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

NO. 2:11-CV-00035-FL

DEFENDERS OF WILDLIFE and NATIONAL WILDLIFE REFUGE ASSOCIATION, Plaintiffs, v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; EUGENE A. CONTI, JR., SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; and JOHN F. SULLIVAN, III, DIVISION ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION, Defendants.	)	**STATE DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT** Fed. R. Civ. P. 8(b)

Pursuant to Federal Rule of Civil Procedure 8(b), North Carolina Department of Transportation ("NCDOT") and Eugene A. Conti, Jr. ("Conti"), the Secretary of NCDOT (NCDOT and Conti, collectively, "State Defendants"), through counsel, respond to the allegations contained in Plaintiffs' Complaint as follows:

FIRST DEFENSE: Failure to State a Claim

Plaintiffs have failed to state a claim upon which relief may be granted, and, therefore, the Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

SECOND DEFENSE and ANSWER

Without waiving the foregoing defense, State Defendants respond to the numbered paragraphs of the Complaint as follows:

NATURE OF THE CASE

1. State Defendants admit that: a decision has been made to authorize, fund, seek permits for, and construct the replacement of the Herbert C. Bonner Bridge ("Bonner Bridge") in Dare County, North Carolina; NC TIP Project B-2500 (the "Project") involves a two-lane bridge crossing Oregon Inlet and maintaining a transportation route from Oregon Inlet to the community of Rodanthe, North Carolina, which lies south of Pea Island National Wildlife Refuge (the "Refuge"); and a Record of Decision was signed, dated, and publicly announced on December 20, 2010 (the "ROD"). Except as admitted herein, the allegations of Paragraph 1 are denied.

JURISDICTION AND VENUE

2. The allegations of Paragraph 2 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants deny the allegations of Paragraph 2.

3. The allegations of Paragraph 3 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants deny the allegations of Paragraph 3.

PARTIES AND STANDING

4. State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4, and, therefore, the allegations are deemed denied.

5. State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5, and, therefore, the allegations are deemed denied.

6. State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6, and, therefore, the allegations are deemed denied.

7. State Defendants admit that the Refuge lies within the geographical boundaries of Cape Hatteras National Seashore. Except as admitted herein, State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7, and, therefore, the allegations are deemed denied.

8. State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8, and, therefore, the allegations are deemed denied.

9. State Defendants deny the allegations of Paragraph 9.

10. State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10, and, therefore, the allegations are deemed denied.

11. State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11, and, therefore, the allegations are deemed denied.

12. State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12, and, therefore, the allegations are deemed denied.

13. State Defendants are without knowledge or information sufficient to form a belief about the truth of what Plaintiffs "believe," and, therefore, the allegations pertaining to Plaintiffs' "beliefs" are deemed denied. State Defendants deny all remaining allegations of Paragraph 13.

14. The allegations of Paragraph 14 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: NCDOT is an agency of the State of North Carolina; NCDOT had a role in preparing the environmental analyses, the Section 4(f) evaluations, and the ROD for the Project, and that these documents were coordinated through NCDOT's Raleigh office; and NCDOT intends to reference these environmental analyses and the ROD in permit applications for the Project. Except as admitted herein, the allegations of Paragraph 14 are denied.

15. The allegations of Paragraph 15 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: Conti is the Secretary of NCDOT; Conti has been sued in his official capacity; and, as Secretary, Conti possesses the authorities provided by law. Except as admitted herein, the allegations of Paragraph 15 are denied.

16. The allegations of Paragraph 16 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: the Federal Highway Administration ("FHWA") is a modal administration within the U.S. Department of Transportation; FHWA had responsibility regarding the environmental analyses and Section 4(f) evaluations involved in this action; and FHWA issued the environmental analyses, Section 4(f) evaluations, and the ROD through its North Carolina Division located in Raleigh, North Carolina. Except as admitted herein, the allegations of Paragraph 16 are denied.

17. The allegations of Paragraph 17 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that John F. Sullivan, III: is the North Carolina Division Administrator for FHWA; has been sued in his official capacity; and, as Administrator, possesses the authorities provided by law. Except as admitted herein, the allegations of Paragraph 17 are denied.

18. State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 18, and, therefore, the allegations are deemed denied.

FEDERAL STATUTORY AND REGULATORY BACKGROUND

19. The allegations of Paragraph 19 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, states in part: "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . ."; and National Audubon Society v. Department of the Navy, 422 F.3d 174, 184 (4th Cir. 2005), states in part: "the purpose of NEPA is to sensitize all federal agencies to the environment in order to foster precious resource preservation." Except as admitted herein, the allegations of Paragraph 19 are denied.

20. The allegations of Paragraph 20 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: NEPA, 42 U.S.C. § 4332, states in part, that federal agencies shall "include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human

environment, a detailed statement . . . ." Except as admitted herein, the allegations of Paragraph 20 are denied.

21. The allegations of Paragraph 21 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: the Council on Environmental Quality ("CEQ") has promulgated regulations codified at 40 C.F.R. parts 1500-1508; and FHWA has promulgated regulations codified at 23 C.F.R. part 771. Except as admitted herein, the allegations of Paragraph 21 are denied.

22. The allegations of Paragraph 22 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants deny the allegations of Paragraph 22.

23. The allegations of Paragraph 23 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: NEPA, 42 U.S.C. § 4332, states in part: "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, [shall include] a detailed statement by the responsible official on," inter alia, "alternatives to the proposed action[]"; NEPA, 42 U.S.C. § 4332, states in part: "all agencies of the Federal Government shall . . . (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources[]"; 40 C.F.R. § 1502.14 states in part: "agencies shall: (a) Rigorously explore and objectively evaluate all reasonable alternatives . . ."; City of Alexandria v. Slater, 198 F.3d 862, 867 (D.C. Cir. 1999), states in part: "an alternative is properly excluded from consideration in an environmental impact statement only if it would be reasonable for the agency to conclude that the alternative does not 'bring about the ends of the federal action[]'"; and

Audubon Naturalist Society of the Central Atlantic States, Inc. v. U.S. Department of Transportation, 524 F. Supp. 2d 642, 667 (D. Md. 2007), states in part: "the 'existence of a viable but unexamined alternative renders an environmental impact statement inadequate.'" Except as admitted herein, the allegations of Paragraph 23 are denied.

24. The allegations of Paragraph 24 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: 40 C.F.R. § 1502.13 states: "The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." Except as admitted herein, the allegations of Paragraph 24 are denied.

25. The allegations of Paragraph 25 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit the allegations of Paragraph 25.

26. The allegations of Paragraph 26 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: 49 U.S.C. § 303 states in part: "Subject to subsection (d), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if -- (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." Except as admitted herein, the allegations of Paragraph 26 are denied.

27. The allegations of Paragraph 27 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: 5 U.S.C. § 702 states in part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Except as admitted herein, the allegations of Paragraph 27 are denied.

28. The allegations of Paragraph 28 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: 5 U.S.C. § 706 states in part: "The reviewing court shall . . . set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." Except as admitted herein, the allegations of Paragraph 28 are denied.

FACTS

29. State Defendants admit that: Bodie and Hatteras Islands are part of the North Carolina Outer Banks, which comprise a barrier island system; Bodie and Hatteras Islands lie between the Atlantic Ocean and Pamlico Sound; Bodie Island is north of Hatteras Island; Bodie and Hatteras Islands are connected by Bonner Bridge, which spans Oregon Inlet; Cape Hatteras National Seashore occupies portions of both Bodie and Hatteras Islands; and Rodanthe, North Carolina, lies at the southern border of the Refuge. Except as admitted herein, the allegations of Paragraph 29 are denied.

30. State Defendants admit that: the force of storms and ocean waves causes both erosion and accretion of the islands of the Outer Banks and has the potential to create inlets; Oregon Inlet is a narrow body of water leading inland between islands from a larger body of water; the islands of the Outer Banks and the inlets between the islands may change due to natural forces; portions of the islands of the Outer Banks may migrate; natural forces may

influence inlet formation or closure; storm events may change the physical environment of the Outer Banks; roads and bridges have been built to provide access to the Outer Banks for local residents and visitors; and beach/dune nourishment and construction of groins and jetties are methods that have been used to control erosion, accretion, and inlet formation. Except as admitted herein, the allegations of Paragraph 30 are denied.

31. State Defendants admit that: according to Refuge data, about 2.7 million people traverse NC 12 in or through the Refuge annually; and the width of the Refuge ranges from 0.25 mile to 1 mile from east to west. Except as admitted herein, the allegations of Paragraph 31 are denied.

32. State Defendants admit that: the Refuge is a breeding ground for migratory birds; according to Refuge data, the Refuge provides habitat for about 365 bird species, 25 mammal species, 24 reptile species, and 5 amphibian species; the Refuge is managed by the United States Fish & Wildlife Service ("USFWS"); and the Refuge has a website, the content of which speaks for itself. Except as admitted herein, the allegations of Paragraph 32 are denied.

33. State Defendants admit that: the Pea Island Migratory Waterfowl Refuge was conceived in 1938 by Executive Order 7864 as a refuge and breeding ground for migratory birds and other wildlife; and over the years, the United States government acquired property for inclusion in the Refuge. Except as admitted herein, the allegations of Paragraph 33 are denied.

34. State Defendants admit that: a transportation route existed on Hatteras Island prior to 1951, when Congress authorized the Secretary of Interior to convey to the State of North Carolina a permanent easement through the Refuge; in 1954, the United States government conveyed a 100-foot wide permanent easement to North Carolina; by 1954, a paved roadway was completed within the permanent easement; and over the last 50 years, North Carolina has

coordinated with the USFWS on occasions to relocate or rehabilitate sections of NC 12. Except as admitted herein, the allegations of Paragraph 34 are denied.

35. State Defendants admit the allegations of Paragraph 35.

36. State Defendants admit that: NC 12 traverses the length of the Refuge and connects the southern terminus of Bonner Bridge to Rodanthe and other points on Hatteras Island; storms may cause the Atlantic Ocean to overwash NC 12, leading to potential sand deposition on portions of the road; overwash may damage the road, which may interrupt access to Hatteras Island; NC 12 must be maintained for local residents and visitors; and three areas known as "hot spots" between Oregon Inlet and Rodanthe are vulnerable to erosion and overwash. Except as admitted herein, the allegations of Paragraph 36 are denied.

37. State Defendants lack knowledge or information sufficient to form a belief about the truth of what unidentified "scientists" may "estimate," and, therefore, any such allegations are deemed denied. Without waiving said denial, State Defendants admit that: Oregon Inlet may widen or narrow as a result of erosion and accretion; Oregon Inlet is dredged to maintain a navigation channel for boats; a terminal groin was built on the north side of Hatteras Island in 1989 in order to protect the southern terminus of Bonner Bridge; and a permit exists for the terminal groin, the terms and conditions of which speak for themselves. Except as admitted herein, the allegations of Paragraph 37 are denied.

38. State Defendants admit that portions of Hatteras Island may migrate. Except as admitted herein, the allegations of Paragraph 38 are denied.

39. State Defendants admit the allegations of Paragraph 39.

40. State Defendants admit the allegations of Paragraph 40, but clarify that the second enumerated "need" in the 2008 Final Environmental Impact Statement (the "FEIS") references "future natural channel migration" (not "future natural migration").

41. State Defendants admit the allegations of Paragraph 41.

42. State Defendants admit that: alternatives for the Project were considered; among these alternatives were Parallel Bridge Corridor Alternatives, which included a replacement bridge approximately parallel to the existing Bonner Bridge and the maintenance of NC 12 from the southern terminus of the Oregon Inlet bridge to Rodanthe; and consideration was given to alternatives such as the maintenance of NC 12 within its existing easement, beach nourishment and dune enhancement, elevation of portions of NC 12 onto bridges on Hatteras Island, and westward relocation of the road. Except as admitted herein, the allegations of Paragraph 42 are denied.

43. State Defendants admit that among the alternatives considered were Pamlico Sound Bridge Corridor Alternatives, which would be approximately 17.5 miles in length, would bypass the Refuge and "hot spots," would cross Oregon Inlet and pass through Pamlico Sound to the west of the Refuge, and would have a terminus in Rodanthe. Except as admitted herein, the allegations of Paragraph 43 are denied.

44. State Defendants admit the allegations of Paragraph 44, but clarify that the Merger Team included the U.S. Environmental Protection Agency (not "Projection" agency) and the North Carolina Wildlife Resources Commission (not "Resource Council").

45. State Defendants admit that: there was a July 23, 2003, written concurrence among Merger Team members to select the Pamlico Sound Bridge Corridor Alternatives for detailed study; about the summer of 2003, it was estimated that a Pamlico Sound bridge could be

constructed by 2010 at a cost of about $260 million; about the summer of 2003, a letter signed by then-Secretary of NCDOT Lyndo Tippett stated in part that: "The previous preferred alternative is no longer viable due to recent trends in shoreline erosion, ocean overwash of NC 12, and other changes in the setting of the project. Additional bridge replacement alternatives will be assessed and a supplemental DEIS [Draft Environmental Impact Statement] will be prepared[]"; and a Supplemental DEIS ("SDEIS") was issued in September 2005. Except as admitted herein, the allegations of Paragraph 45 are denied.

46. State Defendants admit that: Dare County is the county in North Carolina where both the Project and the Refuge are located; Marc Basnight ("Basnight") was the former state senator representing Dare County; Basnight formerly served as President Pro Tem of the North Carolina Senate; Michael Easley ("Easley") is a former Governor of North Carolina; Basnight wrote a letter to Easley dated September 3, 2003, in which he expressed to Easley concerns shared with him by citizens of Dare County; on September 12, 2003, Easley responded to Basnight's letters of September 3 and 11, 2003; Easley's letter to Basnight stated in part that Easley had asked NCDOT "to halt further study of possible alternatives for six months. This will allow Dare County leaders to have the opportunity to develop a feasible proposal of their own for replacing the Bonner Bridge[]"; and Parallel Bridge Corridor Alternatives were studied in the 2005 SDEIS and 2008 FEIS. Except as admitted herein, the allegations of Paragraph 46 are denied.

47. State Defendants admit that: the FEIS was issued in September 2008; when the FEIS was issued, cost estimates for all alternatives had increased; the 2009 Revised Final Section 4(f) Evaluation ("4(f) Evaluation") stated that the Pamlico Sound Bridge Corridor Alternatives would require a single construction phase costing between $942.9 million and $1.441 billion (in

2006 dollars); concurrence was reached that "the Pamlico Sound Bridge Corridor was not a practicable alternative because of the high cost estimates and the impracticality of phasing this alternative[]"; some proposed methods for maintaining NC 12 through the Refuge include, but are not limited to, beach nourishment, dune enhancement, relocating portions of NC 12 westward, and elevating portions of NC 12 onto bridges; one of the Parallel Bridge Corridor Alternatives was the "Phased Approach/Rodanthe Bridge Alternative" and the 2008 FEIS labeled this alternative as the "Preferred Alternative"; the "Phased Approach/Rodanthe Bridge Alternative" would be built in phases; the first phase of the "Phased Approach/Rodanthe Bridge Alternative" consisted of the construction of a new Oregon Inlet bridge; phases two through four of the "Phased Approach/Rodanthe Bridge Alternative" involved, in part, constructing bridges within the easement of existing NC 12; and, upon information and belief, Exhibit 1 resembles an illustration of the "Phased Approach/Rodanthe Bridge Alternative" from the FEIS. Except as admitted herein, the allegations of Paragraph 47 are denied.

48. State Defendants admit that: Defenders of Wildlife ("DOW") submitted comments, through the Southern Environmental Law Center ("SELC"), during the public comment period for the 2005 SDEIS and the FEIS, and these comments speak for themselves; the National Wildlife Refuge Association ("NWRA") submitted comments, through SELC, on the FEIS, and these comments speak for themselves. Except as admitted herein, the allegations of Paragraph 48 are denied.

49. State Defendants admit that: the 4(f) Evaluation was issued in October 2009; the "Environmental Assessment" was issued in May 2010 ("EA"); after the 4(f) Evaluation and the EA were issued, the "Phased Approach/Rodanthe Bridge Alternative" was no longer the "Preferred Alternative"; and both the 4(f) Evaluation and the EA identified the "Parallel Bridge

Corridor with NC 12 Transportation Management Plan" as the new preferred alternative for the Project. Except as admitted herein, the allegations of Paragraph 49 are denied.

50. State Defendants deny the allegations of Paragraph 50. Answering further, State Defendants admit that through the merger process, consensus was reached on the "Parallel Bridge Corridor with NC 12 Transportation Management Plan," the new preferred alternative.

51. State Defendants admit that: the "Parallel Bridge Corridor with NC 12 Transportation Management Plan" involves building a replacement bridge, which is similar to the parallel bridge identified in Phase I of the FEIS as the "Preferred Alternative"; the EA states in part: "[t]he Parallel Bridge Corridor with NC 12 Transportation Management Plan Alternative (Preferred) does not specify a particular action at this time on Hatteras Island beyond the limits of Phase I because of the inherent uncertainty in predicting future conditions within the dynamic coastal barrier island environment. Instead, the alternative addresses the study and selection of future actions on Hatteras Island beyond the limits of Phase I through a comprehensive NC 12 Transportation Management Plan." Except as admitted herein, the allegations of Paragraph 51 are denied.

52. State Defendants admit that the EA states in part: "On August 27, 2007, senior representatives of NCDOT, FHWA, USACE, and NCDENR, meeting as the Merger 01 Dispute Resolution Board for the NEPA/Section 404 Merger Process, identified the Parallel Bridge Corridor with Phased Approach/Rodanthe Bridge Alternative as the LEDPA for this project (see Section 2.15 of the FEIS). Specifically, the agencies concurred that: … Building Phase I alone would not meet the purpose and need of the project; and [f]uture phases present substantial challenges to obtaining permit approvals[] … ." Except as admitted herein, the allegations of Paragraph 52 are denied.

53. State Defendants admit that: SELC submitted comments on behalf of DOW on November 13, 2009, and June 21, 2010; SELC submitted comments on behalf of NWRA on November 13, 2009; and any comments submitted by SELC speak for themselves. Except as admitted herein, the allegations of Paragraph 53 are denied.

54. The allegations of Paragraph 54 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants deny the allegations of Paragraph 54.

55. State Defendants admit that: the ROD was issued on December 20, 2010; the ROD selected and approved for implementation the "Parallel Bridge Corridor with NC 12 Transportation Management Plan Alternative," also known as the "Selected Alternative"; a "Notice of Final Federal Agency Actions on Proposed Highway in North Carolina" was published in the Federal Register on January 11, 2011, and the Notice speaks for itself. Except as admitted herein, the allegations of Paragraph 55 are denied.

56. The allegations of Paragraph 56 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: the ROD "records the decision for the proposed NC 12 Replacement of the Herbert C. Bonner Bridge in Dare County, North Carolina." Except as admitted herein, the allegations of Paragraph 56 are denied.

57. State Defendants admit that: implementation of the Selected Alternative will result in the construction of a bridge connecting Bodie and Hatteras Islands which is approximately parallel to the existing Bonner Bridge; and the environmental documents relating to the Project discuss, among other things, breaching, erosion, storms, ocean overwash, and "hot spots." Except as admitted herein, the allegations of Paragraph 57 are denied.

58. State Defendants admit that the ROD acknowledges that maintenance of the terminal groin at the northern end of Hatteras Island is a component of the Selected Alternative. Except as admitted herein, the allegations of Paragraph 58 are denied.

FIRST CLAIM FOR RELIEF

59. State Defendants' responses to the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

60. The allegations of Paragraph 60 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: regulations codified at 40 C.F.R. §§ 1508.7, 1508.8 discuss "direct effects," "indirect effects," and "cumulative impacts." Except as admitted herein, the allegations of Paragraph 60 are denied.

61. The allegations of Paragraph 61 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: 40 C.F.R. § 1502.16 states in part that an Environmental Impact Statement ("EIS") shall discuss "[m]eans to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f))." Except as admitted herein, the allegations of Paragraph 61 are denied.

62. State Defendants deny the allegations of Paragraph 62 and all of its sub-parts.

63. The allegations of Paragraph 63 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: 40 C.F.R. § 1502.22 states in part: "If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement." Except as admitted herein, the allegations of Paragraph 63 are denied.

64. State Defendants deny the allegations of Paragraph 64 and all of its sub-parts.

65. State Defendants deny the allegations of Paragraph 65.

66. State Defendants deny the allegations of Paragraph 66.

SECOND CLAIM FOR RELIEF

67. State Defendants' responses to the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

68. The allegations of Paragraph 68 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: 40 C.F.R. § 1502.4 states in part: "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement[]"; 40 C.F.R. § 1508.25 states in part: "To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include: (a) Actions (other than unconnected single actions) which may be: (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification. (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common

timing or geography. An agency may wish to analyze these actions in the same impact statement." Except as admitted herein, the allegations of Paragraph 68 are denied.

69. The allegations of Paragraph 69 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants deny the allegations in Paragraph 69.

70. State Defendants deny the allegations of Paragraph 70.

71. State Defendants admit that replacing the existing Bonner Bridge and the maintenance of a transportation route from Rodanthe to Oregon Inlet is the Project that has been developed, studied, evaluated, and analyzed by NCDOT and FHWA. Except as admitted herein, the allegations of Paragraph 71 are denied.

72. State Defendants deny the allegations of Paragraph 72.

73. State Defendants admit that maintenance of the terminal groin is a component of the Selected Alternative. Except as admitted herein, the allegations of Paragraph 73 are denied.

74. State Defendants deny the allegations of Paragraph 74.

75. State Defendants deny the allegations of Paragraph 75.

76. State Defendants deny the allegations of Paragraph 76 and all of its sub-parts.

77. State Defendants deny the allegations of Paragraph 77.

THIRD CLAIM FOR RELIEF

78. State Defendants' responses to the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

79. The allegations of Paragraph 79 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that: 42 U.S.C. § 4332 states in part that an EIS shall include "alternatives to the proposed action"; 40 C.F.R. §1502.14

states in part: "agencies shall: (a) Rigorously explore and objectively evaluate all reasonable alternatives . . . ."; and 40 C.F.R. § 1502.14 states in part: "This section is the heart of the environmental impact statement." Except as admitted herein, the allegations of Paragraph 79 are denied.

80. The allegations of Paragraph 80 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that 40 C.F.R. § 1502.14 states in part: "agencies shall . . . (c) Include reasonable alternatives not within the jurisdiction of the lead agency. (d) Include the alternative of no action." Except as admitted herein, the allegations of Paragraph 80 are denied.

81. State Defendants deny the allegations of Paragraph 81.

82. State Defendants deny the allegations of Paragraph 82.

83. State Defendants admit that: cost estimates for the total expenditures of the Selected Alternative and the Pamlico Sound Bridge Corridor Alternatives were larger than the amounts allocated for the Project in the State Transportation Improvement Program (the "State TIP"); the State TIP allocates monies to cover the costs of Phase I of the Selected Alternative; and the Pamlico Sound Bridge Corridor Alternatives were not practicable based on cost estimates, available funding, and the impracticality of phasing these alternatives. Except as admitted herein, the allegations of Paragraph 83 are denied.

84. State Defendants deny the allegations of Paragraph 84.

85. State Defendants deny the allegations of Paragraph 85.

86. State Defendants deny the allegations of Paragraph 86.

FOURTH CLAIM FOR RELIEF

87. State Defendants' responses to the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

88. The allegations of Paragraph 88 constitute legal conclusions to which no response is required. To the extent that a response is required, State Defendants admit that 40 C.F.R. § 1502.9 states in part: "Agencies: (1) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Except as admitted herein, the allegations of Paragraph 88 are denied.

89. The allegations of Paragraph 89 constitute legal conclusions to which no response is required. To the extent that a response is required, State Defendants deny the allegations of Paragraph 89.

90. State Defendants deny the allegations of Paragraph 90.

91. State Defendants deny the allegations of Paragraph 91 and all of its sub-parts.

92. State Defendants deny the allegations of Paragraph 92 and all of its sub-parts.

93. State Defendants admit that an EA was prepared. Except as admitted herein, the allegations of Paragraph 93 are denied.

94. State Defendants deny the allegations of Paragraph 94 and all of its sub-parts.

FIFTH CLAIM FOR RELIEF

95. State Defendants' responses to the preceding paragraphs are incorporated by reference as if repeated and set forth in full herein.

96. The allegations of Paragraph 96 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that 49 U.S.C. § 303(c) states in part: "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." Except as admitted herein, the allegations of Paragraph 96 are denied.

97. The allegations of Paragraph 97 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that "use" is discussed in regulations promulgated by the U.S. Department of Transportation. See 23 C.F.R. § 774.17. Except as admitted herein, the allegations of Paragraph 97 are denied.

98. The allegations of Paragraph 98 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit that 23 C.F.R. § 774.3(c) states in part: "may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that: (1) Causes the least overall harm in light of the statute's preservation purpose." Except as admitted herein, the allegations of Paragraph 98 are denied.

99. The allegations of Paragraph 99 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants deny the allegations of Paragraph 99.

100. The allegations of Paragraph 100 constitute legal conclusions to which no response is required. To the extent a response is required, State Defendants admit the existence of the FEIS and ROD, the contents of which speak for themselves. Except as admitted herein, the allegations of Paragraph 100 and all of its sub-parts are denied.

101. State Defendants deny the allegations of Paragraph 101.

102. State Defendants admit the existence of the FEIS, the content of which speaks for itself. Except as admitted herein, the allegations of Paragraph 102 are denied.

103. State Defendants admit the existence of the 4(f) Evaluation, the content of which speaks for itself. Except as admitted herein, the allegations of Paragraph 103 are denied.

104. State Defendants admit that the FEIS at page 5-38 states in part: "In all cases, the agencies with jurisdiction over the Section 4(f) properties would prefer the Pamlico Sound Bridge Corridor alternatives over all others." Except as admitted herein, the allegations of Paragraph 104 are denied.

105. State Defendants deny the allegations of Paragraph 105.

106. State Defendants deny the allegations of Paragraph 106.

107. State Defendants deny the allegations of Paragraph 107.

108. State Defendants admit that: the Pea Island Migratory Waterfowl Refuge was conceived in 1938 by Executive Order 7864 as a refuge and breeding ground for migratory birds and other wildlife; over the years, the United States government acquired property for inclusion in the Refuge; a transportation route existed on Hatteras Island prior to 1951, when Congress authorized the Secretary of Interior to convey to the State of North Carolina a permanent easement through the Refuge; and the existing Bonner Bridge was constructed in 1962. Except as admitted herein, the allegations of Paragraph 108 are denied.

109. State Defendants deny the allegations of Paragraph 109.

GENERAL DENIAL

Responding to each and every claim in Plaintiffs' Complaint, State Defendants deny that they are liable to Plaintiffs in any way, either in law or equity. To the extent that any paragraph, sentence, statement, or allegation in the Complaint has not been expressly admitted by the

foregoing responsive answers, the same is hereby expressly denied by State Defendants. Furthermore, State Defendants specifically deny that Plaintiffs are entitled to any of the relief sought.

REQUEST FOR RELIEF

Wherefore, having fully responded to the Complaint and each count thereof, State Defendants respectfully request the following relief from this Court:

(1) that the action be dismissed in its entirety, with prejudice, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure;

(2) that all relief requested by Plaintiffs, including Plaintiffs' request for the issuance of a preliminary and permanent injunction, be denied and that Plaintiffs be granted no relief against State Defendants;

(3) that Plaintiffs have and recover nothing from State Defendants;

(4) that judgment be entered in favor of State Defendants and against Plaintiffs;

(5) that all costs and expenses of this action, including attorneys' fees, be taxed to Plaintiffs; and

(6) for any other and further relief that this Court should deem just, proper, necessary, and appropriate.

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CONTINUED ON PAGE FOLLOWING.

Respectfully submitted this the 6th day of September, 2011.

ROY COOPER
ATTORNEY GENERAL

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ATTORNEYS FOR DEFENDANTS
NORTH CAROLINA DEPARTMENT
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EUGENE A. CONTI, JR., SECRETARY

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

NO. 2: 11-CV-00035-FL

DEFENDERS OF WILDLIFE and NATIONAL WILDLIFE REFUGE ASSOCIATION, Plaintiffs, v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; et al., Defendants.	)	**CERTIFICATE OF SERVICE**

This is to certify that on this date I electronically filed a copy of the foregoing **STATE DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT** with the Clerk of Court using the CM/EFC system which will send notification of such filing, and pursuant to Local Civil Rule 5.1(e), shall constitute service, upon the following:

Julia F. Youngman, Esq.
Derb S. Carter, Esq.
Southern Environmental Law Center
Counsel for Plaintiffs

I further certify that the foregoing **STATE DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT** was served on the Federal Defendants by placing a copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Federal Highway Administration
c/o Victor M. Mendez, Administrator
1200 New Jersey Avenue, SE
Washington, DC 20590

John F. Sullivan, III, Division Administrator
Federal Highway Administration
North Carolina Division
310 New Bern Avenue, Suite 410
Raleigh, NC 27601

This the 6th day of September 2011.

/s/ Tammy A. Bouchelle
Tammy A. Bouchelle
N.C. Bar No. 39461