered by two of five polled local municipalities. 656 F. Supp. at 886-87. In this case, however, when FHWA polled twelve local officials about the reasonableness of using TAZ socioeconomic forecasts for the basis of the No-Build scenario, eight local officials directly confirmed the reasonableness of the assumption. (J.A. 4808). Two others "were unsure but provided information that partly confirms and one deferred to the judgment of another who directly confirmed [the reasonableness of the assumption]." (J.A. 4808). Two other local officials "were unable to provide any information to confirm or refute the assumption." (J.A. 4808). As a result, unlike the scenario in Highway J, defendants' conclusion here that project construction would induce minimal induced growth is consistent with the opinions of the local officials who provided the data upon which the indirect and cumulative effect analysis was based.

Here, defendants discussed and evaluated the possible environmental impacts of induced growth. (J.A. 3800-01) (containing a chart describing changes in land use and discussing the impact of the projected alternative on vegetated land cover and forest); (J.A. 3805) ("A water quality modeling analysis was conducted to determine if induced land use change resulting from the Preferred Alternative would affect water quality within the project study area."). Defendants also provided a detailed discussion of their methodology and findings regarding indirect environmental impacts. (J.A. 3794-3806; 4550-4572). Furthermore, defendants noted that "as with any attempt to forecast future growth or development, there are limitations to the accuracy and certainty of the results of these analyses." (J.A. 4563).

As a result of the ICE analyses, the FEIS explained that the build alternative would result in only a 1 percent increase in growth in developed land over the No-Build scenario. (J.A. 4909) ("The expected growth in developed land from the Baseline to the No-Build is 34%. The relatively small incremental increase (1%) expected between the No-Build and Build is, therefore, not substantial."). This projection is consistent with the documented extraordinary past local population growth and current projections

for continuing growth.[13] This reasoning is also consistent with Dr. Hartgen's ultimate conclusion that his study of the linkage between growth and road improvements in North Carolina finds only a modest correlation between road investments and growth. (J.A. 907).

Plaintiffs also cite Sierra Club to argue against the adequacy of defendants' analysis. (Brief at 33). Plaintiffs argue that Sierra Club "presents an almost identical situation" to this case and that Sierra Club stands for the idea that the "use [of] socioeconomic data that assume construction of a major highway for both 'Build' and 'No-Build' scenarios" violates NEPA. (Brief at 33). This argument has been rejected by at least one court. Laguna Greenbelt, Inc. v. U.S. Dep't of Transp., 42 F.3d 517, 526-27 (9th Cir. 1994) (holding that the use of traffic projections that assumed the construction of the project at issue in the matter did not violate NEPA after concluding "[t]he need for the [project] is based on existing as well as future traffic congestion[,] and the county's

[13] "According to the U.S. Census Bureau Population Division, between April 1, 2000 and July 1, 2009, Union County was the fourteenth fastest growing county in the United States with a 60.5 percent increase in population." Furthermore, "[t]he North Carolina State Office of Budget and Management predicts the population of Union County will increase an additional 48 percent by 2030." (J.A. 4909).

population probably will grow in the coming years even without the [project]").[14]

Additionally, unlike the defendants in Sierra Club, the defendants here did not use the same socioeconomic projections to represent both the No-Build and Build scenarios. Through the quantitative ICE analysis, Defendants generated socioeconomic projections for the Build scenario. (J.A. 4557). Moreover, Sierra Club illustrates how defendants have complied with NEPA even if plaintiffs' criticisms regarding future projections are correct. As the district court in Sierra Club held, "a reliance on existing needs is legally sufficient, even if the analysis of future needs is flawed." 962 F. Supp. at 1044 (citing Laguna, 42 F.3d at 526; Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 442 (5th Cir. 1981); Nat'l Wildlife Fed'n v. Lewis, 519 F. Supp. 523, 533-34 (D. Conn. 1981)).

In Sierra Club, the district court held, with respect to current traffic needs, that "there is no evidence of a need to improve local travel or enhance community linkage[.]" 962 F. Supp. at 1044 (emphasis added). By contrast, the US 74 highway study corridor currently suffers from severe congestion. "Average travel speeds currently range from approximately 20 to 30 miles per hour (mph) during the peak hour, and are expected to decline to less than

[14] The Project responds to current traffic needs. (J.A. 2948). Additionally, the area affected by the Project has grown substantially in the recent past. Supra n. 13.

20 mph by 2030. Congestion is high, with one third of the intersections currently operating at an unacceptable Level of Service . . . during the peak hour." (J.A. 2948). As a result, even if, arguendo, plaintiffs' criticisms regarding future projections are valid, the current traffic needs that the Project alleviates are sufficient to satisfy NEPA.

Thus, defendants diligently performed a full EIS to examine the environmental impacts, including induced growth, of the proposed alternatives. Plaintiffs' substantive disagreements with the conclusions and the manner in which defendants considered and evaluated these impacts does not establish that defendants failed to take a "hard look" at potential environment impacts.

D. Defendants' Alternatives Analysis Satisfied NEPA.

Defendants constructed a reasonable purpose and need statement and properly evaluated how the alternatives compared to each other and to the stated purpose and need. "The proper question to ask at the outset of a NEPA inquiry is not whether the Administration focused on environmental goals but rather . . . whether its stated objectives were reasonable." City of Alexandria v. Slater, 198 F.3d 862, 867 (D.C. Cir. 1999); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991) ("We uphold an agency's definition of objectives so long as the objectives that the agency chooses are reasonable."); Alliance for Legal Action v. FAA, 69 F. App'x 617, 622 (4th Cir. 2003) (unpublished) ("The statement of a

project's purpose and need is left to the agency's expertise and discretion, and we defer to the agency if the statement is reasonable.").

A court considers "both of these inquiries—whether an agency's objectives are reasonable, and whether a particular alternative is reasonable in light of these objectives—with considerable deference to the agency's expertise and policy-making role." City of Alexandria, 198 F.3d at 867. In exercising this deference, a court generally does not second-guess the prioritization and judgments made by the agency. Alliance for Legal Action, 69 F. App'x at 622 ("In this situation, the project sponsor's goals play a large role in determining how the purpose and need is stated."); City of Alexandria, 198 F.3d at 867 ("By suggesting that the Administration violated NEPA because it did not sufficiently prioritize environmental goals, the district court subtly—and impermissibly—transformed a procedural statute into a substantive one.").

Defendants established a reasonable and well-documented purpose and need statement that complied with NEPA. "US 74 is the major east-west route connecting the Charlotte region, a major population center and freight distribution point, to the North Carolina coast and the port at Wilmington." (J.A. 3705). The Project is intended to address two primary needs: (1) deficiencies in existing and projected roadway capacity; and (2) high-speed regional travel that

is consistent with the designations and goals of state and local transportation plans. Id.[15] Although plaintiffs challenged this purpose and need in their original summary judgment pleadings, they have not done so in this appeal.

Just as defendants' purpose and need statement was reasonable, their determinations as to whether certain alternatives met the purpose and need statement were also reasonable. An agency may reject an alternative if it does not meet the stated purpose and need. Route 9 Opposition Legal Fund v. Mineta, 75 F. App'x 152, 155 (4th Cir. 2003) (unpublished) ("An alternative may be eliminated from further consideration if it does not meet the purpose and needs of the project.") (citing Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1067 (9th Cir. 1998); Busey, 938 F.2d at 198).

Plaintiffs assert that "the defendants did not consider in detail any alternative other than a new toll highway in essentially one location." (Brief at 47). Specifically, plaintiffs argue that defendants did not adequately consider alternatives such as

[15] Indeed, through the public comment process, defendants modified the statement of purpose and need where they deemed appropriate and otherwise detailed the reasons other suggested changes were not appropriate. In response to comments that the term "high speed" would unduly narrow the range of Project alternatives, defendants determined that the term did not unduly restrict the possibility of alternatives other than new locations. For example, even though the Monroe Connector DEIS included "high-speed" as a part of the need and purpose statement, detailed study area G contemplated improving a portion of existing US 74. (J.A. 2126). The FEIS also included a substantive discussion regarding the use of "high speed" in purpose and need. (J.A. 3860-61).

upgrading the existing US 74 highway, transportation system management, and combinations thereof. (Brief at 47-51).

As discussed in the Statement of Facts, however, defendants considered these alternatives as part of the NEPA process and reasonably eliminated them because they would not fulfill the purpose and need. See, e.g.,(J.A. 3710-12) (discussing the multi-stage process used to review alternatives). The FEIS illustrated the questions asked as part of the first qualitative screening of alternatives and how certain alternatives fared in response to those questions. (J.A. 3711). In response to comments, the FEIS included a detailed discussion as to why defendants chose not to pursue such alternatives beyond the first stage of alternatives screening. (J.A. 3863-69); see also (J.A. 3645) (discussing the NCDOT US 74 Corridor Study and why it does not support the further consideration of several alternatives).

Plaintiffs simply disagree substantively with defendants' assessment of these alternatives.[16] Indeed, in one portion of their Brief, plaintiffs candidly advance a substantive disagreement with

[16] To the extent the DEIS did not initially address the Corridor Study, defendants evaluated and incorporated the study into the FEIS. (J.A. 3712, 3866-67); cf. Animal Defense Council v. Hodel, 840 F.2d 1432, 1439-40 (9th Cir. 1988) ("Once new information surfaced, the Bureau's decision not to supplement the EIS was reasonable because the Bureau carefully considered the information, evaluated its impact, and supported its decision not to supplement its EIS with a statement of explanation."). Defendants here went beyond the agency in Hodel by incorporating the Corridor Study into the FEIS.

the defendants' evaluation of the Corridor Study and their decision to reject the alternative of upgrading US 74. (Brief at 47-48). Even though defendants reasonably concluded that the Corridor Study did not provide long-term solutions, plaintiffs argue that defendants should have continued to consider this option into the indeterminate future. Id. NEPA does not provide relief for this kind of direct, substantive disagreement regarding an agency's evaluation of alternatives.

Plaintiffs also again claim that defendants improperly used data that assumed the construction of the Monroe Bypass-Connector. (Brief at 41-44). For reasons discussed previously, defendants' construction, use, and analysis of the indirect and cumulative impacts do not violate NEPA.

Moreover, defendants did not violate NEPA by including revised projections regarding the 2035 No-Build traffic forecasts in the "errata" section of the FEIS. (Brief at 45-46). Indeed, these revisions illustrate the willingness of defendants to adjust their calculations and evaluations as part of the NEPA process. (J.A. 3904). Additionally, because the 2035 No-Build forecasts-both original and amended forecasts-were used simply as an additional check of certain 2030 projections, there was no need to revise the FEIS conclusions and analysis. (J.A. 2811). Consequently, defendants acted within their discretion in creating the purpose and need and in evaluating the Project's alternatives.

Plaintiffs also incorrectly assert that defendants failed to consider the environmental impacts of increased traffic induced by the highway's construction. (Brief at 42-43). Defendants concluded that less than 1 percent induced growth from the Project would increase vehicle miles traveled by only 0.2 percent in Union County. (J.A. 4906). Although defendants qualitatively discussed the impacts of induced traffic, they determined that it would not be possible to study quantitatively the effects of induced traffic for 1 percent growth and that such quantitative study would not aid in the decision making process. (J.A. 4340, 4563). For the reasons discussed previously, defendants thoroughly considered the effect of induced traffic growth, and defendants reasonably explained why they did not attempt to quantify all of its potential effects when doing so would be imprudent. See 40 C.F.R. § 1502.22.

E. Defendants' Response to Comments Complied with NEPA.

Throughout their motion and their complaint, plaintiffs suggest that defendants acted in bad faith in presenting information to the public and in responding to public comments. (Brief at 53) (claiming that defendants "obfuscat[ed]" information and published a "misleading" statement in the ROD); (Brief at 56) (describing the detailed interview process conducted by Baker Engineering as a "smokescreen"). Although plaintiffs claim that defendants acted in objective bad faith, id. at 56, 61, they repeatedly include subjective judgments regarding the knowledge of defendants. (Brief

at 53) ("Rather than admitting that construction of the Toll Highway was assumed in the TAZ data, defendants took whatever steps were necessary to sweep the issue under the rug in violation of NEPA.").

A court, however, should "generally restrict its inquiry to the objective adequacy of the EIS, namely, thorough investigation of environmental effects and candid acknowledgment of potential environmental harms. Courts should not conduct far-flung investigations into the subjective intent of an agency." Nat'l Audubon Soc'y, 422 F.3d at 198 (internal citation omitted) (emphasis added). Although an agency may not prepare "an EIS simply to 'justify [ ] decisions already made,' . . . the evidence [a court] look[s] to in determining whether this has taken place consists of the environmental analysis itself." Id. (quoting 40 C.F.R. § 1502.2(g)). Consequently, rather than attempt to glean defendants' intent with respect to a given act or decision, the Court should consider the objective administrative record.

Contrary to plaintiffs' argument and citation to Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973), defendants did not ignore concerns raised by the United States Fish and Wildlife Service. (Brief at 53-56). Instead, defendants formulated responses to the comments (J.A. 3911-4315) and performed additional analysis to address questions regarding the No-Build scenario. Again, plaintiffs simply disagree with the manner in which defendants responded to comments and conducted their environmental analyses. Plaintiffs also disagree with the conclusion that defendants reached

in responding to those comments. (Brief at 56). Such a disagreement does not establish bad faith and does not violate NEPA.

Plaintiffs also assert that defendants included false information in the ROD. (Brief at 56-60). Plaintiffs focus on one sentence in the ROD that was written in response to a comment plaintiffs made on the FEIS. (J.A. 4906). Plaintiffs focus on the sentence, "TAZ socioeconomic forecasts for the No Build Scenario did not include the Monroe Connector." (J.A. 4906). The entire response, however, also contains this sentence: "MUMPO confirmed our assumption regarding the reasonableness of the 2030 TAZ forecasts for use as a No Build basis." (J.A. 4906). The two sentences together show defendants' good-faith efforts to ensure the appropriateness of using this data for the No-Build scenario. Additionally, as discussed previously and as the district court held, defendants supported the reasonableness of using MUMPO's data in the No-Build scenario "with several ample investigations into the propriety of using the data." (J.A. 148).

For reasons discussed previously, defendants repeatedly investigated this issue, and defendants determined that it was reasonable to assume that MUMPO's socioeconomic projections represented the No-Build scenario. Moreover, this one sentence stands in contrast to the substantial work undertaken to construct the model and to respond to concerns regarding the No-Build

scenario. See, e.g., (J.A. 4806-08, 4789-90). A single erroneous sentence in a response to a comment is harmless in the context of defendants' otherwise careful and thorough analysis of the data. Cf. North Carolina v. FERC, 112 F.3d 1175, 1191 (D.C. Cir. 1997) (holding an error as harmless when the challenging party had "not demonstrated that the erroneous figure was integral to the [agency's] projection or that revision of the figure would result in an altered projection").

"With a document as complicated and mired in technical detail as an EIS, it will always be possible to point out some potential defect or shortcoming . . . . An EIS is unlikely to be perfect, and setting aside an EIS based on minor flaws that have little or no impact on informed decision-making or informed public participation would defy common sense." Highway J., 656 F. Supp. 2d at 885 (citing Nat'l Audubon Soc'y, 422 F.3d at 186); see also Nat'l Audubon Soc'y, 422 F.3d at 186 (stating that a court "must take a holistic view of what the agency has done to assess environmental impact"). Indeed, in Alliance for Legal Action, this Court upheld an EIS, even though it "was not perfect" and held that a court "only ask[s] whether an EIS contains '[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" 69 F. App'x at 619, 624 (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).

F. The District Court Did Not Err in Denying Plaintiffs' Motion to Supplement the Record.

The district court did not abuse its discretion in rejecting plaintiffs' motion to supplement the administrative record. As discussed previously, courts review for abuse of discretion a district court's denial of a motion to supplement the administrative record. B&B Partnership v. United States, 1997 WL 787145, *3 (4th Cir. 1997); see also Fort Sumter Tours, Inc. v. Babbitt, 66 F.3d 1324, 1336 (4th Cir. 1995); Novartis Pharmaceuticals Corp. v. Leavitt, 435 F.3d 344, 348 (D.C. Cir. 2006).

As the district court held, (J.A. 114-17), the administrative record certified by defendants carries a strong presumption of regularity. Bar MK Ranches v. Yuetter, 994 F.2d 735, 740 (10th Cir. 1993) (holding that a "standard presumption [exists] that the administrative record submitted by an agency for judicial review is complete"); Additionally, numerous courts have held that "designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." Citizens For Alternatives To Radioactive Dumping v. U.S. Dep't of Energy, 485 F.3d 1091, 1097 (10th Cir. 2007) (quoting Bar MK Ranches, 994 F.2d at 740 (10th Cir. 1993)); Wildearth Guardians v. U.S. Forest Service, 713 F. Supp. 2d 1243, 1253 (D. Colo. 2010); New York v. Salazar, 701 F. Supp. 2d 224, 235 (N.D.N.Y. 2010); Calloway v. Harvey, 590 F. Supp. 2d 29, 37 (D.D.C. 2008).

Indeed, "[c]ommon sense dictates that the agency determines what constitutes the whole administrative record because it is the agency that did the considering, and that therefore is in a position to indicate initially which of the materials were before it-namely, were directly or indirectly considered." Pacific Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (internal quotation marks and alterations omitted).[17]

Although plaintiffs originally sought to supplement the record with several documents, plaintiffs currently ask this Court to supplement the record with only one e-mail. (Brief at 62). Plaintiffs assert that the e-mail "strongly suggests that the [state] Turnpike Authority intended to mislead the public and acted in bad faith . . . ." (Brief at 61). Although a court may look beyond the agency's certified administrative record to determine whether an agency acted in bad faith, United States v. Shaffer Equipment Co., 11 F.3d 450, 460 (4th Cir. 1993) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971), abrogated on unrelated grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977)), it may do so only based on a "strong showing" of such bad faith. Overton Park, 410 U.S. at 420; (J.A. 116) (order of the district court denying plaintiffs' motion to supplement the record)

[17] Plaintiffs did not mention the presumption of regularity in their brief. (Brief at 61-63).

(discussing the strong showing required to supplement the record based on bad faith).

The e-mail that plaintiffs offer does not amount to the kind of strong showing of bad faith required. Instead, it is simply an e-mail sent after defendants issued the ROD in this appeal. The e-mail consists only of one symbol - a "winking" emoticon. Plaintiffs have argued that the unadorned "wink" conveys a particular message regarding the defendants' desire to "mislead the public and act[] in bad faith." (Brief at 61). As discussed previously, a court generally should "restrict its inquiry to the objective adequacy of the EIS" rather than attempt to discern "the subjective intent of an agency." Nat'l Audubon Soc'y, 422 F.3d at 198 (internal citation omitted).

For plaintiffs to prevail and for this e-mail to amount to a strong showing of bad faith, their interpretation must be the only reasonable one. To state the obvious, there are several reasons why someone might send such a happy symbol, even in the apparent context presented in this e-mail. Those reasons could be tied to topics or ideas not connected at all to the e-mail that was originally forwarded to the "winking" sender. Moreover, even assuming, for the sake of argument, that the winking message is responsive to the issue plaintiffs raise here, it does not, by itself, represent a strong showing of bad faith. Consequently, the district court did not abuse its discretion in rejecting plaintiffs' attempt to supplement the record with this "wink."

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted, this 19th day of January, 2012.

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