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VIA U.S. MAIL AND EMAIL

North Carolina Board of Transportation
1 South Wilmington Street
Raleigh, NC 27601

Dear Board of Transportation members:

On November 19, 2015 Governor McCrory announced that he would request that the Board of Transportation expedite construction of the proposed Mid-Currituck Bridge (“Bridge”) – a project that would primarily serve tourists coming from Virginia. As outlined below, this proposal is misguided:

- The Bridge scored extremely poorly under the Strategic Transportation Improvements (“STI”) framework and does not provide a high level of benefit to North Carolina;
- The North Carolina Department of Transportation (“NCDOT”) has not yet determined that the Bridge is financially feasible;
- Tolls to help fund the project were estimated at up to \$26 one-way when toll revenue was supposed to fund 25% of the project cost; now NCDOT wants tolls to fund 60% of the cost;
- The Bridge has not secured the necessary environmental approvals necessary to move forward; and
- The Bridge will likely encounter significant legal and administrative delays.

With so many important transportation needs to fund in the state, we believe it would be unwise to move ahead with this costly, destructive, and controversial project. We urge the Board of Transportation to reject the proposal and move instead to expedite other needed transportation improvements throughout the State of North Carolina. For example, there are very few non-highway projects included in the Governor’s list of projects to be expedited, despite the recognition in his transportation vision that such projects are essential to North Carolina’s future.¹

¹ N.C. DEP’T OF TRANSP., GOV. MCCRORY’S 25-YEAR VISION FOR NORTH CAROLINA: MAPPING OUR FUTURE 30-31 (2015), available at <http://www.ncdot.gov/ncvision25/ncvision25.pdf>.

1) The Mid-Currituck Bridge is a Poor Use of the State's Scarce Transportation Resources.

Governor McCrory's push for special treatment of the Mid-Currituck Bridge is nothing new. The project, with its huge cost and limited utility to North Carolina, has frequently required a leg up from politicians. Former North Carolina Senate President pro-tem Marc Basnight was a strong proponent of the Bridge. Indeed, in 2003 it was coastal legislators' concern about funding for the Mid-Currituck Bridge that delayed replacement of the Bonner Bridge.² Later, Senator Basnight secured earmarked funding for the construction of the Mid-Currituck Bridge. An annual appropriation of \$35 million per year of taxpayer funds was set aside for the Bridge, to be repeated each year for the next thirty years.

In 2013, however, North Carolina determined to move away from letting politicians pick road projects and move to a data-driven approach that would serve all North Carolinians, rather than just special interests. The new Strategic Transportation Investments ("STI") legislation eliminated the earmark for the Mid-Currituck Bridge and subjected the project to the state's data-driven scoring system.

When the Bridge was compared objectively to other projects, it scored extremely poorly. It garnered just 23.34 points out of a possible 100 in the Statewide Mobility tier and ranked very low, with over 250 other "Statewide" projects achieving a higher score. As a result, the Bridge failed to qualify for funding at either the Statewide or Regional tiers. Despite also achieving a low score at the Division level, Division One decided to prioritize the project through its local input points. The project will thus take a very large portion of the Division One's overall funding allocation. As discussed below, this portion may increase as the true cost of the project is ascertained and it is more than likely that Division One will not have sufficient funding to pay for the project.

In its environmental documents, NCDOT has demonstrated that alternative solutions focused on improving existing roads could achieve the stated goals of the Mid-Currituck Bridge for a much lower price tag and with far less detriment to the environment. For example, one specific alternative, the Existing Road 2 alternative, or "ER2," would involve adding a third inbound lane on U.S. 158 between N.C. 168 and the Wright Memorial Bridge as a hurricane evacuation improvement, or using the center turn lane as a third outbound evacuation lane; widening U.S. 158 to eight lanes between Wright Memorial Bridge and the N.C. 12 intersection, and widening N.C. 12 to three lanes between U.S. 158 and the Dare-Currituck County Line and to four lanes between the Dare-Currituck County Line and Corolla. Importantly, this option

² See, e.g., Letter from State Senator Marc Basnight to Governor Mike Easley (Sept. 3, 2003) (available on request) (expressing concern that funding the NCDOT's preferred alternative of a "long" replacement bridge could postpone construction of the proposed Mid-Currituck Bridge); see also Letter from Governor Easley to letter to State Senator Marc Basnight (Sept. 12, 2003) (available on request) (stating that the Bonner Bridge replacement project will be postponed six months to allow Dare County to develop viable alternatives to NCDOT's preferred long bridge).

would yield the same hurricane evacuation benefits as other studied “build” alternatives, including the Bridge,³ and would be the least expensive of the studied alternatives.⁴ Additionally, as described in greater detail below, ER 2 gained the approval of key federal and state environmental regulatory agencies, unlike the proposed Mid-Currituck Bridge.⁵

In the past, NCDOT rejected the ER2 alternative due to the earmarked funding associated with the Mid-Currituck Bridge. Now that North Carolina has moved to a more data-driven approach to selecting highway projects for funding, the alternative deserves a second look. Until this less costly, less damaging alternative has been fully and publicly vetted, it would be unwise for NCDOT to accelerate the Bridge.

2) The Mid-Currituck Bridge May Not Be Financially Feasible.

The financial plan for the Mid-Currituck Bridge is riddled with uncertainties. As yet, it is unclear what the project will actually cost NCDOT. Until a clear financial plan is developed, it would be unwise to prioritize the Bridge over other more needed projects for which the costs are fully known.

In 2012, the formal environmental documentation for the Mid-Currituck Bridge forecast that the project would cost \$500-595 million.⁶ Later, in 2012, in a presentation to the legislature, former North Carolina Turnpike Authority Executive Director David Joyner estimated the cost at \$650 million.⁷ At that time, NCDOT expected part of this cost would be borne by a private partner in the form of a “Public Private Partnership,” or “P3,” agreement. NCDOT also expected a portion of the project cost would be covered by tolls. NCDOT’s traffic and revenue studies projected toll rates that would vary over time, rising to rates as high as \$26 for a one way trip during peak season. In October 2012, Mr. Joyner told the North Carolina General Assembly that the P3 agreement contemplated that the private partner would make an equity investment of \$40 million and would be eligible for toll revenue bonds of around \$132 million, while NCDOT would be responsible for appropriation bonds of around \$464 million.⁸

It would appear that much has changed since 2012. When the project was submitted to the STI process, it was accorded a cost of just \$173.3 million – a significantly lower cost than the \$500-650 million estimates of two years previous. NCDOT provided no public explanation of this dramatic difference in cost estimates. Similarly, where in the past NCDOT had stated that toll revenue and private equity would cover 20-25% of the overall project cost, figures submitted

³ NCDOT, MID-CURRITUCK BRIDGE FEIS at 2-45, Table 2-3: Travel Benefits of Detailed Study Alternatives (Jan. 2012), available at <http://www.ncdot.gov/projects/midcurrituckbridge/> (hereinafter “FEIS”).

⁴ *Id.* at 2-46.

⁵ See *infra* notes 12 to 16.

⁶ FEIS at xvi.

⁷ David Joyner, NCDOT, *The Mid-Currituck Bridge Project*, presentation to the Joint Legislative Transportation Oversight Committee, at slide 7 (Oct. 5, 2012), available at http://www.ncleg.net/documentsites/committees/JLTOC/2011-12_Biennium/2012-10-05/MidCurrituckDOT.pdf.

⁸ *Id.* at slide 43.

through the STI process assume 60% of the project cost will be covered by sources other than NCDOT, with the Department on the hook for only \$173 million.

It is unclear what these significantly changed numbers are based on. NCDOT is currently in the midst of revising traffic and revenue forecasts to ascertain how much revenue could realistically be expected to be generated by tolls. This new study – which as yet is not finalized - will have significant implications for the financial viability of the project, especially since weekend tolls under the old model were to be set at up to \$26 one-way, and now it appears NCDOT seeks toll revenue encompassing three times more of the project cost. We suggest the Board of Transportation demand documentation of any new financial plan *before* approving expedition of the project.

Likewise, it is also currently unclear whether or not the Bridge will continue to advance as a P3 project. The previous contract with the private concessionaire has been cancelled. As far as we know, no new private party has been identified. Moreover, if NCDOT does decide to pursue the project as a P3 arrangement, significant questions remain as to how such an arrangement would be structured. As has been seen with the controversy over the I-77 toll project, the structure of any P3 arrangement raises important matters of public policy, such as how much power is delegated to the private partner, whether any future arrangement would prohibit NCDOT from upgrades to parallel “competing” infrastructure, and who bears the risk if toll proceeds fail to live up to expectations. We suggest the Board of Transportation clarify these matters to avoid a repeat of the situation currently being faced with I-77.

Until there is a clear plan of finance available for the Bridge, based on up to date information about (a) the cost of the project; (b) realistic projections of toll revenue; and (c) complete details of any private financing agreement, it would be unwise to accelerate this project over other transportation needs. The current STIP reflects a cost to NCDOT of just \$173 million, for a project that was estimated to cost \$500-650 million three years ago. All of this money is set to come from Division 1’s already over-stretched budget. It is essential that NCDOT establish the true cost of the Bridge before moving forward with a project and associated cost overruns that may jeopardize funding for other necessary projects across the state.

3) Environmental Laws May Preclude Construction of the Mid-Currituck Bridge.

The Bridge has not yet received the approvals it needs to move forward. The project requires, at a minimum, approval under the National Environmental Policy Act (“NEPA”), the Clean Water Act, the Endangered Species Act, and the North Carolina Coastal Area Management Act, as well as a Bridge Permit from the U.S. Coast Guard. Not one of these approvals has yet been secured.

NEPA

As a major federal action that will significantly impact the environment, the Bridge is subject to NEPA. Initial NEPA studies began in 2006 with a Draft Environmental Impact Statement published in March 2010, followed by a Final Environmental Impact Statement in January 2012.⁹ Usually, the next step in this process would be a “Record of Decision” signed by the Federal Highway Administration (“FHWA”) finalizing selection of the project. No Record of Decision was ever signed for the Bridge, however. Currently then, NCDOT and FHWA are engaged in developing an updated look at the project, which will likely require the preparation of a “Supplemental Environmental Impact Statement.”

The last environmental documentation made available for public review in 2012 failed entirely to comply with the legal requirements of NEPA. Among other deficiencies, the entire analysis was based on a fundamentally flawed baseline that overstated the need for the project while understating its impact on the environment. This exact flaw recently led the U.S. District Court for the Eastern District of North Carolina to vacate the Record of Decision for the proposed Garden Parkway in March 2015.¹⁰ In filings to the Court, the FHWA asserted that it had reviewed many other highway projects under a similar flawed analysis, including the Mid-Currituck Bridge.¹¹ As such, significant additional analysis will need to be performed before the Bridge could legally move forward under NEPA.

Clean Water Act

The Mid-Currituck Bridge must also secure permits under the federal Clean Water Act. To do so, NCDOT will need to demonstrate that construction of the Bridge is the “Least Environmentally Damaging Practicable Alternative” (“LEDPA”). Only after determining that the project is the “LEDPA” can the U.S. Army Corps of Engineers issue a permit to allow bridge construction. The most recent EIS for the project, however, made clear that less damaging practicable alternatives to the new-location Bridge do indeed exist. The ER2 alternative described above – which is made up of major upgrades to existing roads – is not only less expensive, but is preferred by the majority of federal environmental resource agencies including the Environmental Protection Agency,¹² the U.S. Army Corps of Engineers,¹³ the National Oceanic and Atmospheric Administration,¹⁴ and the Department of the Interior.¹⁵ North Carolina

⁹ On behalf of our clients, the Southern Environmental Law Center submitted comments on these two documents on June 7, 2010 and Mar. 12, 2012. See attachments A & B.

¹⁰ See *Catawba Riverkeeper Found. v. N.C. Dep’t of Transp.*, No. 5:15-CV-29-D, 2015 WL 1179646 (E.D.N.C. Mar. 13 2015), attached as attachment C. The Court denied the defendants’ subsequent motions for reconsideration on September 10, 2015. *Catawba Riverkeeper Found.*, No. 5:15-CV-29-D (E.D.N.C. Sept. 10, 2015).

¹¹ See attachments D & E.

¹² MID-CURRITUCK BRIDGE STUDY: STAKEHOLDER INVOLVEMENT FOR FEIS TECHNICAL REPORT, Vol. 1, at 2-34 (Dec. 2011), available at http://www.ncdot.gov/projects/midcurrituckbridge/download/midcurrituck_SIforFEIS_Vol1_201112.pdf.

¹³ *Id.* at 2-2.

¹⁴ *Id.* at 2-11.

state resource agencies also identified ER 2 as the least environmentally damaging alternative.¹⁶ Where previously NCDOT's funding system of earmarks and the "Equity Formula" may have imposed some constraints on this alternative, those constraints no longer exist.

Endangered Species Act

Like the Clean Water Act, the Endangered Species Act contains substantive provisions that can prevent construction of a project where federally endangered species may be impacted. Given the high levels of biodiversity in the vicinity of the proposed Bridge and the many federally endangered and threatened species present, NCDOT must satisfy the requirements of the ESA before moving forward. As of the 2012 FEIS, NCDOT had identified 13 federally protected species in Dare and Currituck counties, 10 of which had habitat present in the project area.¹⁷ These numbers and the details of the species and habitat have likely changed in the intervening years since the publication of the FEIS.

Local Government Commission Approval.

If the Mid-Currituck Bridge is to move forward as a toll project funded by bond sales, it will need the approval of the Local Government Commission ("LGC"). It is unlikely that the LGC will approve bond issuance until all controversy over compliance with environmental laws has been fully resolved. In 2010 and 2011, the LGC issued over \$600 million in bonds for the Monroe Bypass toll road despite contrary recommendations from SELC, which repeatedly advised that no bonds be issued while litigation over the project was still pending. Subsequent to the ruling by the Fourth Circuit that invalidated the EIS for the Monroe project, these bonds sat unused for several years. In light of the lessons learned from this experience, representatives from the Treasurer's Office indicated to SELC that the LGC is unlikely to issue bonds prematurely for NCDOT projects in the future.

For all these reasons, we urge the Board of Transportation not to accelerate the Mid-Currituck Bridge at this time. With so many urgent needs facing North Carolina today, we believe it would be a poor use of newly available transportation resources to spend them on a project that will primarily benefit Virginia tourists. Moreover, we believe it would be fiscally unwise for this Board to hurry forward with a project until the true cost is made clear and until all legal and administrative hurdles have been crossed.

Thank you for your consideration of our concerns. We would be happy to discuss these issues further with you at any time.

¹⁵ *Id.* at 2-33.

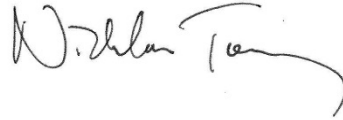
¹⁶ *Id.* at 2-60 (North Carolina Division of Marine Fisheries); *id.* at 2-88 (North Carolina Wildlife Resources Commission).

¹⁷ *FEIS* at 3-68–3-69.

Sincerely,

A handwritten signature in black ink, appearing to read "Kym Hunter". The signature is fluid and cursive, with a large loop at the end.

Kym Hunter
Staff Attorney

A handwritten signature in black ink, appearing to read "Nick Torrey". The signature is cursive and somewhat stylized.

Nick Torrey
Staff Attorney

A handwritten signature in black ink, appearing to read "Ramona H. McGee". The signature is cursive and includes a long horizontal stroke at the end.

Ramona McGee
Associate Attorney

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