

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

STEWARDS OF THE POTOMAC HIGHLANDS)	
and VIRGINIA WILDERNESS COMMITTEE,)	CA No. 2:26-cv-21
	) (Kleeh)
Plaintiffs,)	
	)
v.)	
	)
SEAN DUFFY, SECRETARY)	
U.S. DEPARTMENT OF TRANSPORTATION .)	
Et al.,)	
	)
Defendants.)	
_____)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 65, Plaintiffs Stewards of the Potomac Highlands and Virginia Wilderness Committee (“VWC”) request a preliminary injunction to halt plans by West Virginia Department of Transportation (“WVDOT”) to construct a 6.8-mile four-lane divided highway from Wardensville, West Virginia to the Virginia state line, the eastern-most segment of a 100-mile highway called Appalachian Corridor H. The project would construct a 4- to 5-lane divided highway for 6.8 miles from the current terminus of the adjoining segment of Corridor H just west of Wardensville, W.V. to the Virginia state line, cutting through 2.4 miles of undisturbed National Forest land, impairing access to the Tuscarora Trail and ending abruptly on the crest of Great North Mountain on the Virginia/West Virginia border as a result of Virginia’s refusal to advance a connecting segment in Virginia. The lawsuit alleges, among other things, that the failure of Defendant Federal Highway Administration (“FHWA”) to evaluate the reasonable, less destructive and vastly less expensive alternative of making spot improvements to existing roads violates the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(d). As explained in greater detail below, Plaintiffs satisfy each of the requirements for a preliminary injunction.

STATEMENT OF THE CASE

I. Factual Background

a. The Evolution of Appalachian Corridor H - 1969 to 1996

As originally proposed, Appalachian Corridor H consisted of a 160-mile highway extending from Interstate 79 (“I-79”) near Weston, West Virginia, eastward to Interstate 81 (“I-81”) near Strasburg, Virginia. Corridor Section SDEIS, at I-6 (03/1992).¹ Over the

¹ The 1992 Corridor Selection Draft Environmental Impact Statement (“CSDEIS”), the 1994 Alignment Selection Draft Environmental Impact Statement (“ASDEIS”), the 1996 Final

years, Corridor H has been divided into numerous segments, each of which was preceded by an independent review under NEPA and some of which have already been constructed. For example, a 40-mile section of the Corridor H highway was built prior to 1994 from its I-79 terminus to a point just west of Elkins, West Virginia. *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 370 (D.C. Cir. 1999).

In 1981, the Agencies moved forward with a tiered NEPA process to evaluate the potential impacts of and alternatives to the construction of an approximately 110 to 130-mile segment of Corridor H from Elkins, West Virginia to Interstate 81 in either Strasburg or Winchester Virginia. Corridor Section DSDEIS, at I-1 (03/1992). In 1993, the Agencies selected a 2,000-foot, 114-mile corridor from Elkins, West Virginia to Strasburg, Virginia. 1996 ROD, at 6. After a corridor was selected, the Agencies then evaluated a series of alignments for a four-lane highway within the selected corridor.

The project encountered significant opposition due to its lack of transportation justification – earning it the moniker “the road to nowhere – and the enormous scope of the impacts on the environment and historic properties.”² In response to requests from commenters such as the group Corridor H Alternatives (“CHA”), the CSDEIS considered an Improved Roadway Alternative (“CSDEIS IRA”), involving making selective improvements to existing two-lane highways in the study area, such as adding a third climbing lane for trucks on some of the steeper ascents, adding turning lanes at higher volume intersections, or

Environmental Impact Statement (“FEIS”), and the 1996 Record of Decision (“ROD”) can be found in the Corridor H Resource Library on WVDOT’s website and are subject to judicial notice as public records.

<https://storymaps.arcgis.com/stories/d1fc83e077354894aeec0ae4c137bfc0>

² See WVDOT Motion to Dismiss, Ex. 1 (ECF 22-1, at 58).

straightening the horizontal or vertical alignment of some of the roadway sections. 1996 FEIS, at II-4. The 1993 CSDEIS then determined that “[b]ecause the CSDEIS IRA would consist of spot improvements to existing roads, the CSDEIS IRA would not create a single, continuous, improved roadway connecting Elkins, WV and I-81 in Virginia.” *Id.*

However, “because an Improved Roadway Alternative was of continued public interest and was included in the Virginia Commonwealth Transportation Board Resolution, the 1994 Alignment Selection Draft Environmental Impact Statement (“ASDEIS”) developed and evaluated a new Improved Roadway Alternative (“ASDEIS IRA”) that “would involve both upgrading of existing roadways similar to the CSDEIS and construction on new location where upgrading existing roadways would be ineffective in addressing roadway deficiencies” in order to “result in a single, continuous improved roadway from Elkins, WV to I-81 in Virginia.” 1996 FEIS, at II-4. As a result, unlike the selective roadway improvements advocated by CHA and others, the ASDEIS IRA consisted of 31 miles of new highway on new location and 45 miles of widening on current location” and “would increase the impacts to the environment beyond those calculated for the four-lane Build Alternative.” *Id.* at II-29.

In 1996, the Virginia Commonwealth Transportation Board (“VCTB”) voted to disapprove the construction of the 14-mile segment of Corridor H from the Virginia/West Virginia state line to Strasburg, Virginia. The VCTB also stated that it “cannot support the [1994 ASDEIS] Improved Road Alternative (IRA) . . . due to the breadth of its impacts to residences, businesses, and cultural and environmental resources.” Instead, the VCTB directed the Virginia Department of Transportation to “study the Route 55 corridor safety aspects such as horizontal and vertical alignments, possible need for truck climbing lanes, intersection safety improvements, and other safety related features of the roadway.” 1996

FEIS Vol. II, Appendix A. As a result, the FEIS changed the alignment of the preferred alternative for this segment of Corridor H so that it terminated at the Virginia//West Virginia line rather than in Strasburg, VA. On August 2, 1996, the FHWA issued a Record of Decision (“ROD”) approving the general location and design for Appalachian Corridor H between Elkins, West Virginia, and the West Virginia/Virginia state line.

b. 1996 Litigation and Settlement Agreement

On November 19, 1996, a coalition of Plaintiff organizations, led by nonprofit Corridor H Alternatives, filed an action in the U.S. District Court for the District of Columbia alleging that the Agencies’ decision to approve the rejection of an alternative of making improvements to the existing two-lane roads between Elkins and the Virginia/West Virginia line violated NEPA, and that the Defendants also violated Section 4(f) by failing to complete necessary evaluations prior to issuing a Record of Decision (“ROD”) approving the project in its entirety. Plaintiffs here were not a party to that litigation. The U.S. Court of Appeals for the D.C. Circuit found that the FHWA’s approval of the 100-mile highway to be unlawful and enjoined the project. *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d at 373-374.

Rather than continue with a remand to the FHWA, on February 7, 2000, the parties signed a comprehensive settlement agreement, which fundamentally changed the process for considering the project going forward. *See Settlement Agreement*.³ While nominally still referred to as “Corridor H,” the settlement agreement divided the planned 100-mile highway

³ The Settlement Agreement, <https://perma.cc/9N5D-7DQK>, and the 2002 Amended Record of Decision (“ROD”) <https://perma.cc/D5YK-42TM>, and 2025 Supplemental Environmental Assessment (“SEA”) relating to the Wardensville to the WV/VA State line segment of Corridor H, <https://webapps.transportation.wv.gov/TWS/20250319FinalSEA.pdf> are public records subject to judicial notice, per WVDOT’s Brief in Support of Motion to Dismiss, at 7 (ECF Document 12-13).

into nine (9) separate “projects,” each of which would result in the completion of a useable highway section, and each of which were subject to separate conditions that must be satisfied prior to moving forward with construction. *Id.*, at p. 4. A number of these segments have been fully constructed.

c. Wardensville to Virginia/West Virginia line

With respect to the segment from Wardensville to the Virginia/West Virginia state line at issue here, the settlement agreement provided that no action would be taken to advance that segment unless one of the following conditions occurred:

(1) Four-Lane in Virginia

The Virginia Department of Transportation obtains FHWA approval, in the form of a ROD for completion of Corridor H in Virginia as a four-lane highway connecting the Virginia state line to Interstate 81; or

(2) Unacceptable Level of Service in West Virginia

WVDOT determines that operating conditions on WV Route 55 between Route 259 North (near Wardensville) and the Virginia state line have reached Level of Service "E" as defined by the Highway Capacity Manual at least two hours per day (not necessarily two consecutive hours), and WVDOT's determination is confirmed by an independent expert jointly selected by WVDOT, FHWA, and CHA from the faculty of the Civil Engineering Department of West Virginia University or other comparable academic institution.

(3) Potential Loss of Federal Funding

Funding for the entire Appalachian corridor highway program has been appropriated but must be spent by a date certain in order to avoid the rescission of previously authorized and appropriated federal-aid highway funding for that System; or

(4) Passage of Time

Twenty years has elapsed from the Effective Date.

Settlement Agreement, III. I.(c).

The first three conditions in the Settlement Agreement have not occurred. Most notably, as of 2023, traffic volumes on Route 55 remain substantially the same and continue to provide an acceptable level of service. SEA, 2.3.5.1. Accordingly, WVDOT waited to

advance the project until the expiration of the 20-year stand-down period.

In accordance with the terms of the Settlement Agreement, on May 5, 2003, the Defendants issued an Amended Record of Decision (“2003 Amended ROD”) approving the Wardensville to Virginia State line segment of Corridor H. The 2003 Amended ROD described the project as providing “an approximately 5.5-mile-long highway segment free from congestion, multiple driveways, and many geometric deficiencies associated with the existing route.” 2003 Amended ROD, at 3-4.

The 2003 Amended ROD concluded that no new studies would be prepared under NEPA because the 1996 Final EIS for the 100-mile highway project adequately assessed the environmental impacts for the Wardensville-to-VA/WV state line segment. The 2003 Amended ROD concluded that the segment would serve a useful transportation purpose independent of the completion of the entire 100-mile highway. The 2003 Amended ROD predicted that “by 2021 the entire corridor would be operating under unacceptable levels of service.” The 2003 Amended ROD acknowledged that no supplemental NEPA studies preceded its issuance. *Id.* at 4. Instead, the decision was based on the 1996 FEIS, including the 2013 “no build” traffic projections. *Id.* See 1996 FEIS, Table II-9.

Since there was no apparent immediate need to build this segment, after waiting the passage of 20 years per the condition 4 in the Settlement Agreement, in March 2025, the Defendants issued a Supplemental Environmental Assessment (“SEA”) to reevaluate the 2003 Amended ROD. The SEA noted numerous changes to the project’s design, describing it now as a 6.8-mile, four-lane partially controlled access highway, a significant increase in length from 2003. The SEA stated that, “[a]s prescribed in FHWA guidance for NEPA implementation (“Technical Advisory T6640.1A”), this document addresses current

environmental requirements and revisits the entire project.” SEA, 1.2.4. The SEA failed to consider *any* alternatives other than its Refined Selected Alternative. It failed to consider even the baseline “no build” condition and did not evaluate whether existing conditions on local roadways had changed in the intervening 30 years since the data in the 1996 FEIS.

Numerous comments were submitted by Plaintiffs and others noting numerous environmental impacts that were not adequately considered, including impacts resulting from design changes to Route 55 that would further divert traffic from the Wardensville commercial district, detrimentally affecting the economic vitality of the historic commercial district. Most notably, commenters urged the agencies to consider whether “targeted” improvements to Route 55 would address project needs.

On November 3, 2025, the FHWA approved the Finding of No Significant Impact (“FONSI”) and determined that the construction of the Action Alternative will have no new significant impact on the human environment within the meaning of NEPA and that a Supplemental Environmental Impact Statement is not required. Notably, the FONSI misrepresented the comments urging the consideration of “spot improvements” as being comments that “supported selection of an alternative, the ‘Improved Roadway Alternative (IRA), as defined in the ASDEIS.” FONSI, at 13. However, as the FONSI’s own summary of these comments makes clear, not a single commenter urged the agencies to consider the highly designed and destructive ASDEIS IRA, which, unlike targeted road improvements, involved substantial construction of new roadway on new locations . FONSI, Appendix B.

II. Procedural Background

The Plaintiffs timely filed this lawsuit challenging the FHWA’s FONSI on April 30, 2026. The lawsuit alleges, among other things, that the FHWA’s final decision approving

the FONSI violates NEPA and Section 4(f) because it failed to consider the alternative of making spot improvements for the 6.8-mile Wardensville to VA/WV State line segment, and because the purported transportation need for a four-lane highway for this segment is based in on data extrapolated from studies conducted 40 years ago for the entire 100-mile Corridor H highway project that are not supported by current traffic studies conducted expressly for this segment of Corridor H. Complaint, ¶ 3.

On or about June 16, 2026, WVDOH let bids for construction of this segment of Corridor H, including a \$85.4 million contract to Triton Construction Inc. to build a 3.74-mile section of the highway from Trout Run Cutoff Road to Waites Run Road. The work includes grading, drainage, constructing twin bridges at Trout Run, and paving for the first 1.5 miles of new highway. <https://www.wdtv.com/2026/07/07/first-contract-next-phase-corridor-h-awarded-by-wvdoh/>. Defendants' counsel have advised that pre-construction activities will commence at the end of August 2026 and construction of the project will begin sometime in September 2026.

On July 13, 2026, the FHWA filed a motion to dismiss the complaint for lack of jurisdiction under Rule 12(b)(1), claiming that the complaint does not adequately allege facts that establish Plaintiffs' associational standing to bring this lawsuit because the complaint, while alleging with specificity the injuries that would be suffered by Plaintiffs' members, did not identify these members by name. ECF Documents 19 and 20. WVDOT also moved to dismiss the complaint under Rule 12(b)(6) on the grounds that Plaintiffs were bound by various litigation waivers in the 2000 agreement settling the 1996 Lawsuit, and that principles of res judicata and equitable estoppel flowing from that action barred this suit. On August 3, 2026, Plaintiffs opposed WVDOT's motions to dismiss, refuting those arguments

and providing supporting declarations from Plaintiff's members. ECF Documents 25 and 27.

STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

Motions for preliminary injunctions are governed by a multi-factor test to determine whether plaintiffs have shown: (1) a likelihood of success on the merits; (2) that they are likely to suffer irreparable injury absent such relief; (3) that the balance of the equities tips in plaintiffs' favor; and (4) that the injunction is in the public interest. *See Centro Tepeyac v. Montgomery Cnty*, 722 F.3d 184, 190-91 (4th Cir. 2013); *MicroStrategy, Inc., v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001); *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Irreparable injury must be "*likely* in the absence of an injunction." *Id.* (emphasis in original). If the balance of harms "'tips decidedly' in favor of the plaintiff, a preliminary injunction will be granted if 'the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.'" *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 813 (4th Cir. 1991). "[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

DISCUSSION

- I. Plaintiffs Have A Likelihood of Success on the Merits of Their Claims.
 - A. The FHWA Violated NEPA and Its Own Regulations By Failing to Consider Any Alternatives Other than Its Selected Refined Alternative .⁴

⁴ Plaintiffs have also alleged that the FHWA failed to evaluate alternatives that would minimize harm to the Tuscarora Trail, in violation of Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303; 23 U.S.C. § 138. Spot improvements to Route 55 are also a prudent and feasible alternative that would avoid harm to the trail.

Due to the substantial change in the project from the 100-mile project evaluated in the 1996 as well as due to the substantial passage of time since the 1996 FEIS was prepared and the 2003 Amended ROD was issued, the FHWA was required by its regulations to “prepare a written evaluation of the final EIS.” 23 C.F.R. § 771.129(b). FHWA regulations provide that, where the significance of the impacts from these changes is unclear, the FHWA may prepare an EA “to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project.” *Id.* § 771.130(e).

However, where a project’s changes are substantial and/or the impacts uncertain, the FHWA may undertake its reevaluation by preparing “an EA to assess the impacts of the changes, new information, or new circumstances.” 23 C.F.R. § 771.130(c). Both the statute and the FHWA’s NEPA regulations make clear that an EA must “identify alternatives and measures that might mitigate adverse environmental impacts.” 23 C.F.R. § 771.119(b); 42 U.S.C. § 4332(H).

The obligation to consider alternatives is not removed in cases such as this one, involving a “tiered” NEPA process. “Tiering” refers to a “‘tiered’ or multiphase analysis,” that is used for “large or complex projects.” *Shenandoah Valley Network v. Capka*, 669 F.3d 194, 197 (4th Cir. 2012). The FHWA’s “tiering” regulations provide that “[a]t the first tier . . . agencies consider ‘broad issues such as general location, mode choice, and areawide air quality and land use implications of the major alternatives.’” *Id.* (citing 23 C.F.R. § 771.111(g)). “Site-specific details” are addressed at the second tier. *Id.* NEPA imposes “a continuing obligation” on the FHWA to consider alternatives at the Tier 2 stage, “as nothing

in the statute confines consideration of alternatives to Tier 1.” Shenandoah Valley Network v. Capka, 669 F.3d at 197 (emphasis added).

Here, the FHWA decided to prepare a full scope EA that “addresses current environmental requirements and *revisits the entire project*.” SEA, 1.2.4 (emphasis added). In cases where the agency opts “‘to deal with the problem afresh’ by taking new action,” it is “not limited to its prior reasons but must comply with the procedural requirements for new agency action.” *Dep’t of Homeland Security v. Regents of the Univ. of Cal.*, 590 U.S. 1, 21 (2020) (citing *SEC v. Chenery*, 332 U.S. 194, 201 (1947)). The FHWA is therefore required by NEPA and its own regulations to consider alternatives to its proposed action.

Despite this clear legal authority, the SEA prepared for the Wardensville to Virginia/West Virginia state line project failed to consider any alternatives other than the Refined Selected Alternative— a four-lane highway. Indeed, the SEA did not even address whether the “no build” alternative might fulfill the project’s purpose and need, despite the fact that the agency’s own traffic data in the SEA shows that traffic volumes have not appreciably increased in the last 30 years and continue to provide an accepted level of service. FHWA’s own NEPA guidance states:

The "no-build" alternative must always be included. In addition to fulfilling a requirement, discussion of this alternative can serve two purposes. First, it may be a reasonable alternative, especially where the impacts are high and the need is relatively minor. More often, the no-build serves as a benchmark against which the impacts of the other alternatives can be compared. As part of this alternative, *short-term minor reconstruction, such as safety upgrading and maintenance projects, can be considered*.

https://www.environment.fhwa.dot.gov/legislation/nepa/overview_project_dev.aspx?AspxAutoDetectCookieSupport=1 (emphasis added).

The required inclusion of a “no build” alternative applies equally to EAs, including an

EA that is tiered from a previous EIS. *Oregon Natural Desert Ass’n v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019) (holding that agency’s tiered EA violated NEPA because it “failed to establish the baseline environmental conditions necessary for a procedurally adequate assessment.”); *see also N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1099 (9th Cir. 2012) (agency violated NEPA because its tiered NEPA study improperly relied on the “no-build” alternative considered in the prior NEPA document.). Accordingly, the FHWA’s failure to evaluate the impacts of any alternatives other than its “refined selected alternative” violates NEPA and the FHWA’s own regulations.

B. The FHWA’s Rejection of a Road Improvement Alternative In the 1996 FEIS for the 100-Mile Corridor H Project Has No Relationship to the Alternative of Making Spot Improvements to Route 55 for this Project.

In their comments, Plaintiffs and others urged the FHWA to consider the alternative of making various spot improvements to WV Route 55, such as passing lanes, either on its own or as part of a no-build alternative. *See, e.g., SEA*, Appendix C, at 16; FONSI, at 63, 103, 109, 192. The FONSI incorrectly characterized these comments supporting “selection of the “Improved Roadway Alternative (IRA),’ as defined in the ASDEIS.” FONSI, at 13. In fact, the “Improved Roadway Alternative” considered in the 1994 ASDEIS was a completely different alternative, developed when the purpose and need for the project focused on deficiencies in “the study area’s current highway system *between Elkins, West Virginia and Strasburg, Virginia.*” 1996 FEIS, at ES-3 (emphasis added). The comments advocated for spot or “targeted” improvements to WV Route 55, not the ASDEIS IRA.⁵

⁵ *See, e.g., FONSI*, Appendix B (Responses to Public Comment), at 14 (“two-lane with passing lanes”), 18 (“improve Highway 55 to make it safer”), 30 (“make improvements to Route 55”), 40 (“Targeted upgrades”), 45 (“Targeted upgrades to existing Route 55”), 46 (“Targeted upgrades to existing Route 55”), 47 (“passing lanes and safety improvements”), 61 (“targeted upgrades”) 47 (“Reasonable road improvements . . . could include passing

Unlike the program of selective improvements to local roads advocated by the plaintiffs in the 1996 lawsuit, the ASDEIS IRA involved “31 miles of new highway on new location and 45 miles of widening on current locations,” 1996 FEIS, II-29, and “would increase the impacts to the environment beyond those calculated for the four-lane Build Alternative.” *Id.* at II-4; II-28.⁶ Accordingly, the rejection of an improved roadway alternative in 1992 for the 114-mile corridor and the rejection of the IRA in the 1994 ASDEIS for the 100-mile corridor cannot be the basis for rejecting spot improvements to WV Route 55 in the context of the 6.8-mile Wardensville to WV/VA segment.

While the FONSI provides several rationales for why the ASDEIS IRA was rejected in 1994, including that its environmental impacts that are even “more severe than the environmental impacts of the build alternative,” (FONSI, at 13), this rationale does not pertain to the alternative of making spot or “targeted” improvements to WV Route 55. As noted above, unlike the ASDEIS IRA, the alternative of spot improvements does not involve any construction of new roadway on new location and its associated environmental damage.

Apart from the inapplicable reference to the ASDEIS IRA, the FONSI provides no rationale whatsoever for refusing to consider making spot improvements to WV Route 55 as

lanes”); 56-61 (“safety improvements”); 64 (“improved passing lanes”); 83 (“improve Highway 55”); 85 (“Improving Route 55”); 95 (“Targeted improvements to WV 55”); 98 (“new design that addresses safety needs, stays within the current right-of-way”).

⁶ Likewise, as discussed below, while the alternative of making spot improvements to existing roads was considered in the 1992 CSDEIS as an alternative to address the needs for the 114-mile corridor from Elkins, WV to I-81 in Virginia, the CSDEIS IRA was rejected because it “would not create a single, continuous, improved roadway connecting Elkins, WV and I-81 in Virginia.” 1996 FEIS, at II-4. Here, by contrast, “spot” or “targeted” improvements to WV Route 55 *would* serve the purpose of creating a single, continuous, improved roadway connecting Elkins, WV to Virginia. Indeed, Virginia has chosen to complete Corridor H in Virginia by making spot improvements to VA Route 55. *See* 1996 FEIS, IV-9.

an alternative because it did not even consider it. When an agency does ‘not provide any reasoning or analysis for its conclusion’ then ‘there is nothing’ to which the court can defer.” *Ctr. for Biological Diversity v. Ute Indian Tribe of the Uintah & Ouray Reservation*, No. 21-4098 (10th Cir. July 10, 2023) (citing *WildEarth Guardians v. Bureau of Land Management*, 870 F.3d 1222, 1238 (10th Cir. 2017)); *Habitat Education Center, Inc. v. U.S. Forest Service*, 673 F.3d 518, 536 (7th Cir. 2012) (“There is no indication in this record that the agency considered any relevant factors at all or made any reasoned decision.”) The court cannot defer to an agency conclusion when “there are no agency conclusions to defer to.” *1000 Friends of Wisconsin, Inc. v. U.S. Dep’t of Transp.*, No. 11-C-0545, 2015 WL 2454271, at *9 (E.D. Wis. May 22, 2015).

As the 2003 Amended ROD explicitly finds, the Wardensville to WV/VA segment of Corridor H has independent utility. The FONSI was approved as a separate “final agency action” for NEPA purposes. 91 Fed. Reg. 328 (Jan. 5, 2026). Therefore, FHWA must evaluate the reasonable alternatives to that action rather than treat the 1996 rejection of alternatives for the larger corridor as dispositive. *Shenandoah Valley Network v. Capka*, 669 F.3d at 197. This Court cannot uphold the SEA’s failure to consider the alternative of making spot improvements to WV Route 55 where the FHWA failed to provide any explanation whatsoever for why this alternative should not be considered.

C. Making Spot Improvements to Route 55 Is a Reasonable Alternative That Would Address the Purpose and Needs Stated in the SEA and FONSI.

Had the SEA considered making targeted improvements to Route 55 as an alternative to building this segment of Corridor H, it is clear that this would have been a reasonable alternative that would address the purpose and need for this segment of Corridor H. The SEA and the FONSI articulated the purpose for the project as follows: “within the

Wardensville to VA State Line project area, existing conditions present a need for improvements to east-west transportation. These include: the geometric constraints of the roadways, the poor system linkage, and the overall congestion these conditions create.”

SEA, 1.3.⁷ The SEA then stated that the specific “design deficiencies which have not changed include:

- Over 40% of the route has steep 9% grades;
- Approximately 170 driveways directly access the route;
- 10- to 11-foot lane widths with little (less than 2-foot) or no paved shoulder; and
- 75% of length is no passing zone with inadequate sight distances

Id.; FONSI, at 4. As we now discuss, making targeted (spot) improvements to the existing roadways is a reasonable alternative that, had it been evaluated, would have adequately addressed the needs for the project identified in the SEA and the FONSI.

First, it is important to point out a significant change in the articulated need for the Wardensville to VA/WV state line segment versus the need for the 100-mile Corridor H identified in the 1996 FEIS (and the 2003 Amended ROD): the issue of capacity and Level of Service on Route 55.⁸ Both the 1996 FEIS and the 2003 Amended ROD projected that

⁷ The 2003 Amended ROD also mentioned “*WVDOT's* objective of completing Corridor H as a continuous four-lane highway from I-79 to the West Virginia/Virginia state line.” 2003 Amended ROD, at 3 (emphasis added). However, the scope of “reasonable alternatives” should not be constrained by “those alternative means by which a particular applicant can reach his goals.” *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). Nothing in either the 1996 ROD or the 1996 FEIS suggests that the purpose of the *federal* action can only be furthered by a four-lane highway.

⁸ “Level of Service” is used by transportation engineers to categorize and describe operational conditions within a traffic stream, generally in terms of such service measures as speed and travel time, freedom to maneuver, traffic interruptions, and comfort and convenience. *Highway Capacity Manual*, 2-2. Levels of Service are expressed in grades from “A” (the highest) to “F” (the lowest) *Id.* at 2-3. See Exhibit 1 (excerpts from *The Highway Capacity Manual*, a professional treatise published by the Transportation Research Board, which the FHWA recommends for assessing roadway capacity and evaluating improvements. <https://www.fhwa.dot.gov/policyinformation/pubs/pl18003/chap01.cfm>

traffic volumes would increase in 2013 and 2021, respectively, so that the Level of Service on existing Route 55 would become unacceptable. By contrast, the SEA clearly states that Route 55 currently has an acceptable Level of Service and simply omits any future traffic projections (presumably because past projections of increased traffic in the 1996 FEIS and the 2003 Amended ROD have proven to be demonstrably false). SEA, 2.3.5. Therefore, the conclusion is inescapable that WV Route 55 will provide adequate capacity and an acceptable level of service for both current traffic and future volumes.⁹ Accordingly, the SEA and the FONSI effectively concede that there are no projections that traffic volumes would increase in the future under a “no build” scenario (had one been considered).¹⁰ This

⁹ As the 2000 Settlement Agreement acknowledges, traffic volumes between Route 259 North (near Wardensville) and the Virginia state line must reach “Level of Service “E” as defined by the Highway Capacity Manual at least two hours per day (not necessarily two consecutive hours)” to justify construction of Corridor H based on the need for additional highway capacity. *See* Settlement Agreement, III. I.3.(c)(3). The SEA recognizes that in the 20+ years since the issuance of the 2003 Amended ROD, the increased traffic volumes projected for 2021 did not occur. Compare 2003 Amended ROD, at 3, which asserted that “[u]sing the WVU Growth Model, . . . [t]he 2013 No-Build projection lists two of the three sections operating at LOS “D” or worse, and by 2021 the entire corridor would be operating under unacceptable levels of service” with the SEA, which asserts that “the existing route through the project area on WV 55/US 48, as of 2023, has an Average Daily Traffic (ADT) between 2,200 and 5,100 vehicles and LOS “D” in Section 3.” SEA, 2.3.5.2 (Figure 10). Section 3 encompasses the downtown Wardensville Historic District, where lowered speeds and higher volumes are desirable. *See Coalition for Canyon Pres. v. Bowers*, 632 F.2d 774, 784 (9th Cir. 1980) (noting that “lower traffic capacity was generally acceptable in towns, partly because of their lower speed limits.”)

¹⁰ Because the SEA failed to even evaluate the conditions on existing roads under as part of a baseline “no build” alternative, the SEA provides no projections of future traffic volumes under a “no build” scenario, presumably because it is highly unlikely that future traffic volumes will increase given that these traffic volumes have remained virtually unchanged for the past 30 years. Nor can it be assumed that the accident data cited in the 2003 Amended Road is still accurate since the SEA did not even address this issue. Spot improvements cannot be rejected based on obsolete and demonstrably inaccurate (in the case of traffic projections) data from 20 to 30 years ago. *See Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1480 (9th Cir. 1983) (noting that the continuing duty to evaluate new information is especially relevant where the original environmental analysis

material change in the underlying need for this segment of Corridor H in and of itself warrants revisiting the spot improvement alternative.

Instead of citing lack of “capacity” or unacceptable level of service, the SEA merely references “congestion” related to identified “design deficiencies (e.g., narrow shoulders and sharp curves), few passing opportunities, and no control of access.” SEA, at 1.3. These are precisely the sorts of needs that spot improvements can address. FHWA’s own guidance states that “[r]esearch and experience have shown that the provision of passing lanes, turning lanes, localized alignment improvements, and other relatively low-cost measures can be highly cost-effective in improving both traffic operations and safety on existing two-lane rural roads.” See FHWA Report No. FHWA-IP-87-2, “Low-Cost Methods for Improving Traffic Operations on Two-Lane Roads” (Jan. 1987).

<https://rosap.ntl.bts.gov/view/dot/75083>

The Highway Capacity Manual, which the FHWA recommends for assessing roadway capacity and evaluating improvements, mirrors the FHWA’s guidance, with the following additional explanation:

. . . For the most part, two-lane highways carry light volumes and experience few operational problems. Some two-lane highways, however, periodically experience significant operational and safety problems due to a variety of traffic, geometric, and environmental causes. Such highways may require design or operation improvements to alleviate congestion. When traffic operational problems occur on a two-lane highway, many highway agencies consider widening the highway to four lanes. Another effective method for alleviating operational problems on two-lane highways is to provide passing lanes at intervals in each direction of travel or to provide

was more than five years old); see, e.g., *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2012) (“Reliance on data that is too stale to carry the weight assigned to it may be arbitrary and capricious.”); *1000 Friends of Wisconsin v. U.S. Dep’t of Transp.*, No. 11-C-0545, 2015 WL 2454271, at *9 (“updated Department of Administration population data will significantly change the traffic projections and consideration of reasonable alternatives that appear in the impact statement, and that therefore supplementation of those parts of the impact statement may be required.”)

climbing lanes on steep upgrades. Passing and climbing lanes cannot increase the capacity of a two-lane highway but can improve its level of service. Operational analysis procedures for passing and climbing lanes on two-lane highways are included in this chapter.

There are a number of other design and operational treatments that are effective in alleviating operational congestion on two-lane highways. These include

- Turnouts
- Shoulder use
- Wide cross sections
- Intersection turn lanes, and
- Two-way left-turn lanes

Transportation Research Board, Highway Capacity Manual, at 20-44 (National Research Council 2000) (Exhibit 1). This guidance demonstrates that spot improvements are a reasonable alternative that should be considered for low-volume two-lane highways by undertaking the recommended “operational analysis procedures.”

Finally, spot improvements on the short segment of Route 55 between Wardensville and the VA/WV state line would satisfy the overarching purpose and need enumerated in the 1996 Corridor H FEIS, which was: “1. Improve east-west transportation through northeastern West Virginia; 2. Promote economic development in the region; and 3. Preserve or improve the quality of life in the region. (WVDOH, 1996).” SEA, at 1.3; FONSI, 4.0. Given the low traffic volumes and acceptable level of service on Route 55 in this segment of Corridor H, spot road improvements, by definition, would “improve east-west transportation in northeastern West Virginia.” In contrast to the road improvement alternative rejected for the entire 100-mile Corridor H in 1996, completing the Wardensville to VA/WV state line segment by making targeted improvements to WV Route 55 would also serve the original purpose of the project to “create a continuous roadway from Elkins to the Virginia line.” 1996 FEIS, at I-3 to I-4.¹¹

¹¹ Indeed, the 1996 FEIS implicitly concedes this point in connection with assessing future

Spot improvements to WV Route 55 would also allow the economic revitalization of downtown Wardensville to continue and avoid the economic harm that will result from the diversion of all traffic from Route 55 in downtown Wardensville, which the SEA concedes would result in “the potential adverse effect of reduced tourism downtown.” SEA, 2.3.5.2. Finally, there is absolutely no basis for evaluating whether spot improvements would also “improve the quality of life” in this area, since the SEA failed to evaluate this alternative. Accordingly, there is every reason to believe that the spot improvement alternative would address the purpose and need of this segment of Corridor H.

D. The Waiver Provisions in the Settlement Agreement Cannot Alter the FHWA’s Statutory Obligations Under NEPA.

The prospective litigation waiver of the “improved roadway alternative” in the 2000 Settlement Agreement cannot insulate the FHWA’s failure to consider this alternative from judicial review. FHWA’s obligation under NEPA to evaluate all reasonable alternatives cannot be removed by a settlement agreement, even one approved by the court. As the Fourth Circuit has found, “We think it alien to our concept of law to allow the chief legal officer of

traffic capacity on VA Route 55 in Virginia between the WV/VA state line and I-81, stating “[a]ssuming the 85 % of the maximum latent is attracted to Corridor H and uses Route 55, there would not be any peak hour over-capacity condition on any segment of VA 55 from the WV/VA state line to I-81.” 1996 FEIS, IV-8. The FEIS then states: “the Virginia Commonwealth Transportation Board’s Resolution (Vol. II, Appendix A) directs VDOT to “study the Route 55 corridor safety aspects such as horizontal and vertical alignments, possible need for truck climbing lanes, intersection safety improvements, and other safety related features of the roadway.” *Adopting any of these measures will mitigate those safety problems that may result from the predicted traffic increase.*” 1996 FEIS, IV-9 (emphasis added). Moreover, the 2013 traffic volumes predicted on VA Route 55 from the WV/VA state line to I-81 were more than double the actual 2023 traffic volumes on WV Route 55 from Wardensville to the VW/VA state line. Therefore, by the agencies’ own admission, spot improvements to WV Route 55 would be equally if not more effective to address identified deficiencies and safety issues on WV Route 55 and would likewise “create a continuous roadway from Elkins to the Virginia line.”

the country to violate its laws under the cover of settling litigation. *The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality.*" *Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 762 (4th Cir. 1993) (emphasis added).

Likewise, the U.S. Supreme Court has held that "the fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates the statute or Constitution." *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986).¹² Accordingly, the Settlement Agreement cannot absolve FHWA of this statutory responsibility under NEPA to evaluate the spot improvement alternative in the SEA or provide a reasoned explanation for why this alternative should not be considered.¹³

¹² See also *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55 (1980) ("the Attorney General must still exercise her discretion in conformity with her obligation to enforce the Acts of Congress.")

¹³ In addition, as Plaintiffs explained in more detail in their opposition to WVDOT's motion to dismiss, the plain language of the provision of the settlement agreement governing who is bound by the agreement, does not bind Plaintiffs here, who are neither the alter ego nor successors of any of the Agreement's signatories. Plaintiffs Opp. to WVDOT Motion to Dismiss (ECF Document 27). Even WVDOT concedes Plaintiffs are not bound by the Settlement Agreement under a "straightforward," "textual" reading of the provision governing who is bound by the Agreement. WVDOT Reply to Motion to Dismiss, at 5 (ECF Document 25, at 7). There is no support under basic principles governing the interpretation of contracts to ignore the "straightforward," "textual" reading of this provision and instead "read the Agreement as a whole, . . . [to] determine the parties' reasonable expectations at the time of contracting." *Id.* Indeed, while WVDOT urges that this plain language must be ignored to "determine the parties' reasonable expectations at the time of contracting, Plaintiffs interpretation is in fact consistent with expectation of CHA, the lead plaintiff in the 1996 lawsuit, stated in the Agreement: "CHA has a continuing interest in, and different priorities for, transportation improvements in West Virginia and the Appalachian region, which do not include the completion of Corridor H as a continuous four-lane highway, and that CHA intends to continue advocating those priorities." Settlement Agreement, at 4 ("whereas" clause).

II. Plaintiffs Will Suffer Irreparable Injury If The Court Does Not Issue A Preliminary Injunction.

To demonstrate irreparable injury, a plaintiff need only demonstrate that absent an injunction, it is “likely to suffer irreparable harm before a decision on the merits can be rendered.” *Winter v. NRDC*, 555 U.S. 7, 22 (2008). “[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d 174, 201 (4th Cir. 2005) (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987)).

An injunction at this point is necessary to ensure that the agency, in constructing “its preferred alternative” does not go “too far in doing so, reaching the point where it actually has ‘[l]imit[ed] the choice of reasonable alternatives.’” *Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d at 206. (citation omitted). In this case, Defendants have represented that construction of the project is expected to begin sometime in September 2026, and that certain pre-construction activities will commence at the end of August. The construction of a four-lane highway will destroy mature trees, pollute streams, and result in loss of habitat for numerous species including the endangered wood turtle. These harms are directly traceable to Defendants’ failure to adequately consider less harmful alternatives other than their revised selected alternative of building a new four-lane highway on new right of way.

Interim injunctive relief prohibiting the construction of a challenged highway is often deemed necessary in the absence of legally sufficient compliance with NEPA. As the Fourth Circuit explained, “[f]urther investment of resources by appellees in the proposed route would render alteration or abandonment of the proposed route increasingly costly, and, therefore, increasingly unwise.” *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1327 (4th Cir. 1972). “Given the realities, the farther along the initially chosen path the agency has

trod, the more likely it becomes that any later effort to bring about a new choice . . . will prove an exercise in futility” and “reconsideration would be a hollow gesture.” *Id.*

Here, allowing construction of Corridor H to begin without requiring the FHWA to consider alternatives to this unique highway segment will irreparably harm Plaintiffs and their members. The SEA acknowledges numerous adverse effects from the project: on the Wardensville Historic District, trenching across streams and rivers, and spoiling the viewshed, destroying intact older growth forest, fragmenting wildlife habitat. The attached declaration of VWC member Dr. Steven Krichbaum discusses the harm that project will cause to wood turtles, a potentially endangered species, and their habitat in the George Washington National Forest, by increased roadkill, loss of habitat, and making them more vulnerable to problematic scavenger species. *See* Exhibit 2. Changes caused by the Project would be harmful and irreversible to Great North Mountain. Those are but a few examples of the harms to property and the environment that the highway would inflict on Plaintiffs’ members. As the attached declaration demonstrates, Plaintiffs’ members’ interests and activities observing, enjoying, studying, and protecting the wildlife, flora, scenery, peace and solitude, and historical and cultural resources of the Potomac Highlands and George Washington National Forest will be injured as a result of FHWA’s failure to evaluate a reasonable, less destructive alternative – undertaking targeted (spot) improvements -- that would address the need for this project. The Fourth Circuit has long recognized these injuries as both cognizable and irreparable for purposes of a preliminary injunction as well as standing. *See, e.g. West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324, 329 (4th Cir. 2008). There is no legal remedy for those harms, and this injury is imminent, as

construction activities are scheduled to commence in less than one month.

III. The Balance of the Remaining Equities – Harm to Defendants and the Public Interest – Also Favor Plaintiffs.

Against the inevitable and irreparable injury that will occur to Plaintiffs and their members if construction is allowed to proceed, there is no identifiable harm as a result of this delay that outweighs this injury. The Government "cannot suffer harm from an injunction that merely ends an unlawful practice." *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)).

Here, there is no urgency in constructing this 6.8 mile segment of Corridor H, which already has been deferred for more than 25 years due to the fact that WV Route 55 has and continues to provide an acceptable level of service. Indeed, under the terms of the Settlement Agreement, WVDOT could have begun constructing the project years ago, had there been an actual need for a four-lane highway due to increased traffic. WVDOT deferred this project for 20 years precisely because it was not a critical infrastructure project. Since those traffic levels remain at virtually the same level as they were over 20 years ago, a delay in construction to allow this Court to decide the important issues in this case would cause no harm to either WVDOT or the public.

In any event, to the extent that injunctive relief will delay construction of the highway, this harm is outweighed by the irreparable injury to Plaintiffs if construction is permitted to proceed. As the Second Circuit has held, "compliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided that these costs must be discounted." *Steubing v. Brinegar*, 511 F.2d 489, 496 (2d Cir. 1975); *Society for the Protection of New Hampshire Forests v. Brinegar*, 381 F. Supp. 282, 289 (D.N.H. 1974) (delay in construction of the highway "is better than hasty and irreversible

action.”). Here, “the relatively short delay in construction that will be occasioned by a decision on the merits poses minimal risk of damage to the defendants in view of the extensive time anticipated for remaining construction. Indeed, further expenditure of public funds at this time may be wasted to the extent of any decision on the merits adverse to the Defendants.” *Environmental Defense Fund v. U.S. Army Corps of Engineers*, 324 F. Supp. 878, 881-82 (D.D.C. 1971); *see also I-291 Why? Association v. Burns*, 372 F. Supp. 223, 263 (D. Conn. 1974), *aff’d*, 517 F.2d 1077 (2d Cir. 1975) (same). The public interest in enforcement of the law and avoidance of environmental destruction and potentially unnecessary governmental expenditures favors Plaintiffs.

NO OR ONLY A NOMINAL BOND SHOULD BE IMPOSED

The district court retains the discretion to waive Rule 65(c)’s security requirement, provided that this issue is addressed directly by the Court. *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013). Courts have exercised this discretion to set nominal bond amounts in public interest litigation. *South Carolina v. United States*, 329 F. Supp. 3d 214, 238 (D.S.C. 2018), *vacated and remanded on other grounds*, 912 F.3d 720 (4th Cir. 2019). As the Court further noted “when a party is seeking to vindicate the public interest served by NEPA, a nominal bond amount is proper.” *Id.* Here, given Plaintiffs’ status as nonprofit organizations acting as private attorneys general to enforce statutory obligations and the public interest nature of this case, Plaintiffs request that either no or a nominal bond be imposed.

CONCLUSION

For the foregoing reasons, this motion for a preliminary injunction should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of West Virginia using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: August 28, 2026

/s/Bradley Stephens
Bradley Stephens