

II. FACTS AND BACKGROUND

A. The NEPA Process

Defendant NCDOT first studied the Monroe Connector and Bypass projects in the late 1990s. A Draft Environmental Impact Statement (“DEIS”) was issued for the Monroe Connector portion of the project in 2003. Draft Environmental Impact Statement, Monroe Connector (2003). An Indirect and Cumulative Impacts Analysis for both projects was also performed at that time. In response to concerns from the state and federal agencies, as well as the public, the project was temporarily abandoned in 2006 when Defendants rescinded the DEIS. 71 Fed. Reg. 4958 (Jan. 30, 2006). The Connector and Bypass projects were then reformulated as a joint project and placed under the authority of the North Carolina Turnpike Authority (“NCTA”).

In 2007, State Defendant NCDOT issued a Notice of Intent (“NOI”) to prepare a new DEIS for the Monroe Connector/Bypass. 72 Fed. Reg. 2582 (Jan. 19, 2007). NCTA was absorbed into NCDOT in 2009. N.C. GEN. STAT. § 136-89.182 (2010). They, however, continued to act as the primary agency involved in the preparation of NEPA documents for the Monroe Connector/Bypass project. With the assistance of numerous outside consultants, NCTA issued a DEIS for the project in March, 2009 and an FEIS for the project in May, 2010. A Record of Decision (“ROD”) was issued in August, 2010. Federal Defendant, FHWA, the lead federal agency charged with the primary responsibility of overseeing the NEPA process, signed the ROD on August 27, 2010.

B. Plaintiffs’ Claims

Plaintiffs filed suit challenging the adequacy of the FEIS on November 2, 2010. In their complaint, Plaintiffs raised three interrelated claims. First, Plaintiffs contend that the FEIS includes an alternatives analysis that is deficient in scope and analysis. Second, Plaintiffs contend that the FEIS fails to include a coherent analysis of environmental impacts. Third, Plaintiffs contend that the FEIS contains false and misleading information that violates Defendants’ duty to respond to comments and inform the

public. In setting out some of the bases for these claims below, Plaintiffs will give context to the need to complete and supplement the administrative record with the documents enumerated in this motion.

Plaintiffs' first claim centers on the alternatives analysis performed for the project. In completing this alternatives analysis, Defendants removed all but toll highway options from detailed study at a very early stage. DEIS at 2-1 – 2-21. For example, the alternatives analysis either failed to consider entirely, or eliminated from serious consideration, Traffic Demand Management and mass transit solutions. Most importantly, the analysis failed entirely to consider a 2007 study commissioned by NCDOT, which concluded that \$13.3 million in long-term improvements to the existing roadway, US 74, could result in an acceptable level of service by the year 2015 along the whole of the corridor in Union County, with the exception of one interchange. Stantec, U.S. 74 Corridor Study (July, 2007), A.R. 004972.

Central to all three of Plaintiffs' claims is the socio-economic data used to create a "No-Build" scenario in the EIS. A "No-Build" scenario is generally included in an EIS as a baseline with which to compare alternative solutions. The scenario should present the conditions anticipated to occur if no version of the project in question were to be constructed. Socio-economic data shows how neighborhoods, work centers and undeveloped land will develop over time. To create a "No-Build" scenario for the Monroe Connector/Bypass, Defendants relied on Transportation Analysis Zone ("TAZ") data from Mecklenburg-Union Metropolitan Planning Organization ("MUMPO"). While the "No-Build" scenario was presented as exhibiting conditions without the Monroe Connector/Bypass, the TAZ data actually assumed construction of the road. Thus, rather than being a true "No-Build" scenario, what was presented instead relied upon underlying data for a scenario where the Monroe Connector/Bypass had been constructed. This fundamental flaw skewed both the traffic forecasts and the Indirect and Cumulative Impacts analysis in Defendants' EIS.

The flaw in the TAZ data had significant implications for the traffic forecasts in the DEIS. The forecasts are important in determining the levels of traffic that are anticipated to exist now and in the future for both the existing roadways, and for the future Monroe Connector/Bypass. Defendants used the

traffic forecasts to justify the need for the road, to assess the viability of alternatives, and to calculate the impacts from those alternatives.

Plaintiffs raised concerns in the DEIS that many of the future traffic forecasts were fundamentally flawed. For example, the flawed TAZ data resulted in forecasts in the DEIS that predicted a large growth in traffic volume along the existing corridor under the baseline “No-Build” scenario. DEIS at Table 2-7. This occurred because the “No-Build” scenario included socio-economic data that assumed the construction of the road, and yet did not include the road in the traffic forecasts. Thus, the “No Build” traffic forecasts portrayed a scenario in which the future traffic volumes generated by both U.S. 74 and the planned toll way must squeeze onto U.S. 74 alone. Defendants, communicating among themselves, acknowledged these vast overestimates in the traffic forecasts,² and made nominal corrections in the FEIS.

The flaw in the TAZ data also had implications for the Quantitative Indirect and Cumulative Impacts Analysis included in the FEIS. This analysis is a necessary part of NEPA and identifies the indirect and cumulative effects that construction of a project will have on the project area. For example, the report predicts how much growth and development will be occasioned by the project and what impact that development will have on a range of factors such as air quality, water quality and endangered species. The Quantitative Indirect and Cumulative Impacts Analysis for the Monroe Connector compared construction of the project (the “Build” scenario), with the baseline “No-Build” scenario. However, the “No-Build” scenario was based on the flawed TAZ data discussed above, and thus Defendants were ultimately comparing “building the project” with “building the project.” In light of this flaw, the report ultimately concluded that construction of the road would have negligible (less than 1%) impact on growth and development in the project area.

Plaintiffs first laid out their concerns about the inclusion of the Monroe Connector/Bypass in the TAZ data used to create a “No-Build” scenario in their comments on the DEIS. See FEIS at B3-13- B3-

² See, e.g., Exhibit B.

15. Defendants failed to properly address these comments. See FEIS at B3-39- B3-41. While some nominal changes were made to traffic forecasts in the FEIS, in the form of errata, Defendants failed to acknowledge the inclusion of the Monroe Connector/Bypass in the TAZ data, and indeed continued to rely on the TAZ data to construct “No Build” scenarios. Id. Plaintiffs renewed their concerns in comments on the FEIS. Specifically, Plaintiffs raised the fact that TAZ data used to calculate socioeconomic forecasts for the “No Build” scenario included the Monroe Connector/Bypass. ROD at C-3.

Documents in the current administrative record show that Defendants knew at the time they were responding to comments that the TAZ data did indeed assume the construction of the Monroe Connector/Bypass.³ Moreover, Defendants have subsequently admitted that the TAZ data did assume construction of the road. See State Defendants’ Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 11-12. Nonetheless, rather than address Plaintiffs’ valid concerns in good faith in the ROD, Defendants instead replied with the materially inaccurate statement that “TAZ socioeconomic forecasts for the No Build Scenario did not include the Monroe Connector.” ROD at C-11.

On November 23, 2010, Plaintiffs filed a Motion for Preliminary Injunction with this court. Plaintiffs, State and Federal Defendants all filed briefs on the Motion and the Court held a hearing on December 16, 2010. During the hearing, Plaintiffs and Defendants gave lengthy presentations on the merits of the claims in this case.⁴ The presentations included descriptions of modeling processes, modeling assumptions, and arguments regarding the ultimate difference that may have resulted from the above mentioned flaws in the modeling process. The discussions were technical in nature with Plaintiffs arguing that the flawed process materially affected the EIS, and Defendants responding that the flaw in the model made a negligible difference.

³ See, e.g., Defendant’s Meeting Minutes, December 2, 2009, Administrative Record 22931.

⁴ During the hearing, Plaintiffs used a Map of the Project Area for illustrative purposes. The map explains many of the technical issues involved in this case and proved useful during the hearing. Plaintiffs, therefore move for the court to order that Defendants supplement the record with this map, attached to this Motion and Memorandum as Exhibit C.

C. The Administrative Record

Prior to filing the lawsuit described above, on October 13, 2010, Plaintiffs' counsel made a public records request, under the state's version of the Freedom of Information Act, N.C. GEN. STAT. § 132-1 et seq., to Defendant NCDOT. The request asked for records relating to the Monroe Connector/Bypass.⁵ NCDOT responded to this request on December 13, 2010 with a collection of over 48,000 documents.⁶⁷ On January 31, 2011, Defendants filed the certified administrative record, which, however, contained only 2631 documents.

Following the February 4, 2011 status conference, on February 11, 2011, Plaintiffs supplied Defendants with a list of items necessary to complete the administrative record and a request to supplement the administrative record.⁸ This list included documents already in the possession of Plaintiffs as a result of the records request and documents that Plaintiffs believe are necessary, but are, as yet, unseen by Plaintiffs. On February 18, 2011, Defendants responded to Plaintiffs' list. Defendants acknowledged that some of the listed items should have been included in the administrative record. Further, Defendants proactively included additional documents not included in their initial certified administrative record. Those items were lodged as a supplement to the administrative record on February 25, 2011. Defendants' supplement to the certified administrative record contains an additional twenty-five documents.

Plaintiffs have reviewed the compilation of documents provided in response to the public records request, the certified administrative record and the supplement to the certified administrative record. In addition to the legal arguments that will follow in this memorandum, the significant disparity in the number of documents presented to Plaintiffs as a result of the public records request, and the number of

⁵ October 13, 2010 Public Records Request to NCDOT, Ex. D.

⁶ Based on an email exchange between DOT staff and their counsel regarding a response to Plaintiffs' counsel's records request, it appears that rather than Defendants responding specifically with the records requested, it was determined that they could "satisfy [the] request by getting together the administrative record for this case[.]" Ex. E.

⁷ Boxes containing the documents in question were likewise entitled "Administrative Record."

⁸ Ex. F

documents in the certified administrative record and its supplement, support Plaintiffs' contention that the certified administrative record with its supplement still does not form the complete record. While the scope of the public records request was broader than that of the administrative record, it appears that Defendants combined the two tasks,⁹ and have offered no coherent explanation to account for the large disparity.

Consequently, Plaintiffs first contend that the administrative record is not yet complete without the additional inclusion of some of the specific documents uncovered in Plaintiffs' public records request. Second, Plaintiffs contend that there are some documents, not yet produced by Defendants in any capacity, which should properly be included within a complete administrative record. Third, beyond completion of the record, Plaintiffs contend that additional documents should be allowed to be presented to supplement the administrative record in order to promote effective judicial review.

As outlined in more detail below, Plaintiffs believe that this is an appropriate case in which to allow discovery. In the interests of expediting the case, Plaintiffs offered to forego submitting motions to allow discovery during the status conference on February 4, 2011. In lieu of discovery, Plaintiffs requested that Defendants file a completed administrative record and also consider supplementing it with some extra-record materials. Defendants objected to the inclusion of the majority of the items for completion and all of the items for supplementation listed by Plaintiffs. Plaintiffs believe that those items are necessary to complete and supplement the administrative record. Because the Parties were unable to reach agreement, Plaintiffs are compelled to move for an order from the Court that these documents be added to the administrative record. Rather than request that the Court compel Defendants to include all documents that Plaintiffs believe to be missing from the administrative record, Plaintiffs limit their request to a very small number of documents that are central to Plaintiffs' claims. The documents at issue include modeling data used to create the various technical analyses included in the EIS, previous drafts of

⁹ Exhibit E supra at fn 6.

technical documents, and a number of e-mail exchanges which shed light on the bad faith employed in the development of the EIS.

III. ARGUMENT

A. Defendants have Failed to File a Complete Administrative Record

Generally, a court's review of agency decisions pursuant to the APA is limited to review of the administrative record. See 5 U.S.C. § 706 (2011). The APA does not specify what constitutes a complete record. See id. However, most courts have found that a complete administrative record includes all documents and materials that were before the agency at the time the decision was made. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). This includes "all documents and materials directly or indirectly considered by the agency in making the decision in question." Ohio Valley Env'tl. Coal v. Whitman, 3:02-CV-0059 at 1 (S.D. W. Va. 2003) (quoting Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993)); see also Ad Hoc Metals Coal. v. Whitman, 227 F.Supp.2d 134, 139 (D.D.C. 2002) (holding that an agency's administrative record must include documents "referred to, considered by, or used by [the agency] before it issued its final rule").

There is a standard presumption that the administrative record submitted by an agency for judicial review is complete. See, e.g., Bar MK Ranches, 994 F.2d at 740 (explaining that "the designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity"). An agency, however, may not unilaterally decide what constitutes the administrative record. Id.; see also Tenneco Oil Co. v. Dep't of Energy, 475 F.Supp. 299, 317 (D. Del. 1979). Rather, the presumption is rebuttable with a showing of "clear evidence" that there are documents missing. Bar MK Ranches, 994 F.2d at 740; see also Ohio Valley Env'tl. Coal, 3:02-CV-0059 at 2 (explaining that "[i]f the plaintiffs prove that [an agency] has not included information in the administrative record that was considered by the [the agency] in making its decision, the court will supplement the record with those materials"); see also Natural Res. Def. Council, Inc. v. Train, 519 F.2d

287, 291-92 (D.C. Cir. 1975) (ordering completion of an agency's administrative record where plaintiffs "made a substantial showing . . . that the Administrator had not filed the entire administrative record with the court").

The presumption that the administrative record is complete no longer exists under the facts here. Defendants' initial administrative record submission on January 31, 2011 left out a number of significant documents. After an exchange with Plaintiffs, some of those documents were added as a supplement to the record on February 25, 2011. In supplementing their administrative record after the initial date of certification, Defendants lost their presumption of administrative regularity. See 519 F.2d at 291-92 (holding that the agency had lost the presumption that the administrative record was complete after it supplemented the record with a document that was initially considered). FHWA's certification that the record was complete on January 31, 2011 was thus essentially nothing more than certification of a "fictional account of the actual decisionmaking process." Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) (quoting Home Box Office, Inc. v. Fed. Commc'ns Comm'n, 567 F.2d 9, 54 (D.C. Cir. 1977)). While Defendants generally have a presumption of administrative regularity, they also bear the burden of completing the administrative record. It is not Plaintiffs' responsibility to call attention to documents that should properly have been included.

Perhaps unsurprisingly, given the small number of documents submitted, Defendants failed to include many integral documents in their original certified administrative record. For example, Defendants failed to include a 2003 Indirect and Cumulative Effects ("ICE") study performed for an earlier iteration of the Monroe Connector/Bypass. This study is particularly relevant to this lawsuit as it indicates that the Monroe Connector/Bypass would induce a large amount of growth in the project area, and lead to substantial environmental impacts. This result, which would be expected for a highway of this type, is the opposite outcome produced by Defendants' more recent ICE analysis, and goes to the very heart of Plaintiffs' claims by casting doubt on the reliability of an impact analysis that attributes only

a 1% difference in forecast growth and development to the construction of a twenty mile new location highway.

By failing to include this study in their original administrative record, and only including it when asked to do so by Plaintiffs, Defendants violated the well accepted principle that a complete administrative record “consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.” Thompson v. U.S. Dept. of Labor, 885 F.2d 551, 555 (9th Cir. 1989). In fact, it appears that State Defendant, NCDOT, was purposefully hoping to hide this study from the Court’s view.¹⁰ Defendants have now agreed to include this study in the administrative record. However, the initial omission of the study shows that Defendants failed to live up to the presumption that they would produce a complete administrative record.

Not only did Defendants lose the presumption of administrative regularity when they omitted the above mentioned documents, Plaintiffs demonstrate below that there are several other important omissions in their submission. Defendants thus now have the burden of proving that the submitted administrative record was in fact complete. See, e.g., Walter O. Boswell Mem’l Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984); Portland Audubon Soc’y, 984 F.2d at 1548 (explaining that “where the so-called “record” looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless.”).

i. Defendants Should Complete the Administrative Record with Missing Drafts

Federal Guidance documents suggest that the administrative record should consist of “all documents and materials directly or indirectly considered by the agency decision maker.” U.S. Department of Justice, Environment and Natural Resources Division, “Guidance to Federal Agencies on

¹⁰ See e-mail from Christy Shumate, Dec 17, (2009) (stating that “Because no one commented on [the 2003 ICE] specifically (or differences between the previous and current studies) during our public review comment period, there is no reason for them to be brought into our record. [FHWA] also agree[s] that the appropriate way to handle a comparison between the old and new documents is with a stand-alone memo either to the file or from NCTA to FHWA (they wanted to think about that a little more) that would then be available for a judge to review if there is litigation on our project.”), Ex. G.

Compiling the Administrative Record” (Jan. 1999). Thus, the administrative record should “include all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials.” Id. While internal “working drafts” need not be included, drafts that were circulated outside the author’s immediate office should be included if changes in the document reflect “significant input into the decision-making process.” Id.

While there is no Fourth Circuit opinion speaking directly to the issue of drafts, a number of federal courts have ruled that drafts should be included as part of a complete administrative record. See, e.g., Ohio Valley Env'tl. Coal, 3:02-CV-0059 at 5 (“The administrative rulemaking process is precisely one of initial proposals, comments, compromise, revisions and final drafts, and the materials produced in this process are typically part of the administrative record.”); see also Miami Nation of Indians of Indiana v. Babbitt, 979 F. Supp. 771, 776 (N.D. Ind. 1996) (ordering inclusion of drafts and internal communications in record); Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 522-23 (9th Cir. 1998) (reviewing drafts included in administrative record in ruling on summary judgment).

Defendants failed to include a number of drafts in the administrative record. Most concerning to Plaintiffs is the failure to include drafts or other background documents relating to the Indirect and Cumulative Impacts Reports, the validity of which are at the heart of this lawsuit, as they relate to Defendants’ alternatives analysis, Defendants’ analysis of impacts, and Defendants’ action in providing the public with false and misleading information. While Plaintiffs did not receive copies of any drafts or other documentation as part of their records request, it seems unlikely, and contrary to common sense, that these highly complex documents were produced without any prior drafts or other accompanying documentation.

In fact, it is clear from e-mail correspondence that at least one other iteration of this report *was* considered by the agency before the final draft was adopted.¹¹ It appears from correspondence that one of these drafts again showed that the Monroe Connector/Bypass would, in fact, have “moderate induced growth potential” in the project area, presumably well over the 1% concluded in the FEIS.¹² It is unclear why this draft was excluded from the administrative record, however, perhaps Ms. Shumate’s concern that the draft was “way too incriminating” contributed to its exclusion. Id.¹³ Regardless, this draft and any other drafts of the Indirect and Cumulative Effects analyses circulated for comment, listed in Exhibit A as Item 1, should be included.

Similarly, Defendants failed to include any drafts of the First Qualitative Screening Report for the Monroe Connector/Bypass completed by PBS&J (2007). This report is particularly relevant to this lawsuit, as it was the key document that excluded from consideration all “functional alternatives” to the construction of the Monroe Connector/Bypass such as a range of strategies including Traffic Demand Management and potential transit solutions. Again, Defendants apparently would have the Court infer that this document sprang into being without any prior drafts or other documentation. Common sense tells us that this is unlikely. Accordingly, Plaintiffs ask the court to compel Defendants to include the category of documents listed in Exhibit A as Item 2, all documents relied upon by PBS&J in the creation of the First Qualitative Screening Report, including previous drafts of that document that were circulated for comment.

ii. Defendants Should Complete the Administrative Record with Missing E-mails

Additionally, Plaintiffs move the court to require the inclusion in the administrative record of two e-mails which have been excluded by the agency.¹⁴ These e-mails were sent by agents engaged with the preparation of the EIS prior to the issuance of the ROD and thus are properly part of the administrative

¹¹See e-mail from Christy Shumate to Jennifer Harris and S. Franklin, re Monroe ICE (June 11, 2008) (discussing an early draft of the Indirect and Cumulative Effects analysis), Ex. H.

¹²Id.

¹³Plaintiffs seek to supplement the Administrative Record with this e-mail, as detailed below.

¹⁴Plaintiffs are in possession of each of these e-mails as a result of their October 13, 2010 records request, Exs. H & I.

record. Defendants have included a number of e-mails in both their original administrative record submission, and their certified supplement of February 25, 2011. We understand, however, that in response to our request for inclusion of the e-mails documented below, Defendants will assert that the e-mails were not relied upon by FHWA for the NEPA decision making process. This type of response overlooks Defendants' responsibility to include all documents directly and indirectly considered by the decision-maker "even though the final decision-maker did not actually review or know about the documents and materials," and "even if they were not specifically considered by the final agency decision-maker." U.S. Department of Justice, Environment and Natural Resources Division, "Guidance to Federal Agencies on Compiling the Administrative Record" (January 1999).

Even if FHWA did not directly rely upon the e-mails, the e-mails form part of the decision-making process, and thus, were indirectly relied upon. Indeed, to limit the administrative record to only those records directly relied upon by FHWA in signing the ROD would lead to an absurdly small administrative record. In this NEPA process, it was state Defendant NCDOT, and more specifically, NCTA and its consultants who engaged in the day to day construction of the NEPA documents. While FHWA completes oversight of the project, and ultimately signs off on the final decision, it does not involve itself in the details of the project.

The e-mails are important in documenting Defendants' decision making process. First, Exhibit I, E-mail from Carl Gibilaro, (March 3, 2008) re: US 74 future traffic conditions analysis, is evidence of Defendants' engagement in predetermined decision-making, to avoid looking at a reasonable range of alternatives as required under NEPA. The e-mail states that the consultants involved in drafting the EIS for the Monroe Connector/Bypass were "really only looking at new alignment alternatives." The statement documents the consideration that was given, or not given, to upgrades to existing U.S. 74 and is central to Plaintiffs' claims that Defendants failed to take a hard look at this alternative, as well as other options that did not involve the construction of an expensive toll highway. Second, Exhibit H, the 2008 e-mail from Christy Shumate to Jennifer Harris and S. Franklin, which discusses the "way too

incriminating” draft Indirect and Cumulative Effects analysis, should likewise be included. This e-mail, discussed above, refers to an early draft of the Indirect and Cumulative Effects analyses and documents Defendants’ decision-making process in relation to the Indirect and Cumulative Impacts analyses and their, as yet unexplained, modification of an initial report prepared for those analyses.

iii. Defendants Should Complete the Administrative Record with Missing Modeling Data

Federal Guidance states that a complete administrative record should include all “factual information or data” relied upon by the agency, including “technical information, sampling results, survey information, engineering reports or studies.” U.S. Department of Justice, Environment and Natural Resources Division, “Guidance to Federal Agencies on Compiling the Administrative Record” (January 1999). Again, while there is no Fourth Circuit opinion that speaks directly to the issue of the inclusion of modeling data in an administrative record, federal courts have repeatedly held that transportation modeling data should be included. See Bergen County v. Dole, 620 F.Supp. 1009, 1015-16 (D.N.J 1985) (explaining that the court had previously ordered the agencies to submit all relevant studies and data as part of the Administrative Record, including modeling and traffic data); Lloyd v. Illinois Reg’l Transp. Auth., 548 F.Supp. 575, 589-90 (N.D. Ill. 1982) (“a ‘searching and careful’ inquiry of the record . . . cannot be made where the data relied on by the federal agency in reaching its decision is not included in the administrative record”); See also U.S. Lines, Inc. v. Fed Mar. Comm’n, 584 F.2d 519, 533-35 (D.C. Cir. 1978) (holding that the court “cannot determine whether [a] final agency decision reflects the rational outcome of the agency’s consideration of all relevant factors” without having access to the necessary data relied upon by the agency.)

Defendants have failed to include modeling data for a number of important analyses performed in the course of preparing the FEIS that relate directly to Plaintiffs’ claims. Chief among Plaintiffs’ concerns are the models used to generate the Quantitative Indirect and Cumulative Impacts analysis and the traffic forecast models. These models, which are the sole basis for the traffic forecasts presented in

the EIS, play a key role in Defendants' rejection of alternatives and analysis of impacts, and, accordingly, are central to Plaintiffs' claims on those issues. The inclusion of these documents is necessary to meet Defendants' obligation to include all documents that "'might have influenced the agency's decision,' and not merely those on which the agency relied in its final decision." Amfac Resorts, L.L.C., 143 F. Supp. 2d at 12 (quoting Bethlehem Steel v. EPA, 638 F.2d 994, 1000 (7th Cir. 1980)). Accordingly, to complete the administrative record, Plaintiffs' request that the court require inclusion of the documents related to the Quantitative Indirect and Cumulative Impacts Analysis listed at Item 5 in Exhibit A.

Defendants' contention that they are not in possession of the specified documents is not a defense to their duty to complete the administrative record. It is a well understood principle that "a document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record." Miami Nation of Indians, 979 F. Supp. at 777 (quoting Clairton Sportsmen's Club v. Pa. Tpk. Comm'n, 882 F.Supp. 455, 464 (W.D. Pa. 1995)); Ad Hoc Metals Coal., 227 F.Supp.2d at 139. While Defendants may not currently have possession of the documents, the many consultants relied upon by Defendants, who prepared the reports used in the EIS process, should have them in their possession. Defendants cannot claim that these important analyses did not have any influence on the decision-making process simply because they instructed others to perform the analyses for them, rather than using their own expertise to perform those analyses.

The requested items include all documentation necessary to fully understand the modeling process which is, in turn, important to the Court's full understanding of the issues involved in this case. See, e.g., Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 201 (4th Cir. 2009). For example, central to Plaintiffs' claims in this case is the inclusion of the Monroe Connector/Bypass in the road network used to create forecasts of the "No-Build" scenario. As Plaintiffs set out in their Memorandum in Support of Motion for Preliminary Injunction, the inclusion of the road manifested itself in models through a metric entitled "Travel Time to Employment." This metric was calculated by a

University of North Carolina, Charlotte consultant who put together “Travel Time Concentrations” for the entire Metrolina region, including the project area.

It is essential, therefore, that Plaintiffs obtain the Travel Time Concentrations for Union County, which forms the majority of the project area, in order for the Court to fully understand how the Travel Time to Employment metric was incorporated into the models used by Defendants. Indeed, one of Defendants’ own principal consultants on this matter acknowledges that without these datasets, he “could not say for sure” how influential the inclusion of the Monroe Connector/Bypass was in the model outcomes.¹⁵ This logic is applicable to all the above requested modeling documents. Without reviewing the models and datasets, the Court, Plaintiffs, state and federal agencies, and the general public cannot fully understand how Defendants arrived at the conclusions in the FEIS. Accordingly, the models outlined above should have been included in a complete administrative record.

In a similar vein, documentation for the various traffic forecast models completed for this project should also be included. Plaintiffs request that the Court order Defendants to compile the documentation identified at Item 6 in Exhibit A related to the seven traffic forecasts¹⁶ completed for this project, and that the compilation be added to the administrative record.

In addition to the general importance of these documents to a complete administrative record, it is essential that Plaintiffs be able to fully review these models to ensure their reliability. As outlined above, Plaintiffs have significant concerns about Defendants’ ability to produce adequate traffic forecasts. Defendants’ original forecasts dramatically overstated the traffic volumes on existing US 74, and while Defendants did partially acknowledge this error with a nominal correction of some figures in the FEIS,

¹⁵ See e-mail from Scudder Wagg to Christy Shumate, November 15, 2010 (discussing significance of the Travel Time to Employment concentrations to the Monroe Connector/Bypass EIS), Ex. J. (Plaintiffs are moving to supplement the Administrative Record with this e-mail).

¹⁶ 2030 No-Build Traffic Forecast, Forecast years: 2007 & 2030 (Martin/Alexiou/Bryson (MAB)) (June 2007); 2035 Upgrade Existing Traffic Forecast, Forecast years: 2008 & 2035, (Wilbur Smith Associates (WSA)) (2008); 2035 No-Build Traffic Forecast, Forecast years: 2008 & 2035 (Wilbur Smith Associates (WSA)) (2008); 2035 Build Traffic Forecast, Forecast years: 2008 & 2035 (Wilbur Smith Associates (WSA)) (2008/2009); 2015 Build Traffic Forecast (HNTB) (2009); 2035 Build Update Traffic Forecast, Segment 2, Forecast year 2035, (HNTB) (2009); 2035 No-Build, Revised Traffic Forecast, Forecast years: 2008 & 2035 (HNTB) (2010).

the fact that such huge errors could have occurred in the first place, and gone unnoticed but for Plaintiffs' oversight, calls into question the validity of Defendants' modeling process and makes it imperative that all documents relating to traffic forecast modeling be included in the administrative record.

Accurate traffic forecasts are essential to a valid NEPA process for a highway project. As explained above, the forecasts are used by Defendants to justify the need for a new highway, to eliminate alternatives to highway construction, and to assess the impact from construction. The accuracy of the traffic forecasts is deeply entwined with Plaintiffs claims regarding the adequacy of Defendants' alternatives and impacts analyses. It is important, therefore, that the Court order Defendants to complete the record with the data used to create the forecasts to aid an understanding of the reliability of those forecasts and their effect on EIS conclusions. See Nat'l Audubon Soc'y. v. Hoffman, 132 F.3d 7, 15 (2nd Cir. 1997) (explaining that “[t]he omission of technical scientific information is often not obvious from the record itself, and a court may therefore need a plaintiff's aid in calling such omissions to its attention.”)

B. Supplementation of the Administrative Record is Appropriate

While APA lawsuits are generally confined to the administrative record, in certain circumstances courts allow Plaintiffs both to pursue discovery and to supplement the administrative record.¹⁷ See Overton Park, 401 U.S. at 420; See also Fort Sumter Tours v. Babbitt, 66 F.3d 1324, 1336 (4th Cir. 1995) (explaining that “although review is based on a limited record, ‘there may be circumstances to justify expanding the record or permitting discovery.’”) (quoting Public Power Council v. Johnson, 674 F.2d 791, 793 (9th Cir.1982)).

In particular, federal courts have been willing to expand the administrative record in NEPA cases. Indeed, the Fourth Circuit recently noted “the importance of extra-record evidence in NEPA cases to

¹⁷ As explained above, in the interests of expediting this case, Plaintiffs have agreed not to pursue discovery. In lieu of discovery, Plaintiffs move to supplement the administrative record in this case both because supplementation is necessary to explain the complex issues presented in this case and because Defendants have acted in bad faith.

inform the court about environmental factors that the agency may not have considered.” Ohio Valley Env'tl. Coal., 556 F.3d at 201. The Fourth Circuit explained that “[w]hile review of agency action is typically limited to the administrative record that was available to the agency at the time of its decision, a NEPA suit is inherently a challenge to the adequacy of the administrative record . . . [and]. . . [t]hat is why, in the NEPA context, ‘courts generally have been willing to look outside the record when assessing the adequacy of an EIS.’” Id. (quoting Webb v. Gorsuch, 699 F.2d 157, 159 n.2 (4th Cir. 1983)); See also Nat’l Audubon Soc’y v. Dept. of Navy, 422 F.3d 174, 188 n. 4 (4th Cir. 2005) (finding that the district court did not abuse its discretion in reviewing extra record evidence in a NEPA case).

In reviewing NEPA cases, then, federal courts have developed several well-established exceptions to strict record review. These exceptions include situations in which additional information is helpful to clarify complex technical issues, or if there was bad faith in the agency's decision process. See Krichbaum v. U.S. Forest Service, 973 F.Supp. 585, 589 (W.D.Va. 1997), aff’d without opinion 139 F.3d 890 (4th Cir. 1998) (explaining that “courts have allowed an expansion of the record if additional explanation of the decision is necessary for effective judicial review, if it appears that the agency relied on documents not in the record, if background information is necessary to clarify technical issues, or if there was bad faith in the agency's decision process.”)

i. The Administrative Record should be Supplemented to Explain Complex Issues

As outlined above, courts have held that the administrative record be supplemented when helpful to clarify complex or technical issues. Ohio Valley Env'tl. Coal., 556 F.3d at 201 (upholding the district courts’ decision to supplement the record with expert testimony to explain complex scientific issues); N. Carolina Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transp., 713 F.Supp.2d 491 (M.D.N.C. 2010) (allowing plaintiffs to supplement the record with a fact sheet to explain complex issues about green house gases). As the Court is no doubt aware, given the issues discussed during the hearing on the Motion for Preliminary Injunction, this is a complex case involving a range of technical issues.

For example, as discussed above and during the hearing on the Motion for the Preliminary Injunction, Plaintiffs' claims are based in part on Defendants' use of flawed socio-economic data. As already explained, Defendants relied on TAZ data which assumed the construction of the Monroe Connector/Bypass to create a "No Build" baseline scenario, and, thus, compared "building the project" with "building the project." The inclusion of the project into the TAZ data occurred through the use of a Travel Time to Employment metric, which calculated the time to employment centers from each individual TAZ, and thus predicted where future populations would be likely to reside.

In their memorandum opposing Plaintiffs' Motion for Preliminary Injunction, State Defendants explored these issues at length, explaining, for example, the "top down" and "bottom up" processes used to create the socio-economic forecasts for the project. See State Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 10-11. Defendants also discussed at length the "Land Development Factors" involved in creating the socio-economic factors. Id. at 11-12. Rather than negate the fact that the Monroe Connector/Bypass was included in the TAZ data, Defendants stated, based only on lay person calculations, that its inclusion was "insignificant." Id. at 12. This conclusion is at odds with the acknowledgement from Defendants' own consultants on this matter that without these datasets he "could not say for sure" how significant the inclusion of the Monroe Connector/Bypass was to the growth pattern projections in the ICE.¹⁸

This guess work and speculation clearly demonstrates the importance of the inclusion of extra-record evidence to explain the technical matters in this case. Accordingly, Plaintiffs request that if the court finds that the modeling data discussed above is not necessary to complete the administrative record, as argued in part III (A) (iii) above, it should nonetheless order Defendants to supplement the record with this data under the exception that allows supplementation to explain technical issues, as this

¹⁸ See e-mail from Scudder Wag to Christy Shumate, November 15, 2010 (discussing significance of the Travel Time to Employment concentrations to the Monroe Connector/Bypass EIS), see supra at fn 15.

data will be helpful in assisting the court's understanding of these issues. Ohio Valley Envtl. Coal., 556 F.3d at 201.

ii. The Administrative Record should be supplemented because Defendants acted in bad faith

It is a core purpose of NEPA to “guarantee[] that . . . relevant information will be made available to [a] larger audience that may . . . play a role in both the decisionmaking process and the implementation of that decision.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). As federal regulations make clear, “[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). To facilitate these goals, agencies open the NEPA process to the public through a public comment period. 40 C.F.R. § 1503.1. Agencies are required to respond to public comments in “good faith” and objectively evaluate the arguments presented to them. Envtl. Def. Fund v. Corps of Eng’rs, 470 F.2d 289, 296 (8th Cir. 1972). See also Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973) (explaining that where comments coming from “responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response.”).

In the instant case, Defendants presented a “materially inaccurate statement” in the ROD that was highly misleading, and thus have failed to satisfy the core requirements of NEPA. Sierra Club v. U.S. Army Corps of Eng’rs, 701 F.2d 1011, 1030 (2d Cir. 1983). As described above, Defendants failed to respond to Plaintiffs’ concerns regarding the inclusion of the Monroe Connector/Bypass in socioeconomic data that formed the basis of a “No-Build” scenario. Rather than address Plaintiffs’ legitimate concern that this reality meant that Defendants were essentially comparing “building the project” with “building the project,” Defendants opted instead to present the materially inaccurate statement that “TAZ socioeconomic forecasts for the No Build Scenario did not include the Monroe Connector.” See ROD at C-11. Defendants’ failure to adequately deal with the issues presented to them

by Plaintiffs “raises serious questions about the author’s efforts to compile a complete [EIS].” County of Suffolk, 562 F.2d 1368, 1383 (2nd Cir. 1977).

In presenting this false statement, Defendants not only misled Plaintiffs, robbing them of their ability to play a role in the decision making process, but they also misled sister agencies which went on to make important regulatory decisions based, in part, on false conclusions.¹⁹ See Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1996) (explaining that misleading assumptions have the potential to defeat the purpose of an EIS to ensure that agencies take “hard look” at environmental effects of proposed projects and to ensure that relevant information is available to public).

As is true here, “allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism . . . under the rug, raise issues sufficiently important to permit the introduction of new evidence in the district court.” County of Suffolk, 562 F.2d at 1384-85. (internal quotation omitted). Defendants attempted to sweep Plaintiffs’ serious criticism regarding the legitimacy of the TAZ forecasts under the rug. In light of this fact, it is appropriate for the Court to order supplementation of the administrative record with documents that further shed light on this issue. Id.

Accordingly, Plaintiffs move for the court to instruct Defendants to supplement the administrative record with Exhibits J – L, listed in Exhibit A as items 8-10. These documents, three e-mails, occurred after the issuance of the Record of the Decision, and thus would not ordinarily be included in an administrative record. Plaintiffs, however, believe their inclusion is warranted because they both further flesh out the bad faith by Defendants and, importantly, shed light on the relevance of the bad faith to the NEPA process.

¹⁹ As explained in Plaintiffs’ Reply to Defendants’ Motion in Opposition of a Preliminary Injunction, the results of the Indirect and Cumulative Effects analysis were a deciding factor in prompting the U.S. Fish & Wildlife Service to drop its longstanding concerns about impacts to endangered mussels in the Goose Creek watershed and issue a “concurrence” for the project; Plaintiffs’ Reply to Defendants’ Memo in Opposition to Plaintiffs’ Motion for TRO and Preliminary Injunction, at 5; ROD at A1-A3.

The first e-mail, Exhibit K is, in fact, the most emblematic confirmation of Defendants' bad faith in this matter. See e-mail from Jennifer Harris, Re: TAZ polling data file (September 28, 2010). The e-mail came about as Plaintiffs' counsel, former SELC Associate Attorney, Thomas Gremillion, attempted to follow-up on Defendants' false statement in the ROD denying the inclusion of the Monroe Connector/Bypass in the TAZ data that formed the basis of the No-Build Scenario. See ROD at C-11. Confused by the statement in the ROD which did not appear to square with reality, Mr. Gremillion, who took the lead for Plaintiffs in filing NEPA comments on the DEIS and FEIS, attempted to gain some clarity as to its meaning by sending an e-mail to NCDOT employee Jennifer Harris, Director of Planning and Environmental Studies. Ms. Harris did not respond to Mr. Gremillion's inquiry. Shortly after receiving the e-mail, however, she forwarded it to another NCDOT employee, Christy Shumate, Senior Transportation Planner. The forwarded e-mail contained no written message, but instead employed the symbol “;)””. This symbol is a commonly used form of internet shorthand, an emoticon, which indicates a “wink.”²⁰ The e-mail, thus, confirms that Ms. Harris was aware of the confusion caused by the false statement in the ROD, and suggests that, at the very least, State Defendant NCDOT was not acting in good faith, and was intending to mislead the public. There is no other logical explanation for this behavior by a public employee.

The other two exhibits, J and L, are both e-mails from Scudder Wagg of Michael Baker, Inc. Mr. Wagg was apparently one of Defendants' principal consultants on issues pertaining to the Quantitative Indirect and Cumulative Impacts analysis.²¹ The e-mails from Mr. Wagg document his, and Defendants', lack of understanding of the significance of the inclusion of the Monroe Connector/Bypass in the TAZ forecasts. Given the bad faith that has been employed with regard to this question to date, these e-mails should be added to the administrative record to document the fact that Defendants' failure to explore this

²⁰ See PC Mag.com, http://www.pcmag.com/encyclopedia_term/0,2542,t=emoticon&i=42569,00.asp (last visited March 4, 2011).

²¹ FEIS at 4-5.

issue and to “sweep it under the rug” was arbitrary and capricious. County of Suffolk, 562 F.2d at 1384-85.

Finally, while Plaintiffs have argued above that modeling data behind Defendants’ analyses should be part of a complete administrative record, and, alternatively that the modeling data should be included to help explain complex and technical issues, Plaintiffs also contend that the same data can be included as a supplement to the administrative record under the bad faith exception. As Plaintiffs have outlined, Defendants have not been transparent in responding to questions about their models, and the only way to better vet the model outcomes is to rigorously analyze their input.

IV. CONCLUSION

Plaintiffs were tendered a total of 48,000 documents from their original records request. The originally tendered administrative record included 2,631 documents, with an additional 25 documents being supplemented on February 25, 2011. Plaintiffs, having foregone the opportunity to pursue discovery now request the addition of a mere six documents, and four additional limited categories of documents.

For the reasons set forth herein, Plaintiffs respectfully request that Plaintiffs’ Motion to Complete and Supplement the Record be granted.

Respectfully submitted this 4th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing PLAINTIFFS' MOTION TO COMPLETE AND SUPPLEMENT THE ADMINISTRATIVE RECORD AND MEMORANDUM OF LAW IN SUPPORT with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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This 4th day of March, 2011.

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