No Mid-Currituck Bridge-Concerned Citizens v. North Carolina Department of Transportation: The Procedurally Sound Bridge to Nowhere

I. OVERVIEW

Netflix' acclaimed series "Outer Banks" is not the only heated drama taking place on North Carolina's barrier islands. The popular tourist attraction to East Coast beachgoers and home to many is currently involved in a dispute over the construction and development of a toll bridge across the Currituck Sound (the Sound) in North Carolina, which separates northern Outer Banks from the state mainland.[1] Since the Wright Memorial Bridge is the only highway crossing the Sound to the Outer Banks, roads are heavily congested, especially in the summer.[2] As a result, state and federal agencies, the North Carolina Department of Transportation and the Federal Highway Administration, long considered constructing a second bridge spanning the Sound, and finally, in 2019, memorialized their decision to build a two-lane toll bridge across the mainland and Outer Banks.[3] Plaintiffs—North Carolina Wildlife Federation (an environmental group) and No-Mid Currituck Bridge-Concerned Citizens and Visitors Opposed to The Mid-Currituck Bridge (a community organization)—sued, contending that the agencies violated the National Environmental Policy Act of 1969 (NEPA) by approving the bridge project.[4]

1. No Mid-Currituck Bridge-Concerned Citizens v. N.C. Dep't of Transp., 60 F.4th 794, 798 (4th Cir. 2023).
2. *Id.*
3. *Id.*
4. *Id.*

The agencies initially outlined the project's necessity in 2008 by publishing a "Statement of Purpose and Need," laying out three purposes of the project: (1) improving traffic flow; (2) reducing travel time between the mainland and the Outer Banks; and (3) reducing evacuation times for Outer Banks visitors and residents.[5] Next, the agencies circulated a draft Environmental Impact Statement (EIS) for public comment, and after receiving and incorporating comments, they published a final EIS in 2012.[6] The EIS reiterated the three purposes of the bridge and then analyzed the environmental impacts of various alternatives, including doing nothing (the "no-build alternative") or widening the exiting highways—but not building a bridge (the "existing roads alternative").[7] Ultimately, the agencies found the "preferred alternative" of building the bridge and making slight improvements to N.C. 12 and U.S. 158 to best meet the project's goals and minimize adverse impacts.[8] However, before the agencies could finalize their choice, North Carolina pulled the bridge funding and put the project on hold, and by the time the state recommitted the funds, more than three years had passed since the publication of the final EIS.[9] Adhering to regulation,[10] the agencies reevaluated the EIS and completed their reevaluation, cataloguing several changes since publication of the EIS, including (1) reductions in forecasted traffic, development, and growth; (2) updated sea-level rise projections; and (3) increased project cost.[11] After concluding there were "no issues of significance associated with this project," the agencies decided a supplemental EIS (SEIS) was not required.[12]

In 2019, the Federal Highway Administration proceeded to issue the Record of Decision, leading the Plaintiffs to sue in district court. They challenged the agencies' analysis under NEPA, arguing that (1) the no-build alternative impermissibly assumed a bridge would be built; and (2) a SEIS was required.[13] After all parties moved for summary judgment, the district court denied Plaintiffs' motion for summary judgement and granted the defendants' motion, wholly rejecting both of the Plaintiffs' arguments.[14] Addressing each of the Plaintiffs' arguments, the district

5. *Id.* at 799.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* (citing 23 C.F.R. § 771.129(b)).
11. *Id.*
12. *Id.*
13. *Id.* at 800.
14. *Id.*

court held that (1) the future development in each of the plans was "not contingent on the building of the project," together with (2) none of the Plaintiffs' supposed new information related to environmental concerns caused by the project and even if it did, the agencies took a "hard look" at the new information to rightfully decide it was not significant.[15] Plaintiffs then appealed to the U.S. Court of Appeals for the Fourth Circuit.[16]

The Fourth Circuit affirmed, and *held* that (1) the agencies did not violate NEPA by failing to prepare a SEIS because they took a hard look at the new information proffered and subsequently determined that none of the new information, when considered individually or in totality, was significant enough to merit a SEIS, making their decision not arbitrary or capricious; and (2) the agencies consideration of the no-build alternative did not violate NEPA because they reasonably chose to use local land-use plans as the starting point for their analyses and made clear that maximum development would only occur if a bridge were built. *No Mid-Currituck Bridge-Concerned Citizens v. N.C. Dep't of Transp.*, 60 F.4th 794 (4th Cir. 2023).

II. BACKGROUND

NEPA is designed "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."[17] Although NEPA establishes environmental quality as a substantive goal, it is well settled that NEPA does not mandate that agencies reach particular substantive results.[18] Rather, it simply sets forth procedures that agencies must follow.[19] By directing agencies, NEPA ensures that the agency will not act on incomplete information only to regret its decision after it is too late to correct.[20]

The core provision of NEPA mandates that an EIS be prepared for major federal actions "significantly affecting the quality of the human environment."[21] However, an explanation of when it becomes a requirement for agencies to a create post-decision SEIS is not explicitly addressed in NEPA. Since the EIS is often released years before the commencement of a federal action, such statements are often necessary

15. *Id.*
16. *Id.*
17. 42 U.S.C. § 4321.
18. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996).
19. *Id.*
20. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 371 (1989) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).
21. 42 U.S.C. § 4332(C).

to address important problems that may occur after the EIS is filed. While NEPA does not state when a SEIS is required, regulations promulgated by the Council on Environmental Quality (CEQ) and other agencies do.[22] For example, the CEQ requires that agencies supplement an EIS when "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise.[23]

A. Step One: "Hard Look" Analysis

The Supreme Court has found the statutory requirement that a federal agency contemplating a major action prepare an EIS serves NEPA's "action-forcing" purpose in two important respects.[24] First, it ensures that an agency, when deciding whether to approve a project, will carefully consider, or take a "hard look" at, the project's environmental effects.[25] Second, it ensures that relevant information about a proposed project will be made available to members of the public so that they may play a role in both the decision-making process and the implementation of the decision.[26]

The mere preparation of an EIS, however, does not always suffice as a "hard look" for agencies under NEPA, as NEPA requires agencies to take a hard look at the environmental consequences of their proposed projects even after an EIS has been prepared.[27] Thus, in reviewing an agency's decision not to prepare a SEIS, courts have undertaken a two-step inquiry. First, the court must determine whether the agency took a hard look at the proffered new information.[28] Second, if the agency did take a hard look, the court must determine whether the agency's decision not to prepare a SEIS was arbitrary or capricious.[29]

Looking to the first step, courts have found that if the agency concludes after a preliminary inquiry that the "environmental effect of the change is clearly insignificant," its decision not to prepare a SEIS satisfies the hard look requirement.[30] For instance, in *Marsh v. Oregon Natural*

22. *See Marsh*, 490 U.S. at 372.

23. 40 C.F.R § 1502.9(c)(1)(ii)(1978).

24. *Robertson*, 490 U.S. at 349 (citing Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 97 (1983)).

25. *Id.* at 350.

26. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) (citing *Robertson*, 490 U.S. at 349).

27. *Marsh*, 490 U.S. at 374.

28. *Hughes*, 81 F.3d at 443.

29. *Marsh*, 490 U.S. at 385.

30. Save Our Sound OBX, Inc. v. N.C. Dep't of Transp., 914 F.3d 213, 222 (4th Cir. 2019) (citing Hodges v. Abraham, 300 F.3d 432, 446 (4th Cir. 2002)).

Resources Council, the Supreme Court of the United States unanimously reversed the Ninth Circuit and ruled, among other things, that the Army Corps of Engineers took a hard look at new information when it (1) obtained expert opinion within the agency and consulted two outside experts; (2) gave careful scientific scrutiny to the new information; and (3) explained why the new information did not require the preparation of a supplemental EIS.[31] On the other hand, in *Hughes River Watershed Conservancy v. Glickman*, the Fourth Circuit found that the Army Corps of Engineers violated NEPA by failing to take a sufficiently hard look at the problem of zebra mussel infestation from its proposed dam project before deciding not to prepare a SEIS.[32] Falling short, the Corps relied solely on two telephone conversations with its water quality employees without addressing expert evidence that led to the opposite conclusion.[33]

B. Step Two: Arbitrary and Capricious Standard

If the agency took a hard look at the proffered new information, the court's analysis turns to whether the agency's decision not to prepare a SEIS was arbitrary or capricious.[34] When using this standard of review, courts must consider whether the decision was based on a consideration of the relevant factors or whether there was a clear error of judgment.[35] This inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one."[36]

The Supreme Court in *Marsh* explained the arbitrary and capricious standard, noting that an agency is entitled to deference in its review of pertinent technical documents and expert consulting.[37] On the other hand, the Court observed that courts should not "automatically defer" to agency discretion without reviewing the record and outstanding evidence themselves and ensuring that the agency made a reasoned decision "based on its evaluation of the significance—or lack of significance—of the new information."[38] This judicial interpretation of NEPA is in line with the function of NEPA as a procedural tool that requires agencies to balance a

31. *Marsh*, 490 U.S. at 361.
32. *Hughes*, 81 F.3d at 445.
33. *Id.*
34. *Id.* at 443.
35. *Marsh*, 490 U.S. at 378.
36. *Id.*
37. *Id.*
38. *Id.*

project's economic benefits against its adverse environmental effects, as it prohibits uninformed—rather than unwise—agency action.[39]

The *Marsh* Court also emphasized that not all new information merits preparation of a new statement; rather, the question turns on "the value of the new information to the still pending decisionmaking process."[40] Thus, if "the new circumstance present[s] a seriously different picture of the environmental impact of the proposed project from what was previously envisioned," the value of the new information is significant enough to require a SEIS.[41]

III. THE COURT'S DECISION

The Fourth Circuit affirmed the district court's grant of summary judgment for the defendants in their approval of the bridge project, agreeing with their logic that none of Plaintiffs' supposed new information—changed traffic forecasts, updated development projections, or updated sea-level rise predictions—related to "'environmental concerns' as caused by the proposed action."[42] Rather, the changed circumstances went to the "need and feasibility of the project," not how the project would impact the environment.[43] Further, the court agreed with the district court's conclusion that the agencies did in fact take a hard look at the new information and reasonably decided it was not significant.[44]

Relying on the two-step inquiry laid out by the Supreme Court in *Marsh*, the court addressed all three areas where the plaintiffs claimed significant new information had emerged since the EIS—traffic forecasts, growth and development patterns, and sea-level rise projections—and maintained that none of the developments compelled the agency to publish a SEIS.[45]

As a matter of first impression, the court reasoned that it is unclear why reduced traffic over the bridge—which would seem to decrease the

39. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).

40. *Marsh*, 490 U.S. at 374.

41. Hickory Neighborhood Def. League v. Skinner, 893 F.2d 58, 63 (4th Cir. 1990); *see also* Save Our Sound OBX, Inc. v. N.C. Dep't of Transp., 914 F.3d 213, 222 (4th Cir. 2019) (concluding that it was not arbitrary or capricious for the Agencies to determine that the project did not present a "seriously different picture" than the 2008 EIS, the 2010 EA, or the 2013 EA).

42. No Mid-Currituck Bridge-Concerned Citizens v. N.C. Dep't of Transp., 60 F.4th 794, 800-01 (4th Cir. 2023) (quoting N.C. Wildlife Fed'n v. N.C. Dep't of Transp. 575 F. Supp. 3d 584, 615 (E.D. N.C. 2021)).

43. *Id.* at 800 (quoting *N.C. Wildlife Fed'n*, 575 F. Supp. 3d at 615).

44. *Id.* at 801.

45. *Id.* at 802.

bridge's environmental footprint—would require a SEIS under either NEPA or the Federal Highway Administration's regulations.[46] Though Fourth Circuit jurisprudence calls for only a "preliminary inquiry" into the issue at hand to satisfy the hard look requirement,[47] the court found that the agencies went above and beyond by preparing new traffic forecasts and network and congestion measures. Specifically, the court conceded that although travel-time benefits associated with the bridge might be lower than originally predicted, the updated analysis "found that the main thoroughfares are still congested . . . and forecast to become worse."[48] Moreover, as compared to the alternatives—the no-bridge alternative and the existing-roads alternative—in relieving the congestion, the agencies determined that the bridge project still offered the most benefits overall, especially on summer weekends, and that it would continue to fulfill its hurricane-evacuation purpose.[49] Wrapping up the first issue and relying on logic of the D.C. Circuit in *Friends of Capital Crescent Trail v. Federal Transit Administration*, the court concluded that the new traffic forecasts "did not call into question the entirety" of the bridge, the choice of the bridge over alternatives, or the bridge's environmental impact—"or at least [the agencies were] entitled to so conclude."[50]

Introducing and knocking down the second issue of "significant changes to anticipated growth and development patterns" as the plaintiffs argued demanded a SEIS, the court explained that these trends were only relevant because they affected traffic, which had already been acknowledged as adequately considered by the agencies.[51] Wholly rejecting the plaintiffs' argument on this issue, the court concluded that "[s]tanding alone, slowed development on the Outer Banks isn't a reason to require a supplemental EIS."[52]

Analyzing whether the "dramatic changes to projections of sea level rise" called for a SEIS, the court concluded that although the new sea-level projections may make a bridge a less wise choice, they could not

46. *Id.* (citing 40 C.F.R. § 1502.9(c)(1)(ii) (stating "the Act's regulations require supplementation to an EIS only for new information 'relevant to environmental concerns'"); 23 C.F.R. § 771.130(b)(1) (requiring no SEIS where new information solely results in a "lessening of adverse environmental impacts")).

47. Save Our Sound OBX, Inc. v. N.C. Dep't of Transp., 914 F.3d 213, 222 (4th Cir. 2019).

48. *Mid-Currituck*, 60 F.4th at 802.

49. *Id.* at 802-03.

50. *Id.* at 803 (citing 877 F.3d 1051, 1062 (D.C. Cir. 2017)).

51. *Id.*

52. *Id.*

conclude that the agencies were uninformed about the risks of sea-level rise.[53] Labeling the sea-level issue as a "factual dispute the resolution of which implicates substantial agency expertise," the court highlighted the differences between Plaintiffs' and agencies' data.[54] The agencies had originally considered sea-level rise scenarios ranging from 2.4 to 23.2 inches by 2100 "as well as a 39.4-inch scenario for the bridge project specifically."[55] In their reevaluation, the agencies relied on a 2016 report that forecasted well within the range originally considered, finding that by 2045, sea-level rise could range from 4.4 to 10.6 inches.[56] On the other hand, Plaintiffs relied on 2017 sea-level rise data from the National Oceanic and Atmospheric Administration, showing that "the bridge would see 28.3 inches of sea-level rise by 2050 and 81.1 inches by 2100, resulting in an inundated 'bridge to nowhere' in less than 30 years."[57] Though there was a notable factual discrepancy, the court recognized the importance of deferring to agency discretion in such a scenario.[58] In addition, the court found the agencies' decision not to issue a SEIS was not arbitrary or capricious because the risks of sea-level rise had already been articulated and considered in the EIS as further need for the bridge, potentially providing "the only way off the Currituck County Outer Banks" during a storm surge.[59]

The court then turned to the plaintiffs' argument that "when considered together," the changes in traffic forecasts, expected growth, and sea-level rise projections obligated the agencies to reevaluate whether non-bridge alternatives could better meet the project's purposes.[60] The court first distinguished the noted case from the case that Plaintiffs' relied on, *Alaska Wilderness Recreation and Tourism Association v. Morrison*, where the U.S. Forest Service published several EISs to harvest Alaskan timber, only to suddenly terminate the contract, in turn significantly "alter[ing] the range of viable alternatives available to the Forest Service," since the agency did not initially consider alternatives "outside the contract boundary."[61] Unlike in *Alaska Wilderness*, the new forecasts did not "alter the range of viable alternatives" to the bridge, but rather

53. *Id.*
54. *Id.* at 804 (quoting Marsh v. Or. Nat. Res. Council, 490 U.S. 332, 371 (1989)).
55. *Id.* at 803.
56. *Id.*
57. *Id.* at 804.
58. *Id.* (citing *Marsh*, 490 U.S. at 376; Ohio Valley Env't Coal. v. Aracoma Coal Co., 556 F.3d 177, 201 (4th Cir. 2009)).
59. *Id.*
60. *Id.*
61. *Id.* at 804-05 (citing 67 F.3d 723, 731 (9th Cir. 1995)).

compelled the plaintiffs to argue that the bridge may be less useful or viable.[62] In other words, the agencies' reexamination of the bridge's utility and feasibility as compared to the alternatives did not "undercut the rationale upon which the agency action depended," but rather reinforced their decision that the bridge still met its purposes "as well as or better than the other alternatives."[63] The court thus concluded that the agencies' reevaluation of all the aforementioned factors individually and collectively was sufficient under the hard look analysis, and their decision to not prepare a SEIS was not arbitrary or capricious.[64]

Next, the court briefly considered and rejected Plaintiffs' argument that the EIS was "'fatally flawed to begin with' because the agencies purportedly factored traffic and growth resulting from the bridge into their no-action baseline."[65] When agencies miscalculate the "no build" baseline or assume the existence of a proposed project, courts generally find NEPA violations.[66] However, although the agencies relied on traffic forecasts based on local land-use plans that assumed a bridge would be built, considering an "unconstrained development" scenario, they also considered a "constrained" development scenario under the no-build alternative, which properly omitted the effects of the bridge in constructing the "no-build baseline."[67]

Plaintiffs further argued that the environmental impact of additional development under the bridge scenario was not adequately addressed in the EIS.[68] Responding, the court highlighted the fact that the EIS did account for the added development in the "Indirect Effects" section of the EIS, finding that the bridge would have "no effect on threatened and endangered species" and predicting no "appreciable improvement" in water quality under the no-build and existing roads scenarios because new development would have to comply with water regulations.[69]

Next, the court distinguished the noted case from precedent set in *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, stating that in this instance, the agencies did not mislead

62. *Id.* at 805.

63. *Id.* (quoting Friends of Cap. Crescent Trail v. Fed. Transit Admin., 877 F.3d 1051, 1061 (D.C. Cir. 2017)).

64. *Id.*

65. *Id.* (citing Appellants' Br. at 43).

66. *Id.* (relying on N.C. Wildlife Fed'n v. N.C. Dep't of Transp., 677 F.3d 596, 603 (4th Cir. 2012)).

67. *Id.* at 805-06.

68. *Id.* at 806.

69. *Id.*

the public about the lower level of development without the toll bridge.[70] Rather than mislead the public as the agencies did in *North Carolina Wildlife Federation*, by providing the public with incorrect information about the no-build data, the agencies repeatedly reminded the public of the fact that they considered a lower level of development that would result without the toll bridge.[71]

Finally, the court dismissed the argument that traffic forecasts were based on assumptions that would only occur with the toll bridge, stating that the agencies considered a traffic projection without the bridge.[72] Specifically, certain planned developments were already ninety percent complete in some towns, making the agencies' EIS far from a "material misapprehension of the baseline conditions."[73] Ultimately, the agencies' consideration of the no-build alternative was considered to not have violated the Act.[74]

IV. ANALYSIS

The Fourth Circuit's decision to affirm the district court's grant of summary judgment, rejecting Plaintiffs' contention that the defendants did not follow the procedures laid out in NEPA[75] when they approved the bridged project, was consistent with not only precedent of the Fourth Circuit but also with the widely recognized contention that NEPA is a purely procedural statute preventing "uninformed—rather than unwise—agency action."[76] In other words, "as long as the agency considers a proposed project's adverse environmental effects, it may choose to pursue the project if it decides that the benefits outweigh them."[77]

Recent case law indicates that the court's reasoning reflects current trends in the Fourth Circuit. *Save Our Sound OBX, Inc. v. North Carolina Department of Transportation* involved similar fact patterns as the noted case.[78] There, similarly, the plaintiffs accused the agencies of overlooking the updated data relating to environmental concerns—taken individually and in totality—and failing to reconsider alternatives to said project given

70. *Id.* (citing *N.C. Wildlife Fed'n*, 677 F.3d at 602-03).

71. *Id.*

72. *Id.* at 806-07.

73. *Id.* at 807 (quoting Friends of Back Bay v. U.S. Army Corps of Eng'rs, 681 F.3d 581, 588 (4th Cir. 2012)).

74. *Id.*

75. 42 U.S.C. § 4321 et seq.

76. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).

77. Webster v. U.S. Dep't of Agric., 685 F.3d 411, 418 (4th Cir. 2012) (citing Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 184 (4th Cir. 2005)).

78. *See* 914 F.3d 213, 217-18 (4th Cir. 2019).

the updated data, thus violating NEPA by failing to prepare a SEIS.[79] In step one of its analysis, the Fourth Circuit found that because the agencies went into detail in their comparison between the project at hand and alternatives, their coverage satisfied the hard look requirement.[80] Further, the Fourth Circuit similarly found that neither of the changes that the plaintiffs cited as reasons calling for a SEIS were sufficiently different from the circumstances initially evaluated in the EIS to merit a SEIS, and thus the agencies' decision not to prepare a SEIS was not arbitrary or capricious.[81]

Furthermore, the Fourth Circuit has precedent addressing the issue of extra-record evidence that is in contrast with evidence relied on by agencies in their decision-making.[82] In *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, for example, the Fourth Circuit struck a balance between the importance of extra-record evidence in informing the court about environmental factors and the necessity of deferring to agency discretion and judgement in "matters involving . . . complex predictions based on special expertise."[83] Specifically, the court noted that in such an analysis, "a reviewing court must be at its most deferential"[84] and "must generally defer to the agency evaluation because 'an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'"[85]

Perhaps the most convincing argument that the plaintiffs raised related to the aforementioned controversy—the differences and apparent uncertainty of the sea-level rise projections that the agencies relied on versus those which the plaintiffs relied on.[86] The Ninth Circuit, convincingly, has found that given the multitude of differing projections relating to global warming, "preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential effects."[87] Like in the noted case, in *350 Montana v. Haaland*, the plaintiffs argued that an EIS was required because of differences in global warming data

79. *Id.* at 222.
80. *Id.* at 223.
81. *Id.*
82. *See* Ohio Valley Env't Coal. v. Aracoma Coal Co., 556 F.3d 177, 201 (4th Cir. 2009).
83. *Id.* at 192 (citing Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983)).
84. *Id.* (quoting *Baltimore Gas*, 462 U.S. at 103).
85. *Id.* at 201 (quoting Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378 (1989)).
86. No Mid-Currituck Bridge-Concerned Citizens v. N.C. Dep't of Transp., 60 F.4th 794, 803-04 (4th Cir. 2023).
87. 350 Montana v. Haaland, 50 F.4th 1254, 1272 (9th Cir. 2022).

relied on by the plaintiffs versus the data relied on by the agency.[88] In 2018, the Department of Interior's Office of Surface Mining Reclamation and Enforcement (Interior) approved a proposal to expand a coal mine in South Central Montana, which was expected to result in the emission of 190 million tons of greenhouse gases.[89] Due to the observations of the 2018 Environmental Assessment (EA) finding the effects of the project to be "minor," the Interior did not prepare an EIS.[90] The plaintiffs in *350 Montana* argued that the agencies should have relied on different expertise, namely, by including the domestic combustion-generated emissions as well as the Social Cost of Carbon metric.[91] Though the Ninth Circuit conducted the same arbitrary and capricious standard of review, deferring to the expertise of the agencies,[92] the court concluded that additional factfinding was required to determine whether NEPA was violated. Remanding the case to district court, the court placed significant weight on the agencies' lack of scientific evidence towards domestic combustion of greenhouse gases together with the agencies' lack of evidence to the "information that is known" regarding the scale and scope of the environmental effects of the project relative to the mining industry.[93]

Unlike in *350 Montana*, in *Mid-Currituck*, Plaintiffs did not fault the defendants for their analysis regarding the project's impact on global warming, or, more specifically, rising sea levels.[94] Rather, their argument rests on the substantive opinion that the updated forecasts on the rising sea-levels undermines the viability of a Mid-Currituck Bridge.[95] Unlike the logic of the court in *350 Montana*—ordering a remand due to the Interior's lack of scientific backing regarding greenhouse gas combustion that the Interior itself depicted as a direct causal link to global warming, climate change, and environmental effects—[96] the argument of the plaintiffs in *Mid-Currituck* is based not on potential environmental impacts of the project but on the viability of the project in the wake of

88. *Id.* at 1260-61, 1272.
89. *Id.* at 1258.
90. *Id.* at 1259.
91. *Id.* at 1258, 1260.
92. *Id.* at 1263.
93. *Id.* at 1268, 1272-73.
94. *See* No Mid-Currituck Bridge-Concerned Citizens v. N.C. Dep't of Transp., 60 F.4th 794, 803-04 (4th Cir. 2023).
95. *Id.*
96. *350 Montana*, 50 F.4th at 1263, 1273.

inevitable global warming.[97] Though there is some precedence for requiring an EIS in situations of uncertainty and discrepancy between agency and plaintiff data-collection,[98] there is a lack of jurisprudence recognizing a NEPA violation questioning merely the wisdom rather than the procedure, of agencies.[99]

The Senior Attorney of the Southern Environmental Law Center (SELC), Kym Meyer, who filed the appeal on behalf of Plaintiff and argued the case has said, "[w]e will continue to work to ensure that North Carolina money is not wasted on this costly, unwise project."[100] Seemingly ignoring the conclusion of the court by finding that NEPA is not necessarily violated by an "unwise" agency decision, the SELC will likely have to look somewhere other than NEPA to find the relief they are seeking.[101]

V. CONCLUSION

In *Mid-Currituck*, the Fourth Circuit used its discretion to arrive at a judgment consistent with prior precedent. It applied the appropriate standard and utilized reasoning that mirrored its previous decisions when faced with the issue of whether an agency should have prepared a SEIS; however, according to Meyer, the SELC plans to ask the Fourth Circuit for a rehearing at its February twenty-third meeting, and she is quoted to have stated the petition will "be based on our belief that the Court misunderstood key questions of law and facts about our initial argument."[102] Given the current evidence on the record and unanimity of

97. *350 Montana*, 50 F.4th at 1263, 1273..6 (stating "[i]t's unclear how [p]laintiffs derived these figures.").

98. *See* Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 376-77 (1989) (describing the case as a "classic example of a factual dispute the resolution of which implicates substantial agency expertise.")

99. *See* Ohio Valley Env't Coal. v. Aracoma Coal Co., 556 F.3d 177, 201 (warning that consideration of extra-record evidence in NEPA cases does not "give courts license to simply substitute the judgement of plaintiff's experts for that of the agency's experts"); *see also* Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1244 (9th Cir. 2005) (explaining that the defendants' application and interpretation of particular data did not amount to a level of controversy that would warrant the court to "take sides in a battle of the experts").

100. *Federal Appeals Court Affirms Mid-Currituck Bridge Decision*, COASTAL REV. (Mar. 15, 2023), https://coastalreview.org/2023/03/federal-appeals-court-affirms-mid-currituck-bridge-decision/#:~:text=The%20North%20Carolina%20Wildlife%20Federation,years%2Dold%20plans%20for%20the.

101. *Mid-Currituck*, 60 F.4th at 804.

102. Kip Tabb, *After Legal Victory, Uncertainty Surrounds Mid-Currituck Bridge Project*, OUTER BANKS VOICE (Apr. 1, 2023), https://www.outerbanksvoice.com/2023/04/01/after-legal-victory-uncertainly-surrounds-mid-currituck-bridge-project/.

federal courts in their acceptance of the arbitrary and capricious standard of review for NEPA-related issues, it is unlikely the court will come to a different conclusion in 2024. Though the full financing of the bridge remains in progress, the project is set to start in 2024 and is estimated to cost somewhere between $502.4 to $594.1 million.[103] Hopefully, for North Carolina, that money is not spent on what the SELC fears—an overly congested bridge to an overly-developed and environmentally harmed barrier of islands that will find itself underwater in fifty years. Even if that may be the case, according to the current federally recognized interpretation of NEPA, that is for the agencies, and the agencies alone, to decide.

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103. *Id.*

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