

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

NO. \_\_\_\_\_

**SAVE OUR SOUND OBX, INC., THOMAS  
ASCHMONEIT, RICHARD AYELLA, DAVID  
HADLEY, MARK HAINES, JER MEHTA, and  
GLENN STEVENS,**

**Plaintiffs,**

v.

**NORTH CAROLINA DEPARTMENT OF  
TRANSPORTATION, JAMES H. TROGDON,  
III, in his official capacity as Secretary of the  
North Carolina Department of Transportation,  
FEDERAL HIGHWAY ADMINISTRATION,  
and JOHN F. SULLIVAN, III, in his official  
capacity as Division Administrator for the  
Federal Highway Administration,**

**Defendants.**

**COMPLAINT**

[FED. R. CIV. P. 7]

1. Plaintiffs bring this complaint for injunctive and declaratory relief because Defendants' approval of a jug-handle bridge along the Pamlico Sound just north of Rodanthe in the Outer Banks of North Carolina ("Jug-Handle Bridge") violated the requirements of the National Environmental Policy Act and other related laws. Rather than performing the requisite "hard look" at environmental impacts and reasonable alternatives, Defendants relied on a less robust Environmental Assessment that failed to analyze or weigh the alternatives in a thoughtful and informed manner.

2. Defendants did not engage in a full environmental review because they had no intention of taking an authentic look at the impacts of the Jug-Handle Bridge, and whether other more cost-efficient and environmentally protective alternatives were available. Instead, Defendants sought only to “paper the file” in order to comply with a separate legal settlement with the Southern Environmental Law Center (“SELC”). In exchange for SELC dropping its lawsuit over the larger Bonner Bridge project, Defendants agreed to build the Jug-Handle Bridge to suit the environmentalists’ demands to save a small portion of the Pea Island National Wildlife Refuge through which North Carolina Highway 12 (“NC-12”) already runs. By predetermining the preferred alternative, unreasonably excluding other more reasonable, environmentally friendly, and cost-efficient alternatives, and refusing to perform a full Environmental Impact Statement, Defendants’ decision to approve the Jug-Handle Bridge was unreasonable, arbitrary and capricious, and it therefore should be vacated by this Court.

### **NATURE OF THE CASE**

3. Beginning in the early 1990s, the Federal Highway Administration (“FHWA”) and the North Carolina Department of Transportation (“NCDOT”) began studying replacement options for the Bonner Bridge over Oregon Inlet, as well as improvements to contiguous sections of NC-12. In 2008, NCDOT and FHWA released a Final Environmental Impact Statement (the “2008 FEIS”) analyzing the environmental impacts of seven different alternatives for the Bonner Bridge Replacement Project. The Jug-Handle Bridge at issue in this litigation was not analyzed in the 2008 FEIS.

4. In December 2010, a Record of Decision was released approving Phase I of the project—the replacement of the Bonner Bridge over Oregon Inlet. SELC, on behalf of two non-profit organizations, filed suit in this Court alleging that NCDOT and FHWA had violated federal law in approving Phase I. While litigation over Phase I was unfolding, two areas along NC-12 south

of the Bonner Bridge—one in the Pea Island National Wildlife Refuge and the other in the Rodanthe S Curves (the “S Curves”), just north of the town of Rodanthe—sustained damage during a hurricane. In response, NCDOT and FHWA commenced preparations for long-term improvements to these sections of NC-12. The improvement project regarding the Pea Island breach was labelled Phase IIa, and the improvement project regarding the S Curves area was labelled Phase IIb.

5. In December 2013, NCDOT and FHWA issued an Environmental Assessment identifying a bridge within the existing NC-12 easement (the “Easement Bridge”) as the preferred Phase IIb alternative for the S Curves portion of NC-12. NCDOT and FHWA identified this alternative and *rejected the construction* of a jug-handle bridge that would bypass the S Curves by running over Pamlico Sound and into the town of Rodanthe (identified by Defendants as the “Bridge on New Location” and referred to herein as the “Jug-Handle Bridge”).

6. Pursuant to *quid pro quo* concessions made in exchange for the voluntary dismissal of SELC’s lawsuit over the Bonner Bridge, Defendants later reversed course in a revised Environmental Assessment issued in May 2016 (the “2016 Revised Phase IIb EA”) and instead decided to pursue the Jug-Handle Bridge. This change, officially approved in a Record of Decision issued on December 15, 2016 (the “2016 Phase IIb ROD”), was not the result of an objective analysis of the environmental impacts of the alternatives—indeed, the 2016 Revised Phase IIb EA identified no specific studies or information to justify the about-face—but was rather the unlawfully predetermined result of Defendants’ stipulations in the settlement agreement with SELC. Only after deciding to pursue the Jug-Handle Bridge did Defendants take the formalistic and substantively meaningless steps of preparing an Environmental Assessment and Record of Decision in purported compliance with their legal obligations.

7. In addition to unlawfully predetermining the identification of the Jug-Handle Bridge as the Phase IIb alternative, Defendants also violated the National Environmental Policy Act of

1969 (“NEPA”), Section 4(f) of the Department of Transportation Act of 1966 (“Section 4(f)”), and the North Carolina Environmental Policy Act of 1971 (“NCEPA”) by failing to issue a Supplemental Environmental Impact Statement in light of material changes in environmental circumstances. Specifically, Defendants based their Phase IIb alternatives analysis on woefully outdated data from the 2008 FEIS, including obsolete shoreline erosion projections and materially deficient information regarding the availability of sand deposits suitable to carry out the alternative of beach nourishment—an erosion-prevention strategy involving the replenishment of sand on the beach and dunes. Despite pledging to keep beach nourishment on the table and open to public input in future phases of the Bonner Bridge Replacement Project, Defendants prematurely eliminated this alternative from detailed study pursuant to conclusions reached at closed-door agency meetings in 2012, long before the first Environmental Assessment regarding Phase IIb was even submitted for public comment.

8. Defendants also failed to adequately re-consider their alternatives in light of the material changes in the proposed alternatives themselves. For example, the Jug-Handle Bridge that was ultimately selected was not considered in the 2008 FEIS. Instead, the 2008 FEIS included analysis of an alternative that included, as one portion of the overall project, a bridge that would run over Pamlico Sound and terminate near Rodanthe. However, that alternative had a materially different alignment than the selected Jug-Handle Bridge, and it was considered in conjunction with a westward shift in other portions of NC-12, not just the S Curves area. Despite material changes to both (i) the fundamental data underlying the alternatives analysis, and (ii) the nature of the proposed alternatives themselves, Defendants failed to prepare a full Environmental Impact Statement. In a hasty attempt to expedite the Phase IIb approval process,

Defendants instead took a shortcut and applied their outdated and obsolete conclusions from the 2008 FEIS to the 2016 Revised Phase IIB EA and the 2016 Phase IIB ROD.

9. Defendants further violated NEPA and NCEPA by failing to adequately consider a number of environmental impacts of the Phase IIB alternatives, including the socioeconomic impacts of the alternatives on the property values, business and rental income streams, and local tax base in and around the town of Rodanthe.

10. As a result of Defendants' failure to abide by the requirements of NEPA, Section 4(f), and NCEPA, the alternatives analysis and the 2016 Phase IIB ROD's endorsement of the Jug-Handle Bridge are unlawful, and no federal or state action regarding Phase IIB should be permitted to proceed until a Supplemental Environmental Impact Statement is completed. The new Supplemental Environmental Impact Statement must (i) neutralize the predetermination of the Jug-Handle Bridge as the Phase IIB alternative, (ii) include a revised alternatives analysis and Section 4(f) evaluation in light of material changes in environmental circumstances and the nature of the proposed alternatives, and (iii) include analysis of the Phase IIB alternatives' socioeconomic effects in and around the community of Rodanthe.

## **THE PARTIES**

### **Plaintiffs**

11. Plaintiff Save Our Sound sues on behalf of itself and its members. Save Our Sound is a non-profit North Carolina corporation with its principal place of business in the State of North Carolina. Save Our Sound's mission is to preserve the Pamlico Sound and its surrounding areas. Save Our Sound has approximately 25 members who own or use property that is located in close proximity to, and will be adversely impacted by, the proposed Jug-Handle Bridge. Save Our Sound and its members will be irreparably harmed by construction of the

proposed Jug-Handle Bridge, which will decrease members' property values and diminish members' use and enjoyment of their property and surrounding areas.

12. Plaintiff Thomas Aschmoneit is a member of Save Our Sound and owns property at 23047 Banzai Landing, Rodanthe, NC 27968, which is located in close proximity to, and will be adversely impacted by, the proposed Jug-Handle Bridge. Mr. Aschmoneit will be irreparably harmed by construction of the proposed Jug-Handle Bridge, which will decrease his property value and diminish his use and enjoyment of his property and surrounding areas.

13. Plaintiff Richard Ayella is a member of Save Our Sound and has regularly vacationed on Pamlico Sound near the proposed Jug-Handle Bridge for the last approximately 15 years. The area in which he vacations is located in close proximity to, and will be adversely impacted by, the proposed Jug-Handle Bridge. Mr. Ayella will be irreparably harmed by construction of the proposed Jug-Handle Bridge, which will diminish his use and enjoyment of the area in which he vacations.

14. Plaintiff David Hadley is a member of Save Our Sound and owns property at 23176 Pappy Lane, Rodanthe, NC 27968, which is located in close proximity to, and will be adversely impacted by, the proposed Jug-Handle Bridge. Mr. Hadley will be irreparably harmed by construction of the proposed Jug-Handle Bridge, which will decrease his property value and diminish his use and enjoyment of his property and surrounding areas.

15. Plaintiff Mark Haines is a member and President of Save Our Sound. Mr. Haines also owns properties at (i) 23183 Pappy Lane, Rodanthe, NC 27968; (ii) 23320 NC Hwy 12, Rodanthe, NC 27968; and (iii) 23340 NC Hwy 12, Rodanthe, NC 27968. All of these properties are located in close proximity to, and will be adversely impacted by, the proposed Jug-Handle Bridge. Mr. Haines will be irreparably harmed by construction of the proposed Jug-Handle

Bridge, which will decrease his property values and diminish his use and enjoyment of his properties and surrounding areas.

16. Plaintiff Jer Mehta is a member of Save Our Sound and owns property at 23177 Pappy Lane, Rodanthe, NC 27968, which is located in close proximity to, and will be adversely impacted by, the proposed Jug-Handle Bridge. Ms. Mehta will be irreparably harmed by construction of the proposed Jug-Handle Bridge, which will decrease her property value and diminish her use and enjoyment of her property and surrounding areas.

17. Plaintiff Glenn Stevens is a member of Save Our Sound and owns property at 23165 Wimble Shoals Dr, Rodanthe, NC 27968, which is located in close proximity to, and will be adversely impacted by, the proposed Jug-Handle Bridge. Mr. Stevens will be irreparably harmed by construction of the proposed Jug-Handle Bridge, which will decrease his property value and diminish his use and enjoyment of his property and surrounding areas.

### **Defendants**

18. Defendant Federal Highway Administration, or FHWA, is a sub-agency of the U.S. Department of Transportation, which is an agency of the United States government. FHWA was responsible for overseeing the preparation of the environmental analysis challenged in this action, and it is the federal agency that took the final agency actions challenged herein.

19. Defendant John F. Sullivan, III, is the North Carolina Division Administrator for FHWA and is sued in his official capacity as the head of FHWA's North Carolina Division Office. Administrator Sullivan had the final authority for FHWA's preparation and approval of the inadequate environmental analysis and Record of Decision challenged in this action.

20. Defendant North Carolina Department of Transportation, or NCDOT, is an agency of the State of North Carolina. NCDOT is responsible for complying with NEPA and

Section 4(f) before proceeding with projects that involve major federal actions, and is also responsible for complying with NCEPA. NCDOT had the primary responsibility for preparing the inadequate environmental analysis and Record of Decision challenged in this action.

21. Defendant James H. Trogdon, III, is the Secretary of NCDOT, and is sued in his official capacity as the head of NCDOT. Secretary Trogdon directs the state agency that had the primary responsibility for preparing the inadequate environmental analysis and Record of Decision challenged in this action.

### **JURISDICTION AND VENUE**

22. This action arises under several federal laws, including the National Environmental Policy Act, or “NEPA,” 42 U.S.C. § 4321 *et seq.*, Section 4(f) of the Department of Transportation Act, codified as 49 U.S.C. § 303 and 23 U.S.C. § 138, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*

23. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal-question jurisdiction) and 28 U.S.C. § 1361 (action to compel a federal officer to do his duty).

24. With respect to the claims based on the North Carolina Environmental Policy Act of 1971 (“NCEPA”), N.C. GEN. STAT. § 113A, this Court has supplemental jurisdiction in accordance with 28 U.S.C. § 1367.

25. This Court has the authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and may grant relief pursuant to the APA, 5 U.S.C. § 706.

26. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e), because FHWA is an agency of the United States and this is the district in which “a substantial part of the events or omissions giving rise to the claim occurred.”



## **FEDERAL STATUTORY AND REGULATORY BACKGROUND**

27. Congress enacted NEPA to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. In promotion of this goal, NEPA requires federal agencies to fully consider and disclose the environmental consequences of an agency action before proceeding with that action. *See id.* § 4332(2)(C); 40 C.F.R. §§ 1501.2, 1502.5.

28. To implement the requirements of NEPA, the Council on Environmental Quality (“CEQ”) has promulgated regulations applicable to all federal agencies, 40 C.F.R. §§ 1500-1508. In addition, FHWA has promulgated regulations and adopted procedures for complying with NEPA in the processing of highway and transportation projects, 23 C.F.R. § 771, to supplement the CEQ’s NEPA regulations.

29. NEPA “places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.” *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978).

30. Agencies’ evaluation of environmental consequences must be based on scientific information that is both “[a]ccurate” and “of high quality.” 40 C.F.R. § 1500.1(b). In addition, federal agencies must notify the public of proposed projects and allow the public the chance to comment on the environmental impacts of their actions. *See id.* § 1506.6.

31. NEPA requires agencies to prepare an Environmental Impact Statement for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The Environmental Impact Statement must provide a “full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

32. NEPA requires agencies to consider “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). The discussion of alternatives is the “heart” of the NEPA process and is intended to “provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. The alternatives analysis must “[r]igorously explore and objectively evaluate all reasonable alternatives” to a proposed action. *Id.* § 1502.14(a). The alternatives analysis should “serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” *Id.* § 1502.2(g); *see also id.* § 1500.1(b) (“NEPA procedures must insure [*sic*] that environmental information is available to public officials and citizens before decisions are made . . .”). Thus, NEPA prohibits agencies from predetermining the outcome of their alternatives analysis, instead requiring them to take an objective, “hard look” at the environmental consequences of the alternatives. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

33. An Environmental Impact Statement must be supplemented if “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. §§ 1502.9(c)(1)(i)-(ii).

34. Agencies must consider the reasonably foreseeable social and economic impacts of a proposed action when “economic or social and natural or physical environmental effects are interrelated.” 40 C.F.R. § 1508.14.

35. FHWA regulations require an Environmental Impact Statement to be supplemented when FHWA determines that “[c]hanges to the proposed action would result in significant environmental impacts that were not evaluated in the EIS.” 23 C.F.R. § 771.130(a)(1).

36. Section 4(f) was originally codified at 49 U.S.C. § 1653(f), and a similar provision was codified at 23 U.S.C. § 138, which applies only to the Federal-Aid Highway Program. Section 1653(f) has since been recodified as 49 U.S.C. § 303. The two statutes are together referred to as “Section 4(f).” They state that it is the policy of the United States Government “that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” 49 U.S.C. § 303(a); 23 U.S.C. § 138(a).

37. Under Section 4(f), “a transportation program or project” that requires “the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance” may be approved “only if (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.” 49 U.S.C. § 303(c); *see also* 23 U.S.C. § 138(a).

38. If FHWA concludes that there is no feasible and prudent avoidance alternative, then FHWA may approve:

only the alternative that: (1) Causes the least overall harm in light of the statute’s preservation purpose. The least overall harm is determined by balancing the following factors: (i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property); (ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection; (iii) The relative significance of each Section 4(f) property; (iv) The views of the official(s) with jurisdiction over each Section 4(f) property; (v) The degree to which each alternative meets the purpose and need for the project; (vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and (vii) Substantial differences in costs among the alternatives.

23 C.F.R. § 774.3(c).

39. The APA confers a right of judicial review on any person adversely affected by agency action. 5 U.S.C. § 702. The APA provides that the reviewing court “shall . . . hold

unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), and shall “compel agency action unlawfully withheld or unreasonably delayed,” *id.* § 706(1).

### **STATE STATUTORY BACKGROUND**

40. NCEPA is similar to NEPA in many respects and “require[s] agencies of the State to consider and report upon environmental aspects and consequences of their actions involving the expenditure of public moneys or use of public land.” N.C. GEN. STAT. § 113A-2.

41. For “any action involving significant expenditure [greater than \$10 million] of public moneys or use of public land for projects and programs significantly affecting the quality of the environment of the State,” NCEPA requires a “detailed statement . . . setting forth . . . a. [t]he direct environmental impact of the proposed action; b. [a]ny significant adverse environmental effects which cannot be avoided should the proposal be implemented; c. [m]itigation measures proposed to minimize the impact; d. [a]lternatives to the proposed action; e. [t]he relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and f. [a]ny irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented.” N.C. GEN. STAT. §§ 113A-4(2), 113A-9(7a).

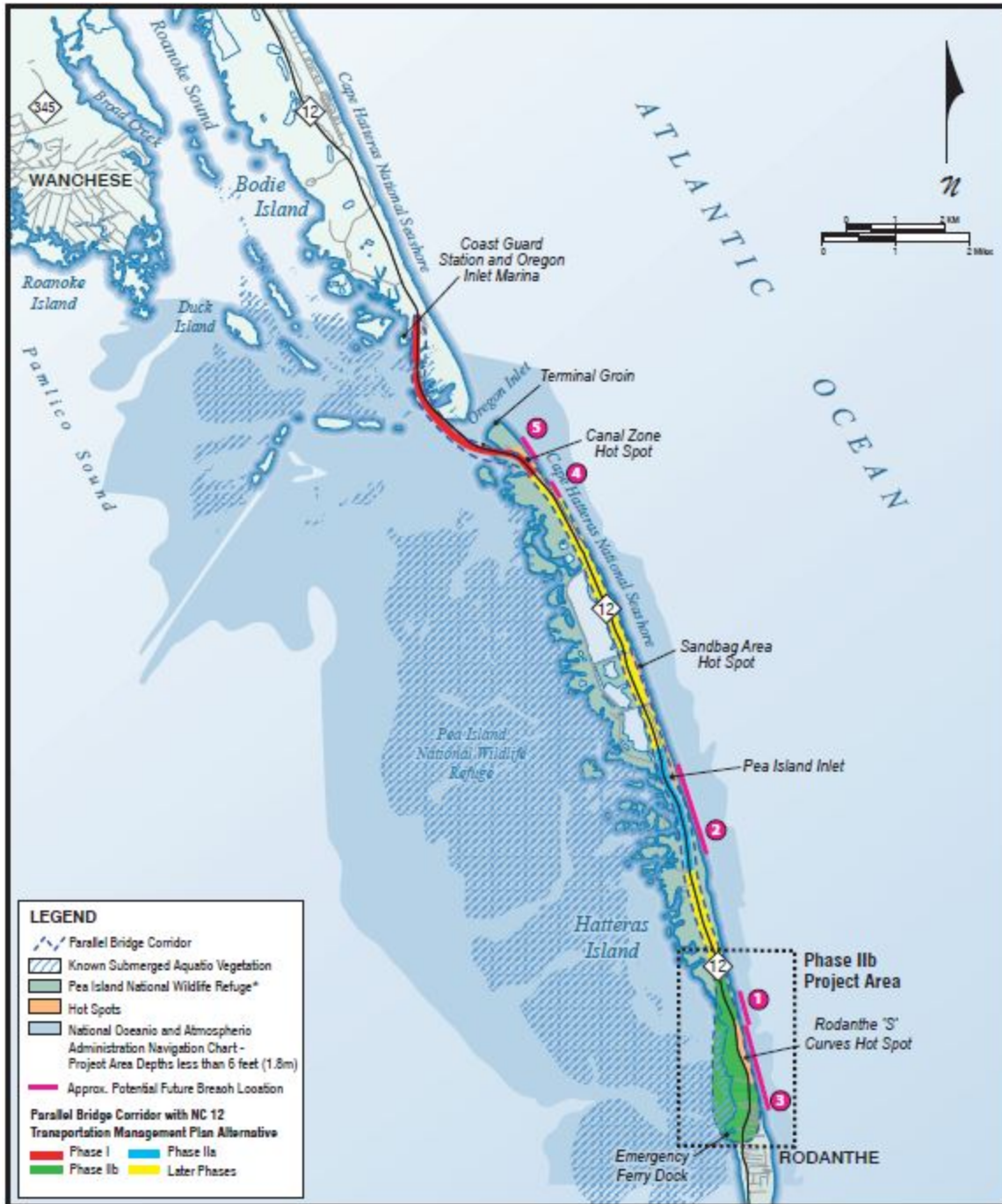
42. NCEPA provides that “[t]he preparation of an environmental document required under [NCEPA] is intended to assist the responsible agency in determining the appropriate decision on the proposed action.” N.C. GEN. STAT. § 113A-13. NCEPA therefore prohibits agencies from predetermining a course of action prior to preparing an environmental document analyzing the alternatives to the proposed action.

43. NCEPA allows a state agency to meet its environmental policy requirements in the same document used to comply with NEPA. However, the document must fully satisfy the requirements of NCEPA. N.C. GEN. STAT. § 113A-10 (“In those instances where a State agency is required to prepare an environmental document . . . under provisions of federal law, no separate environmental document shall be required to be prepared or published under [NCEPA] so long as the environmental document . . . meets the provisions of [NCEPA].”)

44. The North Carolina Administrative Procedure Act provides a right to judicial review to any person who is aggrieved by a final agency decision in a contested case and who has exhausted the available administrative remedies. N.C. GEN. STAT. § 150B-43.

### **FACTS**

45. This lawsuit concerns the Bonner Bridge Replacement Project, which has been led by NCDOT and FHWA and is intended to provide long-term improvements to NC-12 along the Outer Banks. The Bonner Bridge Replacement Project currently consists of three separate phases: Phase I, which involves replacing the Bonner Bridge over Oregon Inlet; Phase IIa, which involves providing improvements to NC-12 in an area of the Pea Island National Wildlife Refuge (the “Refuge”); and Phase IIb, which involves providing improvements to NC-12 in an area north of Rodanthe—the S Curves—that was breached by Hurricane Irene. This action focuses primarily on Phase IIb and the identification of the Jug-Handle Bridge as the preferred and selected alternative. The phases and route of NC-12 in the area in question are depicted as follows:



46. The Jug-Handle Bridge will be approximately 2.8 miles long including the approach road, and approximately 2.4 miles long excluding the approach road. The 2016 Revised Phase IIb EA and 2016 Phase IIb ROD projected the Jug-Handle Bridge to cost between \$179.2 million and \$198.2 million, and a design-build contract subsequently has been awarded

for \$145.3 million. The Jug-Handle Bridge’s northern terminus lies within the Refuge, and its southern terminus lies in downtown Rodanthe. The southern portion of the bridge will have a jug-handle shape as the bridge runs into Pamlico Sound before proceeding northward parallel to the shore. The Jug-Handle Bridge is projected to appear as follows:



<b>PHOTOSIMULATION OF THE 2014B BRIDGE ON NEW LOCATION ALTERNATIVE</b>	<b>Figure 10</b>
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47. The Jug-Handle Bridge constitutes a “significant expenditure of public moneys” for purposes of the NCEPA, N.C. GEN. STAT. § 113A-9(7a), because the construction of the bridge will entail more than \$10 million in expenditures of public moneys by the State of North Carolina.

48. The federal and state environmental resource and regulatory agencies that have an interest in the Bonner Bridge Replacement Project formed a “NEPA/Section 404 Merger Team”

(the “Merger Team”) that has made a number of significant decisions regarding the project. The Merger Team consists of representatives from FHWA, NCDOT, the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the National Marine Fisheries Service, the National Park Service, the North Carolina Department of Cultural Resources, the North Carolina Wildlife Resources Commission, the North Carolina Department of Environment and Natural Resources (“NCDENR”) – Division of Water Quality, the NCDENR – Division of Coastal Management, and the NCDENR – Division of Marine Fisheries.

49. In 1990, NCDOT began studying replacement alternatives for the Bonner Bridge. Following agency scoping efforts, a Draft Environmental Impact Statement was issued for review in November 1993. Supplemental Draft Environmental Impact Statements were issued in September 2005 and February 2007.

50. In September 2008, a Final Environmental Impact Statement (the “2008 FEIS”) was issued for the Bonner Bridge Replacement Project. The 2008 FEIS included a Final Section 4(f) Evaluation, assessed seven alternatives, and identified the Parallel Bridge Corridor with Phased Approach/Rodanthe Bridge as the preferred alternative. Although one of the seven considered alternatives—the “Parallel Bridge Corridor with Road North/Bridge South” alternative—included a bridge along Pamlico Sound near Rodanthe, that bridge had a materially different alignment from the Jug-Handle Bridge that was ultimately selected as the Phase IIb alternative. The Road North/Bridge South alternative also entailed several miles of NC-12 being moved westward of the existing easement in the Refuge.

51. Beach nourishment and beach nourishment combined with a bridge within the existing NC-12 easement were among the alternatives considered in the 2008 FEIS. The 2008



FEIS's alternatives analysis included consideration of shoreline erosion projections that were based on modeling that was completed in 2004.

52. In October 2009, a Revised Final Section 4(f) Evaluation was issued, adding a new detailed study alternative—the Parallel Bridge Corridor with NC-12 Transportation Management Plan—and selecting it as the preferred alternative. This alternative involved the division of the Bonner Bridge Replacement Project into phases. Under Phase I, the Bonner Bridge over Oregon Inlet was to be replaced as soon as possible, followed by future phases to be determined at a later time “based on actual conditions existing . . . at the point in time that additional action becomes necessary.” Revised Section 4(f) Evaluation at B-6.

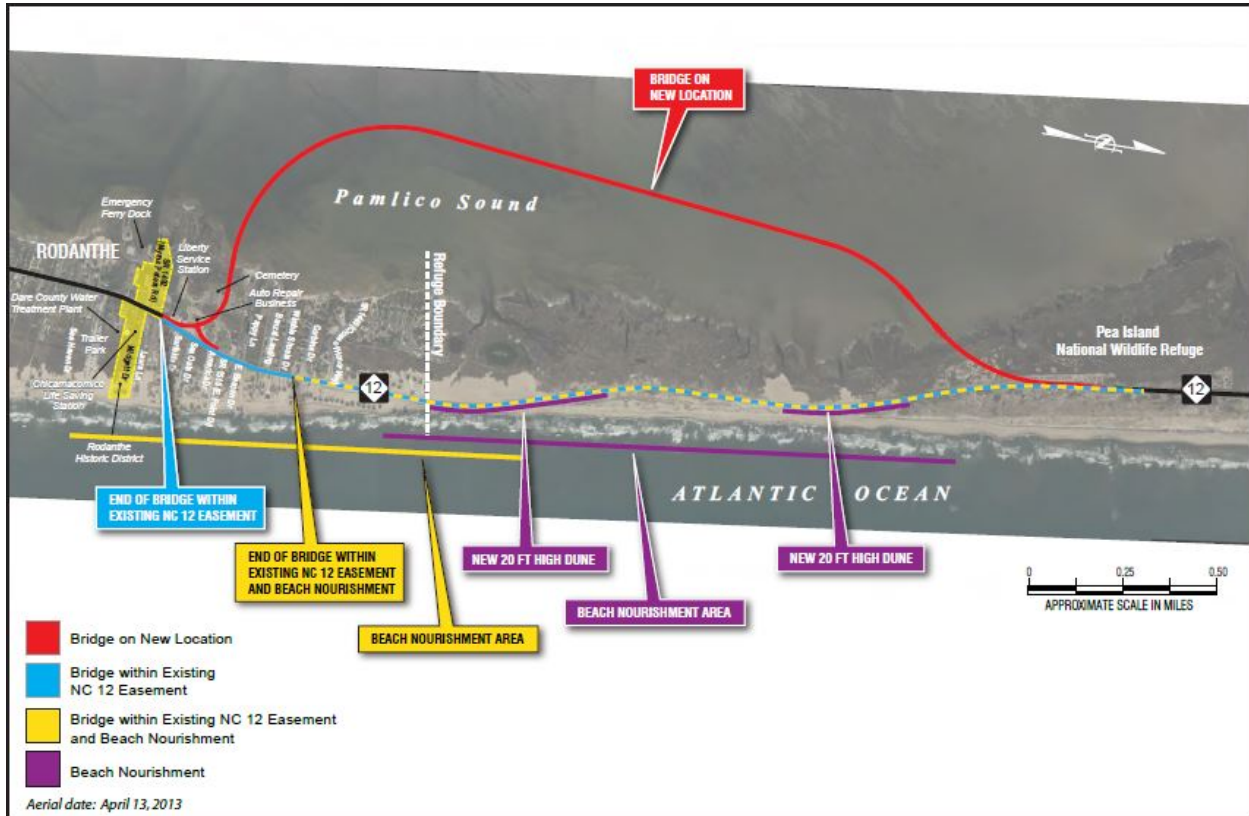
53. In May 2010, an Environmental Assessment (the “2010 Phase I EA”) was issued for Phase I—the replacement of the Bonner Bridge. The 2010 Phase I EA included the Revised Final Section 4(f) Evaluation as an appendix.

54. In December 2010, a Record of Decision (the “2010 Phase I ROD”) was issued for Phase I of the Bonner Bridge Replacement Project, approving the construction of a replacement bridge over Oregon Inlet pursuant to the alternative identified in the Revised Final Section 4(f) Evaluation and the 2010 Phase I EA.

55. In August 2011, Hurricane Irene hit the coast of North Carolina and damaged NC-12 in two locations—in northern Rodanthe at the S Curves and within the Refuge approximately six miles south of Oregon Inlet.

56. In February 2013, an Environmental Assessment was issued for Phase IIa of the Bonner Bridge Replacement Project, the purpose of which was to provide long-term improvements at the Refuge breach. A Record of Decision for Phase IIa was issued in October 2013.

57. In December 2013, an Environmental Assessment (the “2013 Phase IIb EA”) was issued regarding long-term improvements along the S Curves. The 2013 Phase IIb EA identified four considered alternatives: (i) Bridge on New Location (*i.e.*, Jug-Handle Bridge); (ii) Easement Bridge; (iii) beach nourishment; and (iv) beach nourishment combined with a bridge within the existing easement. These alternatives are depicted as follows:



Although the 2013 Phase IIb EA identified beach nourishment and beach nourishment combined with a bridge within the existing easement as alternatives, it summarily rejected them by stating that the Merger Team had already decided to eliminate them from “detailed study.” Between the two Phase IIb detailed study alternatives—the Easement Bridge and the Jug-Handle Bridge—the 2013 Phase IIb EA identified the Easement Bridge as the preferred alternative.

**Settlement of the SELC Action and the Ensuing Identification  
of the Jug-Handle Bridge as the Preferred and Selected Alternative**

58. In July 2011, Defenders of Wildlife and the National Wildlife Refuge Association (collectively, the “SELC Plaintiffs”) filed a lawsuit in this Court challenging the replacement of the Bonner Bridge under Phase I, alleging claims under NEPA and Section 4(f) (the “SELC Action”). Defendants FHWA, NCDOT, and John F. Sullivan, III, were named as defendants in the SELC Action.

59. This Court entered summary judgment in favor of defendants in the SELC Action, *Defenders of Wildlife v. N.C. Dep’t of Transp.*, 971 F. Supp. 2d 510 (E.D.N.C. 2013), and the SELC Plaintiffs appealed from that decision to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed in part, reversed in part, and remanded to the district court. *Defenders of Wildlife v. N.C. Dep’t of Transp.*, 762 F.3d 374 (4th Cir. 2014).

60. On April 30, 2015, defendants in the SELC Action entered into a settlement agreement (the “Settlement Agreement”) with the SELC Plaintiffs. The Settlement Agreement required NCDOT to “identify Phase IIb Bridge on New Location [*i.e.*, the Jug-Handle Bridge] as its preferred alternative and seek Merger Team Concurrence Point 3,” Ex. A ¶ 1(c), which meant seeking concurrence from the Merger Team that the Jug-Handle Bridge was the least environmentally damaging practicable alternative (“LEDPA”), Ex. B at 5.

61. The Settlement Agreement also required the NCDENR – Division of Coastal Management (“DCM”) to “provide a written statement of [its] support and preference for [the Jug-Handle Bridge]” and to “otherwise . . . use best efforts to help NCDOT attempt to secure Merger Team concurrence.” Ex. A ¶ 1(e). The Settlement Agreement further required FHWA and NCDOT, in the event the Merger Team concurred that the Jug-Handle Bridge was the LEDPA for Phase IIb, to “promptly revise” the 2013 Phase IIb EA and Section 4(f) Evaluation

by identifying the Jug-Handle Bridge as the preferred alternative, and to “[p]ropose to identify the Phase IIb [Jug-Handle Bridge] Alternative as the ‘least overall harm’ alternative.” Ex. A ¶ 3(c)(i).

62. The Settlement Agreement required the SELC Plaintiffs to dismiss their suit challenging Phase I only if the Jug-Handle Bridge was identified as the LEDPA, Ex. A ¶ 1(h), and the SELC Plaintiffs covenanted not to file suit regarding Phase IIb only if the Jug-Handle Bridge was identified as the LEDPA *and* chosen as the selected alternative, *id.* ¶ 2(b).

63. On June 17, 2015, less than two months after the Settlement Agreement was executed, the Merger Team identified the Jug-Handle Bridge as the LEDPA in accordance with the goals of the Settlement Agreement.

64. The Merger Team’s process was governed by a memorandum of understanding that provides, “Having concurred at a particular milestone, a [Merger Team] member will not request to revisit previous concurrence points unless there is substantive new information that warrants a reevaluation.” Ex. B at 3. Thus, FHWA and NCDOT’s agreement to “attempt to secure Merger Team concurrence” that the Jug-Handle Bridge was the LEDPA restricted future consideration of whether this alternative truly was the LEDPA during the NEPA process.

65. NCDOT and DCM are both members of the Merger Team. Therefore, by requiring these agencies to “use best efforts” to secure Merger Team concurrence that the Jug-Handle Bridge was the LEDPA, the Settlement Agreement required these agencies to affirmatively cast their vote as Merger Team members in favor of the Jug-Handle Bridge as the LEDPA, regardless of what an objective “hard look” analysis might reveal about the merits of identifying this alternative as the LEDPA.

66. Following the dismissal of the SELC Action pursuant to the Settlement Agreement, construction for the replacement of the Bonner Bridge commenced on March 8, 2016.

67. On May 24, 2016, Defendants issued the 2016 Revised Phase IIb EA, in which Defendants unsurprisingly identified as the new preferred alternative the Jug-Handle Bridge—with a modified alignment that will bring the bridge closer to the shoreline than the jug-handle bridge alternative previously analyzed and rejected in the 2013 Phase IIb EA. The 2016 Revised Phase IIb EA cites no new studies or specific reasons for switching the preferred alternative from the Easement Bridge to the Jug-Handle Bridge, instead providing a cursory “alternative fact” explanation that “[s]ome of the changes . . . were in response to comments made on the 2013 Phase IIb EA.” 2016 Revised Phase IIb EA at 1-5. The 2016 Revised Phase IIb EA also makes the grand understatement that it “takes into account” the Settlement Agreement with the SELC Plaintiffs, while summarily and unconvincingly stating that “[t]he stipulations did not predetermine the choice of the [Jug-Handle Bridge] Alternative as the Preferred Alternative.” 2016 Revised Phase IIb EA at 1-6.

68. Plaintiff Save Our Sound timely submitted comments to the Revised Phase IIb EA, in which Save Our Sound raised objections to Defendants’ identification of the Jug-Handle Bridge as the preferred alternative, as well as the process by which such identification was made. Plaintiffs Thomas Aschmoneit, Richard Ayella, David Hadley, Mark Haines, Jer Mehta, and Glenn Stevens have also timely submitted comments regarding Phase IIb of the Bonner Bridge Replacement Project.

69. On December 15, 2016, the 2016 Phase IIb ROD was issued, thereby approving the Jug-Handle Bridge as the selected alternative and officially allowing NCDOT to proceed

with construction of the Jug-Handle Bridge. The 2016 Phase IIb ROD is a final agency action by NCDOT and FHWA subject to review by this Court.

**Premature Elimination of Beach Nourishment and Failure to Supplement or Prepare a New Environmental Impact Statement**

70. The 2010 Phase I EA stated:

Possible solutions for later phases of the project include bridging, road relocation, and/or beach nourishment. All of these solutions, which are available for implementation as part of the Preferred Alternative, were identified and assessed as part of the [2008] FEIS and *would be reassessed at the time decisions on future phases are being made.*

2010 Phase I EA at 2-28 (emphasis added).

71. Despite the 2010 Phase I EA’s assurance that beach nourishment would remain a considered alternative until decisions on future phases were made, the Merger Team reached consensus on November 14, 2012—more than four years before an official decision was made regarding Phase IIb—that only the Jug-Handle Bridge and the Easement Bridge alternatives would be carried forward as the detailed study alternatives for Phase IIb. In so doing, the Merger Team decided that neither beach nourishment nor a combined nourishment/bridge approach would be analyzed as a detailed study alternative.

72. Since the time the 2008 FEIS was issued, “significant new circumstances or information” have arisen. 40 C.F.R. § 1502.9(c)(1)(ii). For example, shoreline erosion projections for the year 2060 constituted a material component of the 2008 FEIS. However, these projections were based on modeling completed in 2004 and have since been rendered obsolete. As Defendants themselves have admitted, “the erosion in the Rodanthe area through 2060 is now forecast to be less than was forecast for the 2008 FEIS and 2010 EA.” 2013 Phase IIb EA at 2-11. Defendants nonetheless failed to issue a Supplemental Environmental Impact Statement, instead relying on these outdated shoreline projections in order to hastily prepare an Environmental Assessment that advances the construction of the Jug-Handle Bridge.

73. Additionally, Defendants have cited “uncertainties related to the availability of a suitable sand source” as a reason for eliminating beach nourishment as an alternative for detailed study in 2012. 2016 Revised Phase IIb EA at F-20. However, in the summer of 2014, the U.S. Army Corps of Engineers (the “Corps”) led an emergency beach nourishment project at the S Curves, which lies within the section of NC-12 addressed by Phase IIb. This beach nourishment project provided new information regarding sand sources and the efficacy and cost of beach nourishment in this section of NC-12. Specifically, the Corps “identified sand sources within Wimble Shoals” that were “compatible with the native beach sand in the project area.” 2016 Revised Phase IIb EA at 2-16. The Corps also concluded that this emergency beach nourishment project “would have no significant impacts” on the environment. *Id.* Despite these material changes to the data upon which the decision was made to eliminate beach nourishment as a Phase IIb alternative, Defendants failed to reassess beach nourishment in light of this new information.

74. Many of the houses and businesses in and around Rodanthe depend on tourism, particularly kiteboarding tourism, as a source of income. The Jug-Handle Bridge would disrupt kiteboarding and other recreational activities in Pamlico Sound, thereby reducing the property values and rental and business income streams in the area. Defendants’ alternatives analysis does not address the socioeconomic impacts of the alternatives on the values and income streams of local properties. Furthermore, the reduction in business income, rental income, and property values will foreseeably contribute to a reduction in local tax revenue, which Defendants likewise have failed to address.

#### **COUNT I: VIOLATION OF NEPA**

75. Plaintiffs incorporate herein by reference each of the foregoing paragraphs.

76. Defendants' identification of the Jug-Handle Bridge as the preferred and selected alternative was the result of unlawful predetermination. By entering into the Settlement Agreement with the SELC Plaintiffs, NCDOT and FHWA entered into a *quid pro quo* agreement by which the agencies agreed to support the Jug-Handle Bridge in exchange for SELC Plaintiffs' agreement to voluntarily dismiss their lawsuit challenging the replacement of the Bonner Bridge.

77. Rather than satisfying the legal obligation to "[r]igorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14(a), the 2016 Revised Phase IIb EA is a mere formality given the Defendants' predetermined decision to pursue the Jug-Handle Bridge.

78. NEPA requires that an Environmental Impact Statement be prepared or supplemented in light of "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). Significant new information has arisen since the 2008 FEIS was issued, including the revised shoreline erosion projections and data generated from the 2014 emergency beach nourishment project at the S Curves. Defendants have nonetheless neglected to issue a Supplemental Environmental Impact Statement, instead relying on the woefully outdated information reflected in the 2008 FEIS.

79. NEPA also requires that an Environmental Impact Statement be supplemented when there are "substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1)(i). The Jug-Handle Bridge and the Easement Bridge analyzed in the 2013 Phase IIb EA and the 2016 Revised Phase IIb EA are materially different than any of the alternatives considered in the 2008 FEIS. Defendants therefore violated NEPA's mandate by failing to issue a Supplemental Environmental Impact Statement in light of these material changes in the proposed actions.



80. Defendants have violated NEPA by failing to adequately consider and address the impacts of the Phase IIb alternatives, including the effects of the alternatives on the property values, business and rental income streams, and tax base in and around Rodanthe.

**COUNT II: VIOLATION OF SECTION 4(f)**

81. Plaintiffs incorporate herein by reference each of the foregoing paragraphs.

82. Defendants failed to consider whether there was a feasible and prudent avoidance alternative by failing to perform the analysis required by Section 4(f) in light of updated information, including revised shoreline erosion projections, new information regarding available sand deposits, and changes in the nature of the proposed alternatives.

83. Even assuming that there is no prudent and feasible alternative, Defendants did not properly consider which “alternative . . . causes the least overall harm in light of [Section 4(f)’s] preservation purpose.” 23 C.F.R. § 774.3(c). In addition to not being updated based on material changes in environmental data and the nature of the proposed alternatives, Defendants’ Section 4(f) evaluation is fundamentally flawed in that it (i) fails to consider the Jug-Handle Bridge’s permanent use of Pamlico Sound waters within the boundaries of the Refuge, (ii) fails to properly assess the impacts of the alternatives on the Refuge’s qualities as a wildlife refuge, and (iii) fails to analyze the distinctions between the Easement Bridge’s constructive use of the Refuge and the Jug-Handle Bridge’s constructive and actual use of the Refuge. Defendants’ “least overall harm” analysis is also flawed due to the failure to consider beach nourishment and beach nourishment combined with a bridge within the existing easement.

84. The Jug-Handle Bridge is not the alternative that causes the least overall harm to the Refuge.

### **COUNT III: VIOLATION OF NCEPA**

85. Plaintiffs incorporate herein by reference each of the foregoing paragraphs.

86. NCEPA parallels the requirements of NEPA. The same claims made under Paragraphs 75 through 80 above detailing non-compliance with NEPA are here made regarding non-compliance with NCEPA.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court enter the following relief:

- A. Declare that Defendants have violated NEPA, Section 4(f), NCEPA, and their implementing regulations, in the respects set forth above;
- B. Declare the 2016 Phase IIb ROD unlawful and of no effect;
- C. Issue a mandatory injunction directing Defendants to comply with the provisions of NEPA, Section 4(f), and NCEPA;
- D. Require Defendants to issue a Supplemental Environmental Impact Statement, consistent with NEPA, Section 4(f), and NCEPA, which gives fair and full consideration of Phase IIb alternatives, including beach nourishment and beach nourishment combined with a bridge within the existing NC-12 easement, in light of current information;
- E. Temporarily and permanently enjoin Defendants from issuing any permits, follow-on Records of Decision, or other approvals that depend on the 2008 FEIS, the 2016 Revised Phase IIb EA, or the 2016 Phase IIb ROD;
- F. Temporarily and permanently enjoin Defendants from entering into any contracts that depend on the 2008 FEIS, the 2016 Revised Phase IIb EA, or the 2016 Phase IIb ROD;
- G. Reimburse Plaintiffs' attorneys' fees and litigation costs; and
- H. Such other and further relief as the Court may deem just and proper.

Dated: February 2, 2017

Respectfully submitted,

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