

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

WESTERN DIVISION

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

NORTH CAROLINA WILDLIFE  
FEDERATION, CLEAN AIR CAROLINA,  
and YADKIN RIVERKEEPER,

Plaintiffs,

v.

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

Defendants.

**COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

**INTRODUCTION**

1. This action challenges violations of the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4321 *et seq.*, in connection with Defendants’ decision to authorize, fund, seek permits for and otherwise advance construction of the Monroe Connector/Bypass. The proposed 20 mile road project, (the “Toll Road”) would constitute a new location, controlled-access toll highway from US 74 near I-485 in Mecklenburg County to US 74 between the towns of Wingate and Marshville in Union County. The stated purpose of the Toll Road is to improve mobility and capacity in a two county area southeast of Charlotte.

2. As set out more fully below, this lawsuit is prompted by the deficient Final Environmental Impact Statement (“FEIS”) and subsequent issuance of the Record of Decision (“ROD”) for the Toll Road. The FEIS was prepared by the North Carolina Department of Transportation (“NCDOT”) and Federal Highway Administration (“FHWA”). The Record of

Decision (“ROD”) issued by FHWA, approving the FEIS, is a precursor under federal law to the further development of the Toll Road including permitting, financing and construction of the Toll Road.

3. Under NEPA, Defendants are required to prepare an Environmental Impact Statement that rigorously explores and objectively evaluates a range of reasonable alternatives that meet the basic purpose of the project, and thoroughly examines and discloses the project’s direct, indirect and cumulative environmental and social impacts. The Monroe Connector/Bypass FEIS fails both requirements.

4. First, the FEIS fails in its Alternatives Analysis: it is framed by a biased, outcome-driven statement of the project’s underlying purpose and need; it fails to seriously consider a range of reasonable alternatives to the Toll Road at the proposed location, including upgrades to existing US 74, a parallel highway corridor; and its analysis is based on flawed data, including acknowledged, uncorrected errors and therefore lacks a rational basis upon which to compare the narrow alternatives that it does consider. In particular, by using incorrect assumptions that dramatically overstate the level of traffic projected to be on US 74 in the future, the consideration of upgrades to that road was effectively precluded.

5. Second, the FEIS fails to adequately evaluate the impacts from the project and relies on flawed data, assumptions and analysis to present a false scenario in which the Toll Road facilitates no additional growth and development in the area, and, therefore the FEIS erroneously concludes there will be no adverse impacts to air or water quality, including an endangered mussel species in the Goose Creek watershed. In evaluating the environmental impacts resulting from potential future development associated with the Toll Road, Defendants based their

analysis on data that assumes construction of the project for both the “Build” and the “No-Build” scenarios, thereby minimizing these important impacts.

6. In addition to the fundamentally flawed analysis of impacts and alternatives, Defendants also fail in their obligation to inform the public about the impacts of the Toll Road by presenting false and misleading information in the FEIS and the ROD. Defendants incorrectly state in the ROD that the No-Build scenario used to generate the Indirect and Cumulative Impacts Analysis did not assume the building of the Monroe Connector/Bypass. Furthermore, Defendants failed to correct the use of two conflicting sets of data to present the impacts to stream yardage.

7. The fundamental errors in the FEIS make it an unlawful platform for the issuance of a final decision selecting the Toll Road as the preferred alternative to proceed with permitting, funding and construction. Issuance of the ROD was therefore contrary to law, arbitrary and capricious, and constituted an abuse of discretion under § 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (2002).

### **JURISDICTION AND VENUE**

8. This action arises under NEPA, 42 U.S.C. § 4321 et seq. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and may issue declaratory and further relief pursuant to 28 U.S.C. §§ 2201 and 2202. Plaintiffs are entitled to bring this action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

### **PARTIES AND STANDING**

#### **Plaintiffs**

10. Plaintiff North Carolina Wildlife Federation (“NCWF”) is a not-for-profit corporation founded in 1945. NCWF, which is an affiliate of the National Wildlife Federation

(“NWF”), has over 10,000 members, supporters and affiliate constituents in North Carolina. NWF has approximately 5 million members, including 25,000 members in North Carolina. The NCWF's mission is to educate, inspire and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources and to protect the environment in order to achieve a peaceful, equitable and sustainable future. Its primary goal is to raise awareness and involve people of all ages in conservation and protection of the environment. The NCWF advocates for protection and conservation of wildlife habitat, including protecting declining habitats and species on private and public land. The NCWF works to promote and protect areas for hunting, fishing and wildlife observation for sportsmen and wildlife enthusiasts.

11. NCWF has members who live in the vicinity of the proposed Monroe Connector/Bypass and members from across the state, who visit, recreate, observe birds and other wildlife, photograph and otherwise use and enjoy the waterways, public lands, wetlands and other lands in the vicinity of the proposed Monroe Connector/Bypass. NCWF also has members who live in Mecklenburg and Union counties who are impacted by poor air quality.

12. This plaintiff group monitors and participates in highway and transportation planning in Mecklenburg and Union Counties, has participated in the administrative processes surrounding the planning of the Monroe Connector/Bypass in these counties and has members who participated in these processes, including the process leading to the approval of the ROD challenged in this case. This plaintiff group seeks to inform and educate its members and the public concerning highway and transportation planning and the impacts of transportation decisions on the human environment, and advocates for transportation planning and policies that will have the least long-term impact on the human environment. These organizational interests

are directly and irreparably injured by the Defendants' violations of law described in this complaint.

13. Plaintiff Clean Air Carolina (“CAC”) is a not-for-profit corporation founded in 2002. CAC has 120 members in North Carolina. CAC’s mission is to ensure cleaner air quality for all by educating the community about how air quality affects health, advocating for stronger clean air policies, and partnering with other organizations committed to cleaner air and sustainable practices. Its primary goal is to improve health by achieving the cleanest air possible. CAC aims to improve North Carolina air quality by rethinking the practice of relying almost exclusively on highways for transportation needs and instead supporting a multi-modal system which includes more passenger rail, bike and pedestrian options, and consequent development patterns that will lead to less single occupant vehicle auto travel.

14. CAC is based in Charlotte and maintains a regional and statewide influence. The organization has specific concerns about air quality in the Charlotte region. CAC has members who live in Mecklenburg County who are impacted by poor air quality.

15. This plaintiff group monitors and participates in highway and transportation planning in Mecklenburg and Union Counties, has participated in the administrative processes surrounding the planning of the Monroe Connector/Bypass in these counties and has members who participated in these processes, including the process leading to the approval of the ROD challenged in this case. This plaintiff group seeks to inform and educate its members and the public concerning highway and transportation planning and the impacts of transportation decisions on the human environment, and advocates for transportation planning and policies that will have the least long-term impact on the human environment. These organizational interests

are directly and irreparably injured by the Defendants' violations of law described in this complaint.

16. Plaintiff Yadkin Riverkeeper (“Riverkeeper”) is a not-for-profit corporation founded in 2008 in Winston Salem, North Carolina. The Yadkin Riverkeeper has over 250 members, supporters and affiliate constituents in North Carolina. It seeks to respect, protect and improve the Yadkin Pee Dee River Basin through education, advocacy and action. The Riverkeeper is a licensed member of the Waterkeeper Alliance, which connects and supports local Waterkeeper programs to provide a united voice and to champion clean water issues around the world. Waterkeeper Alliance seeks to protect fishable, swimmable and drinkable waterways worldwide.

17. The Monroe Connector/Bypass is located in the Yadkin Pee Dee river basin. The project will impact water quality in that river basin. The Yadkin Riverkeeper has members who live in the vicinity of the proposed Monroe Connector/Bypass and members from across the state, who recreate in the vicinity of the proposed Monroe Connector/Bypass. Yadkin Riverkeeper also has members who live in Mecklenburg and Union counties who are impacted by growth’s effects on water quality.

18. This plaintiff group monitors and participates in highway and transportation planning in Mecklenburg and Union Counties, has participated in the administrative processes surrounding the planning of the Monroe Connector/Bypass in these counties and has members who participated in these processes, including the process leading to the approval of the ROD challenged in this case. This plaintiff group seeks to inform and educate its members and the public concerning highway and transportation planning and the impacts of transportation decisions on the Yadkin Pee Dee River and advocates for sustainable development practices that

will accommodate growth without compromising the long-term health of the River. These organizational interests are directly and irreparably injured by Defendants' violations of law described in this complaint.

### **Defendants**

19. Defendant North Carolina Department of Transportation ("NCDOT") is an agency of the State of North Carolina. On July 17, 2009 the functions and funds of North Carolina Turnpike Authority ("NCTA") were transferred to NCDOT. NCTA is thus now located within the Department of Transportation and subject to and under the direct supervision of the Secretary of Transportation. N.C. Gen. Stat. § 136-89.182. NCDOT is responsible for complying with NEPA before proceeding with its projects which involve major federal action and had the primary responsibility for preparing the inadequate EIS and ROD challenged in this action. NCDOT issued this inadequate environmental analysis through its office in Raleigh. NCDOT is relying on the FEIS and ROD to pursue permits for this project.

20. Eugene Conti is the Secretary of NCDOT. Secretary Conti had the final authority for the State's preparation of the inadequate environmental analysis challenged in this action and for the State's decision to proceed with the challenged project despite this inadequate analysis. Secretary Conti is sued in his official capacity.

21. The Federal Highway Administration is a federal agency within the U.S. Department of Transportation. FHWA was responsible for overseeing the preparation of the inadequate environmental analysis challenged in this action and for insuring that this analysis complied with NEPA. FHWA issued this inadequate environmental analysis through its office in Raleigh, North Carolina.

22. John F. Sullivan is the North Carolina Division Administrator for FHWA. Mr. Sullivan had the final authority for FHWA's preparation and approval of the inadequate FEIS and ROD challenged in this action. Mr. Sullivan is sued in his official capacity.

### **LEGAL BACKGROUND**

23. The National Environmental Policy Act requires agencies to prepare or adopt an Environmental Impact Statement (“EIS”) before undertaking a major federal action that will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C).

24. The EIS serves three primary functions. First, it ensures that an agency takes a hard look at the direct, indirect and cumulative environmental impacts of a proposed project. Second, it guarantees that the agency considers a range of reasonable alternatives to accomplish the underlying goals of the proposed project and considers options that may have fewer adverse impacts on the environment before deciding whether to undertake the project in the form proposed. Finally, the EIS presents detailed information about a proposed project, its impacts, and reasonable alternatives, to the public and other agencies, so that they may participate in the decision-making process.

25. To implement the requirements of NEPA, the Council on Environmental Quality has promulgated regulations applicable to all federal agencies. See 40 C.F.R. §§ 1500-1508 (“the CEQ regulations”).

26. FHWA has also promulgated supplemental regulations and procedures for complying with NEPA. See 23 C.F.R. § 771.101.

27. NEPA requires that an EIS contain a statement of purpose and need for the proposed action which “shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including their proposed action.” 40 C.F.R. § 1502.13.

28. NEPA requires an agency to include in an EIS a “detailed statement” on “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). In this statement, the agency must rigorously explore and objectively evaluate all reasonable alternatives that could achieve the underlying project purpose. 40 C.F.R. § 1502.14(a). This alternatives analysis is “the heart of the environmental impact statement,” and should “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public.” 40 C.F.R. § 1502.14. Only those alternatives that are deemed to be unreasonable can be eliminated from the study. 40 C.F.R. § 1502.14(a).

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

30. The "effects" that must be discussed in the EIS include, among other considerations, the direct environmental impacts of the proposed action, the indirect effects of the proposed action, and the cumulative impacts of the proposed action. 40 C.F.R. § 1502.16 (a) – (h); 40 C.F.R. § 1508.7.

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

32. The NEPA regulations define "cumulative impact" as the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

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

34. The CEQ regulations provide that an agency preparing a final EIS "shall assess and consider comments" on the draft EIS and "shall respond" to those comments in one of several specified ways, including making requested modifications, corrections and supplementations. 40 C.F.R § 1503.4(a). If the agency decides the comments do not warrant further agency response, it must so declare, "citing the sources, authorities or reasons which support the agency's position." 40 C.F.R. § 1503.4(a)(5).

## **FACTS GIVING RISE TO LEGAL CLAIMS**

### **Project History**

35. As its name suggests, the Monroe Connector/Bypass was originally conceived as two separate projects.

36. NCDOT began the NEPA process for the Bypass and Connector projects in the late 1990s, and issued a draft EIS for the Monroe Connector in 2003. In February 2004, NCWF and other advocacy groups submitted comments on that document, raising concerns about the indirect and cumulative impacts from induced growth caused by the project. The comments

highlighted the deficient analysis in the FEIS of significant water quality impacts on the Goose Creek watershed, which would likely jeopardize the continued existence of the endangered Carolina heelsplitter mussel (Lasmigona decorata).

37. In an October 28, 2005 Biological Assessment prepared by the NCDOT for FHWA, the NCDOT presented a litany of “conservation measures needed to offset the indirect and cumulative impacts of the Monroe Bypass and Connector” on the Carolina heelsplitter. This preliminary approach was comprised of a variety of land use strategies developed by NCDOT to protect the watershed. The approach, however, was never implemented.

38. Still, rather than attempt to revise its prior DEIS and address NCWF and the other advocacy group comments, NCDOT rescinded the DEIS, explaining that it would pursue a new project with the Turnpike Authority that would combine the Monroe Bypass and Connector projects. 71 Fed Reg. 19, 4958 (Jan. 30, 2006).

39. In 2007, the consulting company Stantec conducted a study of US 74 in Union County at the behest of NCDOT. The Stantec study concluded that roughly \$3.1 million in short term improvements could improve mobility to higher level of service along the US 74 study corridor. Furthermore, the study predicted that \$10.2 million of long-term improvements—such as conversion to a superstreet-type facility, implementation and optimization of closed-loop traffic signal systems, and addition of lanes to intersections—could result in an acceptable level of service by the year 2015 along the whole of the corridor in Union County, with the sole exception of the interchange at Rocky River Road.

40. Despite the results of the study that predicted adequate service by 2015 in the study area by upgrading the existing US 74, the DOT moved forward with plans for combining the Bypass and the Connector into one project. In the March 2009 DEIS for the combined

project, in the “needs” section on existing and projected existing roadway deficiencies, it states that congestion on the existing US 74 road is high, with one-third of the intersections operating at an unacceptable level of service during peak hours. Still, the NCDOT eliminated from consideration the possibility of upgrades to US 74 as an alternative in either the draft or final EIS.

41. The project was refashioned by the transportation agencies as a single toll highway, with an estimated cost of approximately \$800 million, a portion of which would be defrayed by the collection of toll revenues.

#### **Air Quality and Water Quality – Impacts of Induced Growth**

42. It is commonly recognized that additional highway capacity, especially on the urban fringe of a fast-growing metro area, leads over time to additional traffic and motor vehicle miles traveled (“VMT”). Induced traffic can include traffic diverted from other roads and other transportation modes, traffic that would not otherwise have occurred at all but for the improvement, and traffic produced by increased population growth.

43. It is also commonly recognized that additional highway capacity, especially on the urban fringe of a fast-growing metro area, leads over time to significant impacts in land use and residential and commercial development, among other environmental impacts.

44. The Monroe Connector/Bypass will lead, over time to additional VMT in the Charlotte metro area and significant impacts to land use, residential and commercial developments and other environmental concerns.

45. Goose Creek is a tributary of the Yadkin River near Charlotte, NC. The headwaters of Goose Creek are located in Mint Hill, a rapidly developing suburb of Charlotte in Mecklenburg County.

46. Goose Creek is the habitat of a federally-endangered aquatic species, the Carolina heelsplitter. The threats from induced growth associated with increased traffic in the Goose Creek sub-basin and increased stormwater discharges from that induced growth highlight the need for rigorous analysis of road construction and its impacts, to preserve and protect sensitive aquatic habitats.

47. The Monroe Connector/Bypass will induce development, leading to additional development that will affect the endangered Carolina heelsplitter and its designated critical habitat in Goose Creek.

48. Both Union and Mecklenburg counties suffer from poor air quality, including ozone (commonly referred to as “smog”), a significant portion of which is generated by cars and trucks in the Charlotte metro region. The region is currently designated as an ozone non-attainment area under the 1997 National Ambient Air Quality Standard. The area is also in non-compliance with the stricter 2008 standard, although this standard is currently suspended while the EPA considers strengthening it even further.

49. Increases in the number of vehicle miles traveled (VMT) in a given area can lead to increases in the levels of air pollutants including ozone and greenhouse gases (“GHGs”).

50. Defendants used the same socio-economic data to generate traffic forecasts for both the “Build” and “No Build” scenarios, and thus the FEIS fails to present any increase in VMT as a result of the project. Socio-economic data shows how neighborhoods, work centers and undeveloped land will develop over time.

51. Defendants’ analysis of indirect and cumulative impacts from the Monroe Connector/Bypass used a baseline No-Build scenario that was based on data that nonetheless assumed the building of the road. Thus, the FEIS fails to present and analyze the true level of

induced growth and associated indirect and cumulative impacts from the project.

52. The flawed inputs into the FEIS VMT and indirect and cumulative impacts calculations create a false scenario, in which no additional VMT, and little induced growth, will result from the project. This is clearly at odds with the commonly understood principle that additional highway capacity leads over time to significant additional VMT, induced development and associated environmental impacts. In fact, the financing for the Toll Road is heavily dependent on a rapid rate of growth, and consequent increase in VMT and induced development, in a relatively undeveloped and inaccessible area of the Charlotte region.

53. The assertion in the FEIS that little additional development will result from the project is also inconsistent with a statement in the DEIS that there is high potential for accelerated growth in Eastern Union County as a result of the project.

54. The claim in the FEIS that the Toll Road will not significantly increase VMT is also inconsistent with the revised traffic volume estimates presented in the FEIS.

55. Defendants thus failed to analyze any increase in VMT and associated increases in air pollutants, including GHG, and failed to analyze the impacts of induced development including impacts to water quality, habitat and endangered species.

#### **The Flawed NEPA Process**

56. On June 15, 2009, the Southern Environmental Law Center (“SELCC”) timely submitted voluminous comments on the March 2009 DEIS on behalf of NCWF, CAC, Yadkin Riverkeeper, and the Sierra Club Central Piedmont Chapter. SELCC’s comments raised a number of substantive issues, including the impermissibly narrow statement of purpose and need, inadequate range of alternatives considered, and failure to evaluate adequately the environmental impacts of the project.

57. Numerous state and federal agencies also submitted comments on the DEIS voicing concerns about its analysis of cumulative and indirect impacts from the project and other issues, including North Carolina Department of Environment and Natural Resources, Division of Natural Resources Planning and Conservation – Natural Heritage Program, North Carolina Division of Water Quality, North Carolina Wildlife Resources Commission, U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency.

58. By letter dated May 26, 2009, the North Carolina Wildlife Resources Commission, (“NCWRC”) raised concerns about the conflicting figures used in the DEIS to discuss the impacts to streams. The DEIS used one set of numbers to justify why the preferred alternative should be selected and a separate set of numbers to explain the impacts to stream yardage from the project. NCWRC also raised concerns about indirect and cumulative impacts from the project and in particular the impacts to streams on the 303(d) list and impacts to state and federal species of concern.

59. U.S. Fish and Wildlife Service submitted comments on June 12, 2009 questioning the legality of the narrow purpose and need stated for the project. The comments raised concerns about the adequacy of the alternatives analysis in the DEIS and the presentation of conflicting sets of figures for the analysis of streams. The comments also stated concerns about other indirect and cumulative impacts from the project.

60. U.S. Environmental Protection Agency submitted comments on June 16, 2009 stating its belief that the DEIS did not represent the reasonable range of alternatives required under NEPA. The letter raised a number of additional issues including concerns about the analysis of indirect and cumulative impacts from the project, concerns about impacts to water

quality, air quality, and concerns about the presentation of conflicting sets of figures in the analysis of streams.

61. On May 25, 2010, Defendants NCDOT and FHWA issued a final environmental impact statement (“FEIS”) for the Monroe Connector/Bypass.

62. The FEIS failed to cure almost all of the substantial omissions and misstatements of the DEIS, including those pointed out by the agencies, citizens and interested groups.

63. The FEIS did revise some of the traffic forecast figures related to the 2035 forecasts for US 74. However, rather than explain these changes, the FEIS simply included a table with altered figures and no explanation. The underlying concern that the same socio-economic forecasts had been used to calculate both the No-Build and Build traffic forecasts for the Toll Road was not addressed, and the majority of the forecasts remained the same. The purpose of the No-Build scenario is to form a baseline for evaluating alternatives. For the few figures that were changed, the FEIS did not discuss how the changes might alter the analysis of the purposes and need for the Monroe Connector/Bypass, and the analysis of alternatives, both of which relied on the flawed calculations originally presented in the DEIS.

64. The FEIS continued to rely on two sets of conflicting figures for stream impacts. The FEIS used one outdated figure from the DEIS which vastly underestimated the impacts to streams to justify the choice of the preferred alternative when compared against other options, and used a different, updated set of figures to discuss the impacts from the preferred alternative.

65. Several agencies and environmental groups submitted comments criticizing the failure of the FEIS to address significant concerns raised in comments on the DEIS, and reiterating those concerns as related to the inadequacies of the FEIS.

66. By letter dated July 12, 2010 US EPA laid out its continuing concerns about the analysis of the project in the FEIS. The letter included statements disagreeing with findings in the FEIS that the project would have no impacts on water quality or air quality. Additionally, the letter questioned the adequacy of the indirect and cumulative impacts analysis and associated mitigation laid out in the FEIS, and described how the FEIS used misleading figures to compare water quality impacts across alternatives.

67. North Carolina Wildlife Resource Commission submitted comments on July 13, 2010 reinforcing its concerns about the Toll Road's impact on sensitive aquatic resources. The letter explained that indirect and cumulative impacts continued to be NCWRC's greatest concern, explaining how increases in impervious surfaces and run-off, among other things, could impact sensitive streams and listed species.

68. On August 22, 2010, FHWA completed the NEPA process by issuing the ROD approving the FEIS.

69. The ROD did not address Plaintiffs' concern that the indirect and cumulative impacts analysis had relied on socio-economic forecasts for the Build and the No-Build scenarios that both assumed the construction of the Monroe Connector/Bypass. In response to Plaintiffs' comment letter, the ROD simply stated that the socioeconomic forecasts for the No-Build Scenario did not include the Monroe Connector.

70. On September 28, 2010 a representative from the Charlotte Department of Transportation confirmed that the Monroe Connector/Bypass had been included in models used to generate the No-Build scenario for the indirect and cumulative impacts analysis used in the EIS.

71. The ROD continued to use two conflicting set of figures to discuss stream impacts. Outdated figures from the DEIS were used to justify the choice of the chosen alternative in comparison to other alternatives. Updated, correct figures were used to show the impacts from the chosen alternative. The revised figures were 9.4% higher than the original figures used in the ROD to select the preferred alternative.

72. On October 8, 2010, the U.S. Army Corps of Engineers (the “Corps”) issued a public notice that NCDOT had submitted a wetlands fill permit application for the Monroe Connector/Bypass under Section 404 of the Clean Water Act. NCDOT’s permit application incorporated by reference the FEIS and ROD issued for the Connector. Thus, the Corps is relying on the faulty analysis in the FEIS to consider the permit request.

### **CLAIMS FOR RELIEF**

#### **FIRST CLAIM FOR RELIEF:**

##### **Defendants’ Alternatives Analysis Was Deficient in Scope and Analysis**

73. The above paragraphs are incorporated herein by reference.

74. Defendants’ Alternatives Analysis failed to comply with NEPA because Defendants used an impermissibly narrow statement of purpose and need to frame the alternatives analysis.

a. The FEIS prepared for the Monroe Connector/Bypass by Defendants articulates the following primary underlying purpose and need: “To construct a facility that allows for safe, reliable, high-speed regional travel in the US 74 Corridor between I-485 in Mecklenburg County and the Town of Marshville in Union County, in a manner consistent with the North Carolina Strategic Highway Corridors Vision Plan for US 74 and the designation of US 74 on the North Carolina Intrastate System.”

b. By defining the project purpose to essentially restate the project design rather than identify the primary underlying purpose of the project, Defendants illegally constrained the analysis of project alternatives and converted their “preferred alternative” into an inescapable conclusion, in violation of NEPA and its implementing regulations.

c. By framing the purpose and need of the project in this impermissibly narrow way Defendants created an improper framework which restricted the analysis of alternatives.

75. Defendants’ Alternatives Analysis failed to comply with NEPA because it failed to consider a reasonable range of alternatives to the proposed Monroe Connector/Bypass.

a. The FEIS failed to seriously consider a “no-action” alternative;

b. The FEIS failed to seriously consider other alternatives that could help to improve mobility in region, such as an upgrade or other improvements to the existing U.S. 74 corridor and the associated local road network; increased investment in mass transit in the corridor, upgrades to the existing rail freight corridor; or a combination of these and other strategies that would improve mobility and capacity in the corridor.

c. The FEIS failed to consider alternatives presented in the Stantec study commissioned by NCDOT.

d. The FEIS relied on flawed traffic forecasts that use the same socio-economic data to inform both the Build and No-Build scenarios, thus blinding a true consideration of alternatives including upgrades to the existing US 74 which would have appeared feasible if the data had been properly presented and future traffic along the existing corridor had not been overstated.

e. The FEIS failed to properly present the costs of the various alternatives.

The FEIS obscured the fact that public funding will be required for the project in addition to projected toll revenue.

76. Defendant's failure to rigorously explore reasonable alternatives to the proposed Monroe Connector/Bypass violates NEPA and its implementing regulations, and is arbitrary, capricious, and otherwise contrary to law.

77. Defendants' Alternatives Analysis failed to comply with NEPA because Defendants failed to provide a rational basis to compare the few alternatives that they did consider.

a. The EIS failed to consider a true "no build" alternative, as required by law and thus had no true baseline with which to compare alternatives;

b. The EIS used the same land use and socioeconomic assumptions to develop traffic forecasts for both build and no-build scenarios;

c. The EIS used data which assumed the building of the Monroe Connector/Bypass to develop the No-Build scenario baseline for the indirect and cumulative impacts analysis and thus failed to properly consider the relative indirect and cumulative effects of the Toll Road;

d. The selection of the Preferred Alternative in the FEIS and the ROD was based in part on inaccurate and misleading figures regarding the relative impacts to stream yardage of various alternatives.

e. These omissions and errors form the foundation for the agencies failure to provide a rational basis for analyzing the alternatives and selecting a preferred alternative for the project.

78. Defendant's failure to objectively evaluate reasonable alternatives to the proposed Monroe Connector/Bypass violates NEPA and its implementing regulations, and is arbitrary, capricious, and otherwise contrary to law.

**SECOND CLAIM FOR RELIEF:**

**Defendants Failed to Analyze the Environmental Impacts of the Monroe Connector/Bypass, Including Both Indirect and Cumulative Impacts**

79. The above paragraphs are incorporated herein by reference.

80. Defendants Indirect and Cumulative Impacts Analysis in the FEIS violates NEPA because it failed to account for impacts from the Monroe Connector/Bypass including the potential for growth-inducing effects. The FEIS evades this responsibility by comparing the indirect and cumulative impacts of the Toll Road to a No-Build scenario which nevertheless assumed construction of the Toll Road in its data inputs and analysis. The FEIS thus minimizes the impacts of the Toll Road almost to zero and consequently fails to account for:

- a. Degradation of water resources including impaired water bodies listed under the Clean Water Act Section 303(d).
- b. Loss of terrestrial wildlife habitat and fragmentation of forested areas.
- c. Negative impacts to federally endangered species including the Carolina heelsplitter mussel and Schweinitz's sunflower.
- d. Alteration of land use that will impact historic sites and cultural resources.
- e. Increases to VMT and associated increases in ozone precursors and GHGs.

81. Defendants' failure to take a hard look at the social and environmental impacts of the proposed action and to disclose this information in the FEIS violates NEPA and its implementing regulations, and is arbitrary, capricious, and otherwise not in accordance with law.

**THIRD CLAIM FOR RELIEF:**

**Defendants Presented False and Misleading Information in the NEPA Documents and Violated Their Duty to Inform the Public**

82. The above paragraphs are incorporated herein by reference.

83. Defendants violated NEPA by failing to prepare documents with objective good faith and failing to make relevant information available to the public before any decision was taken.

a. Defendants failed to address the flawed analysis used to create the indirect and cumulative impacts analysis.

b. Comments submitted on the DEIS and FEIS clearly questioned the use of socio-economic data for the creation of a no-build scenario that assumed the construction of the Monroe Connector/Bypass.

c. Defendants failed to correct this flaw, and instead stated in the ROD that socio-economic forecasts for the No-Build Scenario did not include the Monroe Connector/Bypass.

84. Defendants failed to correct misleading information about impacts to stream yardage.

a. Comments submitted on the DEIS and FEIS made it clear that the use of two conflicting sets of figures to discuss stream yardage impacts was confusing and misleading.

b. Defendants ignored these comments and continued to use inaccurately low figures to justify the choice of the selected alternative in the ROD.

85. Defendants' knowing use of inaccurate information in the FEIS and ROD violates NEPA and its implementing regulations, and is arbitrary, capricious, and otherwise not in accordance with law.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiffs respectfully request that this Court:

1. Enter a declaratory judgment that the Defendants violated the National Environmental Policy Act by preparing an inadequate FEIS that uses an improperly narrow statement of purpose and need, fails to consider a reasonable range of alternatives, fails to provide a rational basis upon which to compare selected alternatives, identifies a preferred alternative based on inaccurate information, fails to adequately analyze and disclose the environmental impacts of the proposed project and by failing in their obligation to inform the public about potential impacts of the project by presenting false and misleading information in the FEIS and the ROD;
2. Vacate the Record of Decision for the challenged project;
3. Enter appropriate preliminary and permanent injunctive relief to ensure that Defendants comply with the National Environmental Policy Act, and specifically to ensure that Defendants take no further actions toward proceeding with the challenged Monroe Connector/Bypass until they have complied with NEPA;
4. Award Plaintiffs the costs of this action, including their reasonable attorneys' fees; and
5. Grant such other relief as the Court deems just and proper.

Respectfully submitted this 2nd day of November, 2010.

S/Chandra Taylor

Chandra T. Taylor – NC Bar No. 28116

S/Kimberely Hunter

Kimberely Hunter – NC Bar No. 41333

S/ J. David Farren

J. David Farren – NC Bar No. 12809

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