UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

NATIONAL COUNCIL OF NEGRO WOMEN, EDUCATION, ECONOMICS, ENVIRONMENTAL, CLIMATE AND HEALTH ORGANIZATION, *et al.*,	)	
Plaintiffs	)	Civil Case No. 22-cv-314-HSO-BWR
v.	)	
PETER BUTTIGIEG, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. Introduction

The Interconnecting Gulfport project, also called the Airport Extension Road, is a road proposed to run through the large wetland complex to the south and west of the U.S. 49/Interstate 10 interchange. These wetlands are part of the Turkey Creek watershed, which the U.S. Environmental Protection Agency has designated as a priority watershed for implementation of collaborative watershed protection and restoration efforts to restore water quality. The wetlands themselves are considered an Aquatic Resource of National Importance with functional on-site values important to the Turkey Creek Watershed.[1] The wetlands are directly adjacent to or upstream from two historic neighborhoods: the Forest Heights neighborhood, and the Turkey Creek community.

The U.S. Department of Transportation ("USDOT") is supplying $20,000,000 in federal funding to the Mississippi Department of Transportation ("MDOT") for the Airport Extension Road through a program called BUILD grants. The City of Gulfport actually applied for the grant, and stated that "the purpose of the project is to provide a transportation infrastructure network in good operating condition that will encourage existing and *support new commercial and economic growth.*"[2] The grant application explains in detail the way the Airport Road Extension would stimulate new building and commercial growth, predicting how much commercial space could be built - 2,800,000 square feet – and the number of acres that would be opened to development – 380 – in an area "primed for quick development."[3] The grant application further stated that the project would relieve traffic congestion on U.S. Highway 49,

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[1] AR 6694 [Doc 37-2, pg. 103]. References to the Administrative Record in this matter will be both to the Bates number appearing on the document, and to the ECF document filing number and page.
[2] AR 16243 [Doc 53-8, pg. 133](emphasis supplied).
[3] AR 16244 [Doc 53-8, pg. 134]

and would provide emergency access to an adjacent outlet mall, but was quite clear that "[t]he largest anticipated benefit of this project is more of an economic impact than a direct project benefit . . . "[4]

The USDOT stated that the justification for the project was that it aligns with criteria related to safety and economic competitiveness. The project was stated to "reduce congestion, will provide additional access to public rights-of-way in the city's least restrictive commercial zone, and will supplement the city's regional economic competitiveness." The USDOT found with high confidence that the costs of the project would exceed its benefits but approved the grant anyway.[5]

A June 2022 Preliminary Environmental Assessment ("the Preliminary EA") prepared by a contractor for the City of Gulfport on behalf of the USDOT defined the purpose of the project exclusively as improving traffic flow on U.S. 49.[6] However, after commenters noted this purpose was inaccurate, as well as other flaws in the Preliminary EA, the September 2022 Final Environmental Assessment ("EA" or sometimes "Final EA") defined the project purpose as both traffic flow and economic growth: "a purpose is of this project is to provide transportation infrastructure that will improve the flow of vehicular traffic around the Interstate 10 and US 49 interchange *and that will encourage existing and support new commercial and economic growth*."[7] The EA does not state any other purpose for the project, although it also states that "the project addresses BUILD grant criteria related to safety, and economic competitiveness." *Id.* USDOT's Federal Highway Administration signed a Finding of No Significant Impact

[4] AR 16259 [Doc 53-8, pg. 149]
[5] AR 1806-07 [Doc 24-3, pgs. 66-67]
[6] AR 8856 [Doc 40-3, pg. 29]
[7] AR 15480 [Doc 53-5, pg. 23](emphasis supplied).

("FONSI") on September 14, 2022, stating without further explanation that the EA was "determined to adequately and accurately discuss the needs, environmental issues, and impacts of the proposed project and mitigation measures," and concluding that "an Environmental Impact Statement is not required."[8]

As explained in detail below, USDOT's EA and FONSI violate the Administrative Procedure Act and the National Environmental Policy Act for four reasons:

1. The agency did not identify and analyze the impacts of reasonably foreseeable new commercial and economic growth that would be directly or indirectly caused by the Airport Extension Road.
2. The agency refused to evaluate reasonable alternatives to the Airport Extension Road because the alternatives were not within the City of Gulfport's jurisdiction.
3. The agency's conclusion that the Airport Extension Road would reduce traffic congestion is arbitrary and capricious for several reasons, including that it did not take into account the traffic that would be generated by the commercial development that is a primary purpose of the project.
4. The agency's conclusion that destruction of nationally important wetlands by the project would be mitigated to insignificance is arbitrary and capricious because it is based on conclusory statements not supported by facts in the administrative record.
5. As a consequence of the agency's failure to accurately depict the impacts on the human environment of the project, the determination that no Environmental Impact Statement is required is arbitrary, capricious and contrary to law.

[8] AR 15456 [Doc 53-4, pg. 94]

II. Legal Background

A. Summary Judgment and Standard of Review Under the Administrative Procedure Act

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

Challenges to agency decisions under the National Environmental Policy Act ("NEPA") are reviewed under the Administrative Procedure Act, 5 U.S.C. § 701–706 ("APA") to determine whether the decision was "arbitrary, capricious, or contrary to law." Agency action must be set aside if the agency relies on factors which Congress did not intend for it to consider, entirely fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*, 463 U.S. 29, 43 (1983). An agency must also "consider all relevant factors raised by the public comments and provide a response to significant points within." *Chamber of Com. v SEC*, 85 F.4th 760, 774 (5th Cir. 2023).

Under the arbitrary and capricious standard, a reviewing court must "studiously review the record," *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992), and "make a searching and careful inquiry into the facts...," *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 230 (5th Cir. 2007), to ensure that the agency "reasonably considered the relevant issues and reasonably explained the decision." *Chamber of Com.*, 85 F.4th at 774.

The arbitrary and capricious standard is deferential, but as the Fifth Circuit has affirmed it has "serious bite." *Data Mktg. P'ship v. DOL*, 45 F.4th 846, 856 (5th Cir. 2022). When an agency does not use any method and makes only generic statements, the Court cannot "defer to a void." *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010). *See also Sierra Club v. Van Antwerp*, 709 F. Supp.2d 1254, 1261 (S.D. Fla. 2009), *aff'd*, 362 F.App'x 100 (11th Cir. 2010) ("[T]he Court is unable to defer to the Corps' unsupported conclusion.").

APA cases are generally decided on the record before the agency. However, as explained in the Plaintiffs' Motion for Consideration of Extra-Record Evidence filed in this case [Doc. 66] in National Environmental Policy Act cases the Fifth Circuit permits appropriate extra-record evidence like that submitted with this motion to determine whether the agency adequately considered the environmental impact of a particular project. *E.g.*, *Coliseum Square Ass'n., Inc. v. Jackson*, 465 F.3d 215, 247 (5th Cir. 2006).

B. The National Environmental Policy Act

NEPA requires that federal agencies "take a 'hard look' at the environmental consequences before taking a major action." *Baltimore Gas and Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). NEPA's "look before you leap" principle ensures that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Equally important, NEPA's disclosure requirements foster meaningful public participation in the decision-making process. *Id.*

Under the Council on Environmental Quality's NEPA regulations, agencies generally perform an Environmental Assessment for a proposed action that is not likely to have significant

effects. 40 C.F.R. 1501.5 (2022).[9] If the agency determines there will be no significant impacts, it issues a Finding of No Significant Impact and no further review is required. *General Land Office of Tex. v. United States DOI*, 947 F.3d 309, 315 (5th Cir. 2020). If the Finding of No Significant Impact is based on mitigation of impacts, the agency shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts. 40 C.F.R. 1501.6(c). The agency must provide non-conclusory record evidence demonstrating that the project's impacts would be mitigated below the level of significance. *O'Reilly*, 477 F.3d at 230.

"[A decision to forego preparation of an EIS may be unreasonable for at least two distinct reasons: (1) the evidence before the court demonstrates that, contrary to the FONSI, the project *may* have a significant impact on the human environment,[] or (2) the agency's review was flawed in such a manner that it cannot yet be said whether the project may have a significant impact . . . ." *Fritiofson et al. v. Alexander*, 772 F.2d 1225, 1243 (5th Cir. 1985)(citations omitted).[10]

For either an EA or an EIS NEPA requires agencies "to the fullest extent possible," consider the "reasonably foreseeable environmental effects" of a proposed agency action and "a reasonable range of alternatives," 42 U.S.C. § 4332, including the direct, indirect, and cumulative impacts. 40 C.F.R. §§ 1501.5, 1508.1 (2022). *"Reasonable alternatives* means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action." 40 C.F.R. § 1508.1(z) (2022) (emphasis added).

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[9] As relevant here the Council on Environmental Policy's NEPA implementing regulations were updated in May 2022. The Final EA for the Airport Extension Road was signed in September 2022 but generally cited to a prior version of the CEQ regulations. *E.g.*, AR 15620.

[10] Abrogated on other grounds by *Sabine River Auth.*, 951 F.2d 669.

Described as "the heart" of the NEPA process, the agency must "[r]igorously explore and objectively evaluate all reasonable alternatives" to the proposed action. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 450 (5th Cir. 2005). The alternatives discussion must be "sufficient to permit a reasoned choice among different courses of action," *Isle of Hope Historical Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 646 F.2d 215, 220 (5th Cir. 1981).

The agency must also consider direct and indirect impacts. Direct effects of a proposed action are "caused by the action and occur at the same time and place," while "indirect" impacts are defined as those that are:

> caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include *growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate*, and related effects on air and water and other natural systems, including ecosystems.

40 C.F.R. § 1508.1(g) (2022) (emphasis added). Cumulative impacts are the result of any past, present, or reasonably foreseeable future actions. *Id.* § 1508.1(g) (2022); *Fritiofson et al. v. Alexander*, 772 F.2d 1225, 1243 (5th Cir. 1985)[11] (cumulative impact review must include "actions that are not yet proposals and from actions—past, present, or future—that are not themselves subject to the requirements of NEPA.").

The Fifth Circuit lays out a five–step test for a "meaningful cumulative-effects study."

> (1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

Fritiofson, 772 F.2d at 1245.

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[11] Abrogated on other grounds by *Sabine River Auth.*, 951 F.2d 669.

"Reasonably foreseeable" means those "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *City of Shoreacres,* 420 F.3d at 453; *see* 42 U.S.C. § 4332(C)(ii); CEQ, Memo Re: Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question No. 18, 46 Fed. Reg. 10826 (Mar. 23, 1981, as amended 1986) [hereinafter "Forty Most Asked Questions About NEPA"].

In the context of highway or road projects, growth spurred by the project (sometimes called "induced growth") is reasonably foreseeable when it is one of the reasons for the project. *E.g., Davis v. Coleman*, 521 F.2d 661, 675 (9th Cir. 1975) (requiring cumulative impacts analysis where "[t]he growth-inducing effects of the Kidwell Interchange project are its raison d' etre").

III. Plaintiffs Have Standing to Bring This Suit

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and the Plaintiff organizations have Article III standing, including associational standing. "Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). The first part of the *Hunt v. Washington Apple* test requires at least one member of one of the plaintiffs to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the

defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quotation omitted).[12]

> Under NEPA "[t]he procedural injury implicit in agency failure to prepare an EIS—the creation of a risk that serious environmental impacts will be overlooked—is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project [such that they can] expect [ ] to suffer whatever environmental consequences the project may have."

Sabine River Auth., 951 F.2d at 674.

Organizations may also have standing in their own right by meeting the same standing test that would apply to members. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). An organization can show the required "identifiable trifle" of injury by showing that the agency action has "perceptibly impaired" the organization's "core business activities." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024).

With respect to the causation and redressability elements of the standing test, in the case of a procedural injury like failure to comply with NEPA the ordinary showing is relaxed and the "litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). The plaintiff is not required to prove that adhering to the procedure would have produced a different outcome because "'the likelihood and extent of impact are properly addressed in connection with the merits' in a harmless error analysis." *United States v. Johnson*, 632 F.3d 912, 921 (5th Cir. 2011). In this case the failures under NEPA demonstrate causation, and reversal and a remand would supply this redress for Plaintiffs' injuries.

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[12] The presence of one party with standing is sufficient in a multi-party case. *Sabine River*, 951 F.2d at 674.

The declaration submitted with this motion establishes each of the necessary elements for standing. Exhibits 1. Declarant Katherine Egland testifies in detail about her long term and intimate connection with the area that will be affected by this project, and how she will be injured if the project is built, particularly without adequate consideration of environmental impacts. Ms. Egland is and has been a member of the Sierra Club, Healthy Gulf and the National Council of Negro Women, and is a founder of Education, Economics, Environmental, Climate and Health Organization (EEECHO). For 30 years she has been visiting Turkey Creek and the surrounding community regularly, she currently visits on average once a month, and she plans to continue visiting for as long as she is able. Through EEECHO, she has led educational tours for students and other residents to Turkey Creek to teach about the ecosystem's unique value. *Id.* ¶ 8–9. *Id.* ¶ 5–7. Additionally, the project's wetland destruction will harm EEECHO as an organization because it will harm the organization's core mission, and its office will be exposed to the increased flooding potential. *Id.* ¶ 17.

IV. The US DOT Violated NEPA by Failing to Evaluate the Reasonably Foreseeable Impacts of Induced Development

A. Undisputed Material Facts

1. The City of Gulfport's application for a BUILD Grant emphasized repeatedly that a primary purpose of the Airport Road Extension is to spur new commercial and economic growth along the route.[13] The application states that the project "will also create new public rights-of-way for businesses to locate along,"[14] "could creat[e] up to 2,800,000 s[quare] f[eet] of new retail development";[15] that lack of connectivity has "stifled development.";[16] that the "largest

[13] AR 16237 [Doc 53-8, pg. 127]
[14] AR 16244 [Doc 53-8, pg. 134]
[15] AR 16235 [Doc 53-8, pg. 125]
[16] AR 16259 [Doc 53-8, pg. 149]

anticipated benefit of this project is more of an economic impact than a direct project benefit," that the project will "promote future development by providing direct public access and services to 380 acres of real estate in the City's least restrictive and most traveled commercial zone";[17] that "this newly accessible commercial area will be primed for quick development";[18] and "private-owners and developers have been engaged and are in support of this project.

2. The Final EA states a purpose of the project is to "support new commercial and economic growth…[and] provide additional access to public rights-of-way in the city's least restrictive commercial zone [to] supplement the city's regional economic competitiveness."[19] The EA also states that a benefit of the project is economic competitiveness and the increased accessibility for commercial and residential growth.[20] The EA acknowledges that "[s]econdary, or indirect impacts, would mainly be the result of induced development that would be encouraged by construction of the Preferred Alternative C. …. For a transportation project in a somewhat undeveloped area such as this proposed project, induced development can occur at any location where access is allowed along the roadway."[21] The project will be expected to increase the rate of development in the area.[22] "The increased accessibility of the area will enhance the area's potential for both commercial and residential development."[23]

3. A Mississippi Department of Transportation employee commented that the Preliminary EA "does not address the anticipation of any future development which is an

[17] AR 16244 [Doc 53-8, pg. 134]
[18] AR 16236 [Doc 53-8, pg. 126]
[19] AR 15480–81 [Doc 53-5, pgs. 23-24]
[20] AR 15622–24 [Doc 53-5, pgs. 165-167]
[21] AR 15621 [Doc 53-5, pg. 164]
[22] AR 15622 [Doc. 53-5, p.165]
[23] AR 15624 [Doc. 53-5, p. 167]

obvious purpose of the project."[24] The employee states that "[c]ommercial development resulting from the project is inevitable, there should be a discussion of what's anticipated . . ."[25] MDOT also stated to USDOT that a purpose of the project is to enhance economic development.[26]

4. Plaintiffs and other agencies provided extensive comments requesting that the agency review the direct, indirect and cumulative impacts of the project, including induced development.[27] For example, the U.S. Environmental Protection Agency stated that the Preliminary EA "does not provide sufficient information about the anticipated economic growth, commercial development, and development patterns that may be induced by this project." EPA identified that the Preliminary EA "does not discuss the anticipated new commercial and economic growth, does not mention the 380 acres of land that the project will allow public direct access, and provides no reference to the anticipated 'quick development . . .'[28] EPA stated the Preliminary EA "does not acknowledge and discuss the cumulative impacts on wetlands that could potentially result from this project and other reasonably foreseeable projects in the Turkey Creek Watershed…" *Id.*

6. Agency comments on the Preliminary EA also noted "[i]nduced development results in new traffic in the area. What are the indirect effects/projected traffic to be generated by this change in land use and development?"[29]

7. The Environmental Assessment nonetheless provides only cursory statements about indirect and cumulative effects of induced development:

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[24] AR 11603 [Doc 46-4, pg. 26]
[25] AR 11604 [Doc 46-4, pg. 27]
[26] AR 3716 [Doc 28-5, pg. 144]
[27] AR 18280–85 [Doc 53-20, pgs. 27-32]
[28] AR 18317 [Doc 53-20, pg. 64]
[29] AR 6806 [Doc. 37-4, p. 10]

> Long-term indirect cumulative effects would continue to occur. However, these effects, both beneficial and adverse, are difficult, if not impossible, to quantify…The proposed project would have the potential to result in incremental impacts to wetlands, habitat, and water quality. Reductions in wetlands and species habitat would create species competition for available food and shelter and, eventually, slight reductions in some wildlife populations. Close coordination and approval from the appropriate state and federal agencies would be required for any activity potentially affecting wetlands and habitat to ensure adverse effects would be avoided or reduced.[30]

8. In response to comments USDOT acknowledged induced development would be expected to occur but stated it would be speculative to arrive at a precise figure.[31]

B. **Analysis**

The undisputed facts establish that a, if not the, primary purpose of this road project is to bring about up to 380 acres and 2.8 million square feet of commercial real estate development in an area of undeveloped wetlands that are designated as an Aquatic Resource of National Importance.[32] This induced development is not just foreseeable, it is the *raison d'etre* of the project. *See Davis v. Coleman*, 521 F.2d at 675. The area to be opened up by the Airport Extension Road is described as "primed for quick development."[33] It is emphasized to be in the city's "most aggressive commercial zone." *Id*.

The expected and intended aggressive development will result in an increase in impermeable surfaces, destruction of wildlife habitat, increases in traffic and other impacts. Despite this fact, the EA contains only vague and conclusory statements about this development and its impacts. As a consequence, the agency has failed to consider an important aspect of the problem, and its analysis does not show a rational connection between the facts found and the conclusions drawn.

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[30] AR 15623 [Doc 53-5, pg. 166]
[31] AR18334–35 [Doc 53-20, pgs. 81-82]
[32] AR 16244, 6694 [Doc 58-3, pg. 134], [Doc 37-2, pg. 103]
[33] AR 16244 [Doc 58-3, pg. 134]

It is well established that a NEPA review of new road projects requires consideration of the potential induced development of adjacent land. "Development induced by the construction of a new highway is a secondary effect that must be considered in the EIS for the proposed highway." *Sierra Club v. Fed. Hwy. Admin*., 435 F.App'x 368, 375 (5th Cir. 2011). As the Firth Circuit stated: "[t]he extent of [a cumulative impact] analysis will necessarily depend on the scope of the area in which the impacts from the proposed action will be felt and the extent of other activity in that area." *Fritiofson*, 772 F.2d at 1246. Where a new overpass is constructed over a "busy urban intersection[]," for example, induced impacts are not a concern. *See, e.g., Fath v. Tex. Dep't of Transp.*, 924 F.3d 132, 140 (5th Cir. 2018). In contrast, here, where a primary propose of the Airport Extension Road is to provide access to 380 acres of undeveloped land where there is currently no access,[34] **"**a person of ordinary prudence" would conclude that induced impacts are "reasonably foreseeable" and must be addressed. *City of Shoreacres*, 420 F.3d at 453.

Additionally, NEPA requires consideration of the impacts from induced growth because the stated primary purpose of the Airport Extension Road is to stimulate economic and commercial growth. *Davis v. Coleman*, 521 F.2d at 675; *Friends of the Earth, Inc. v U.S. Corps of Eng'rs,* 109 F.Supp.2d 30, 41 (D.D.C. 2000) ("[s]ince the economic development of these areas [near the proposed casinos] is an announced goal and anticipated consequence of the casino projects, the Corps cannot claim that the prospect of secondary development is 'highly speculative[]' [and] must consider the growth-inducing effects of the casinos."); *N. Carolina All. for Transp. Reform, Inc. v. USDOT*, 151 F.Supp.2d 661, 690 (M.D.N.C. 2001) ("the FEIS

[34] AR 18317 [Doc 53-20, pg. 64]

expressly states that the Western Section will attract residential and business development."); *Sierra Club v. Marsh*, 769 F.2d 868, 878 (1st Cir. 1985); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F.Supp.2d 1298, 1326 (S.D. Fla. 2005).

USDOT apparently asserts that it cannot conduct any analysis both because the amount of development is too speculative and also because the analysis is too difficult to quantify.[35] *Fritiofson* provides the apt response to the agency's claim: "Reasonable forecasting and speculation is… implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" 772 F.2d at 1244. Gulfport and MDOT even estimated the number of acres of wetlands that would be lost [380 acres] and the number of square-feet of commercial development [2,800,000 square-feet],[36] Numerous EAs show best practices for evaluating future impacts, *e.g*. *Sierra Club v. Fed. Hwy. Admin*., 435 F.App'x at 375-76 (convening panel of experts and conducting survey of developers to adequately assess induced impacts), and readily-available sources and trainings advise agencies on how to conduct induced growth analyses.[37] The EA indisputably did not include the required five-prong cumulative impact analysis, *see Fritiofson*, 772 F.2d 1225.

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[35] AR 18334–35 [Doc 53-20, pgs. 81-82]
[36] AR 18317, 16244 [Doc 53-20, pg. 64], [Doc 58-3, pg. 134]
[37] *E.g.*, USDOT, Fed. Hwy Admin., NEPA and Transportation Decisionmaking: Questions and Answers Regarding the Consideration of Indirect and Cumulative Impacts in the NEPA Process (last visited Oct. 8, 2024), *available at* https://www.environment.fhwa.dot.gov/nepa/QAimpact.aspx (listing multiple references and trainings and stating "Surveys and consultation with local landowners, developers, real estate agencies, or other individuals with special expertise within the proximity of the project study area can yield useful information."); Forty Most Asked Questions About NEPA, Question No. 18 ("It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory."); EPA, *Evaluation of Ecological Impacts of Highway Development* at 38 (methodology for cumulative impacts analysis including projected development) (Apr. 1994), *available at* https://www.epa.gov/sites/default/files/2014-08/documents/ecological-impacts-highway-development-pg_0.pdf.

Both EPA and MDOT raised the concern that USDOT must consider induced growth early on in the process.[38] The opinion of "agencies having pertinent expertise" is "undeniably relevant" and "a reviewing court 'may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.'" *See Davis v. Mineta*, 302 F.3d. 1104, 1123 (10th Cir. 2002) (citing *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir.1983)).

USDOT's vague reference to approvals from other agencies and City of Gulfport ordinances in the responses to comments adds nothing to its analysis.[39] Although it is unclear what USDOT meant by these references, it is clear that the agency may not rely on the City's ordinances to control impacts from induced development at some point in the future. Agencies must carry out their own independent analysis rather than rely on another permitting body to address the impacts of the project at issue. *Env't Def. Ctr. v. Bureau of Ocean Energy and Res. Mgm't,* 36 F.4th 850, 874 (9th Cir. 2022)(cannot rely on later permit to reduce impacts to insignificance); *North Carolina v. FAA.*, 957 F.2d 1125, 1129–30 (4th Cir. 1992)(agency does not satisfy NEPA "by simply relying on another agency's conclusions about a federal action's impact on the environment"); *Great Basin Res. Watch v. Bureau of Land Mgm't*, 844 F.3d 1095, 1103–04 (9th Cir. 2016)("[A] failure to discuss [environmental impacts] in an EIS was not excused by the fact that the facility 'operate[d] pursuant to a state permit under the Clean Air Act,' because '[a] non-NEPA document ... cannot satisfy a federal agency's obligations under NEPA'").

[38] AR 18317, 11602-4 [Doc 53-20, pg. 64], [Doc 46-4, pgs. 25-27]
[39] AR 15623, 18335 [Doc 53-5, pg. 166], [Doc 53-20, pg. 82]

In addition, there are no facts in the record that substantiate the claim that other agencies or Gulfport city ordinances would prevent or mitigate impacts to the human environment to the point of insignificance. Commercial development requires parking lots, infrastructure, drainage and multiple other attendant impacts. The USDOT's conclusory statements do not address any of these issues.

The question really comes down to this: USDOT gave this project $20,000,000 based on a purpose of connecting commercial centers and encouraging "quick development" of up to 380 acres of wetlands. Yet when it was time to assess the impacts of that induced development the USDOT adopted the City of Gulfport's position that it was just too hard to say what development, if any, is reasonably foreseeable. This is contrary to NEPA and a plain failure to consider an important aspect of the impacts of the Airport Road Extension, and renders the Final EA and the Finding of No Significant Impact arbitrary and capricious.

V. The USDOT Violated NEPA by Refusing to Evaluate Reasonable Alternatives That Were Outside the Jurisdiction of the City of Gulfport

A. Undisputed Material Facts

1. The purpose and need is stated in the EA "to provide transportation infrastructure that will improve the flow of vehicular traffic around the Interstate 10 and US 49 interchange and that will encourage existing and support new commercial and economic growth."[40]

2. In October 2017 the Mississippi Department of Transportation issued a Planning and Environmental Linkage study ("PEL study") which screened alternatives for improving mobility and improving safety along U.S. 49 and the ramps to I-10.[41] The PEL study evaluated seven

[40] AR 15480 [Doc 53-5, pg. 23]
[41] AR 16192 [Doc 53-8, pg. 89]

projects intended to address this need. The Airport Road Extension ranked the lowest, after other projects such as improving the intersections on U.S. 49.[42]

3. The PEL study noted that four of the seven projects had "independent utility," including the Lorraine Road Interchange Improvements, U.S. 49 Intersection Improvements, the C/D System Concepts, and the Airport Road Extension. *Id.*

4. The PEL study concluded that the Lorraine Road Interchange and the US 49 Intersection Improvements were "the clear winners" because of the "relatively low cost" and "improvement in mobility and safety."[43]

5. The PEL study explained: "The Airport Road Extension was the lowest scoring concept because although it does have independent utility, it would do little to divert traffic away from US 49 without the interchange with 1-10. This concept also had more environmental impacts than the other concepts."[44]

6. The EA states that only alternatives "identified in the PEL study" were carried forward for further consideration.[45]

7. The EA states that "[t]here were seven projects recommended in the PEL study, however the Airport Road extension is the only corridor that falls within the City's jurisdiction… The other 6 projects are improvements to MDOT facilities."[46] The EA also states "[a]lthough five of the seven projects recommended in the PEL study are interrelated and associated with the US 49/I-10 interchange, the Airport Road extension project is the only one that has independent utility." *Id.*

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[42] AR 16208–09 [Doc 53-8, pgs. 98-99]
[43] AR 16208 [Doc 53-8, pg. 98]
[44] AR 16209 [Doc 53-8, pg. 99]
[45] AR 15482 [Doc 53-5, pg. 25]
[46] AR 15486 [Doc 53-5, pg. 29]

8. Sierra Club comments on the Preliminary EA explained that it "improperly rejected alternatives on the basis that they were not within the City's control," "does not adequately discuss why the City chose the alternative that ranked lower than all other options except the No-Build option in the PEL study," and "does not contain sufficient explanation about why the Airport Road extension has independent utility and other alternatives do not have independent utility."[47]

9. In response to comments the EA further states that "five of the seven projects in the PEL study are dependent upon each project's construction to deliver the desired transportation improvements."[48]

B. **Analysis**

USDOT asserts one primary reason for not evaluating other alternatives, including all of the higher-ranked alternatives in the PEL study: because the Airport Road Extension is the only alternative "that falls within the City's jurisdiction." It is less clear whether it also refused to consider the other, higher ranked alternatives because it thought the Airport Extension Road was the only alternative with "independent utility." In any case both of these reasons for refusing to consider better alternatives are contrary to the administrative record, and contrary to law.

First, the USDOT's failure to evaluate alternatives that are outside of the City's jurisdiction violates NEPA and its implementing regulations as a matter of law. NEPA itself and the CEQ's definition of "reasonable alternative" do not limit reasonable alternatives to those within any party's jurisdiction, instead requiring "a reasonable range of alternatives that are

[47] AR 18286–87 [Doc 53-20, pgs. 33-34]
[48] AR 18326 [Doc 53-20, pg. 73]

technically and economically feasible, and meet the purpose and need for the proposed action." 40 C.F.R. § 1508.1(z) (2022).

Agencies are required to consider reasonable alternatives even if they are outside the agency's jurisdiction. *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974)("[t]he agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide"); *see also* Forty Most Asked Questions About NEPA, Question 2a ("[i]n determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative.") and Question 2b ("An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable"). There is no suggestion in the EA that the better alternatives in the 2019 PEL study are not reasonable and technically and economically feasible; rather they are simply dismissed as outside the City of Gulfport's jurisdiction.

As a factual matter the administrative record establishes that the project's purpose and need is *not* to build a project within the City of Gulfport's jurisdiction. The purpose and need is "to provide transportation infrastructure that will improve the flow of vehicular traffic around the Interstate 10 and US 49 interchange and that will encourage existing and support new commercial and economic growth."[49]

The USDOT's claim that the Airport Extension Road is the only one with independent utility – although it is unclear whether this was actually a basis for rejecting other alternatives – is also directly contrary to the record. The PEL study actually states that the higher-ranked

[49] The Court may also note that the actual recipient of the BUILD grant is the Mississippi Department of Transportation, and the City of Gulfport is a sub-recipient. AR 18375 [Doc 53-20, pg. 122], AR 15480 [Doc 53-5, pg. 23]

Lorraine Road Interchange Improvements, U.S. 49 Intersection Improvements, and the C/D System Concepts all have "independent utility."[50] The USDOT's demonstrably incorrect statement about independent utility is "an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

For these reasons, the USDOT's failure to consider other reasonable alternatives for the project purposes violate NEPA and its implementing regulations and are arbitrary and capricious.

VI. The USDOT's Conclusion That the Airport Road Extension Will Relieve Traffic Congestion Is Arbitrary and Capricious

A. Undisputed Material Facts

1. The EA defines the purpose and need of the project as "a purpose of this project is to provide transportation infrastructure that will improve the flow of vehicular traffic around the Interstate10 and US 49 interchange and that will encourage existing and support new commercial and economic growth."[51]

2. The project "could create up to 2,800,000 [square feet] of new commercial development."[52]

3. The Preliminary EA included in Appendix B what were stated to be traffic modeling outputs.[53]

4. An MDOT employees observed "[s]eems the project does little for the US 49 Traffic and seems a stretch to state the need is for emergency vehicles."[54]

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[50] AR 16208–09 [Doc 53-8, pgs. 98-99]
[51] AR 15480 [Doc 53-5, pg. 23]
[52] AR 16244 [Doc 53-8, pg. 134]
[53] AR 5066–77 [Doc 31-3, pgs. 36-47]
[54] AR 11596 [Doc 46-4, pg. 19]

5. Sierra Club's comments on the Preliminary EA included the report of expert traffic engineer Dr. Adam Kirk, who explained the USDOT information in Appendix B actually showed the project increased delays, and that actual delays will be even worse if the traffic analysis accounted for the additional traffic from the expected commercial development.[55]

6. Dr. Kirk's July 2022 report explains that:

> A retail development of this size would be a regional traffic generator, bringing in additional traffic from outside the adjacent street system. The ITE Trip Generation Manual 11 edition, which is the national standard for estimating trip generation, estimates that 2.8 million square feet of retail development to generate over 78,000 trips per day. None of this additional traffic generated is accounted for in the traffic projections for the project, nor is it accounted for in the traffic analysis. This high volume of traffic on the Airport Road Extension will further impact traffic operations on US 49 at the 1-10 interchange, significantly more than is shown to occur with only the road connection."[56]

7. The Final EA does not specifically address or dispute the facts stated in Dr. Kirk's report. However, it includes a new August 2022 modeling report by Neel-Schaeffer Associates "in response to the public hearing process" question of "whether or not the proposed project would result in any improvements in the US 49 corridor."[57] The August 2022 Neel-Schaeffer report details what changes were made from the modeling results in Appendix B of the Preliminary EA. The changes listed do not include any consideration of the additional traffic associated with commercial development that is a primary purpose of the project.[58]

8. USDOT does not state in any of the traffic reports or elsewhere in the EA why it did not consider the additional traffic associated with the development that is a primary purpose of the project.

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[55] AR 11820–30 [Doc 46-5, pgs. 146-156].; *see also* AR 18275–76 [Doc 53-20, pgs. 22-23]
[56] AR 11821 [Doc 46-5, pg. 147]
[57] AR 16313–31 [Doc 53-8, pgs. 203-221]
[58] AR 16317–18 [Doc 53-8, pgs. 207-208]

9. One of the City of Gulfport's contractors reviewed the August 2022 modeling study and asked "is there a way to look like we have more delay savings?" Another contractor replied "[t]echnically, you could but it would likely not be what you're looking for and it is not a standard measure for these sorts of things." The contractor further notes that the average delay for side streets increases, and taking all the intersections together "looking at only delay might show an improvement or very well no improvement or a minor increase."[59]

10. There was no opportunity to provide public comment on the August 2022 Neel-Schaeffer study. However, Plaintiffs did have Dr. Adam Kirk evaluate the study. By separate motion filed contemporaneously with this motion [Doc.66] the Plaintiffs request that the Court consider Dr. Kirk's report to allow proper evaluation of the technical subject matter of the August 2022 Neel-Schaeffer study. Dr. Kirk's report demonstrates that (a) the August 2022 study did not include consideration of additional traffic associated with commercial development; using the same methodology as USDOT's August 2022 traffic study, (b) including the traffic that would result from the commercial space overwhelms the intersections at U.S. 49, and (c) the August 2022 report used incorrect assumptions about the operation of turning lanes, which resulted in overestimating the improvements in traffic flow.

B. **Analysis**

Though NEPA does not prohibit "unwise" agency actions, it does "prohibit[] uninformed" agency actions. *Robertson*, 490 U.S. at 351. While the USDOT may be able to proceed with a project where the costs outweigh the benefits, the agency cannot "entirely fail[] to

[59] AR 11950–51 [Doc 47-2, pgs. 28-29]

consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, like the traffic that will result from a project designed to encourage commercial development.

As detailed in Section IV.A above, the project's primary purpose is to spur commercial development. As a logical consequence traffic will increase as a result of the project, causing increased delays. USDOT apparently does not dispute Dr. Kirk's July 2022 report that induced development would bring about increased traffic counts. Dr. Kirk's July 2022 report explained that study ignored the additional 78,000 trips per day that would result from 2.8 million square feet of retail development that would "significantly" worsen traffic.[60] However, the EA fails to account for any traffic that would result from development of whatever scale in this "newly accessible commercial area [that] would be primed for quick development." USDOT also does not dispute at any point in the record that the modeling in Appendix B of the Preliminary EA study showed that the project would actually make traffic delays worse. *See Chamber of Com.*, 85 F.4th at 774, 780 (agency is required to respond to significant points in comments and violated APA by failing to respond to comments to conduct a proper cost-benefit analysis).

The August 2022 traffic modeling is apparently the basis for the statement in the EA that while the project has a negative cost/benefit ratio, it will provide access that is "in some cases, quicker than currently provided, while modestly decreasing transportation costs to consumers."[61] However, the undisputed facts show that the August 2022 report continues to ignore the traffic growth attributable to increased commercial development from the project.[62] In addition, the

[60] AR 11821 [Doc 46-5, pg. 147]
[61] AR 15481 [Doc 53-5, pg. 24]
[62] AR 16313–31 [Doc 53-8, pgs. 203-221]

correspondence among the consultants preparing the study demonstrates that the project may not reduce traffic delays even if the traffic from induced growth is ignored.[63]

In a similar case, the Middle District of North Carolina found that using identical data to analyze the "build and no-build" alternatives was arbitrary and capricious when the agency did not produce evidence that construction of the road would not spur or accelerate development, and in fact the EIS stated that development would occur. *N.C. Alliance for Transp. Reform, Inc. v. United States DOT*, 151 F.Supp.2d 661, 689-90 (M.D. N.C. 2001). Here the Final EA states that development is expected to occur along the roadway,[64] and the record is abundantly clear that a primary if not the primary purpose of the project is commercial development in currently undeveloped areas.

Traffic impacts are "an important aspect of the problem," *State Farm*, 463 U.S. at 43, because one purpose of the project is supposed to be reducing congestion, and the EA relies on traffic and related safety and reliability benefits to justify this money-losing project. S*ee Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (since the agency "*chose* to trumpet the benefits [of the activity] as a 'selling point,' for the [] project, …NEPA therefore requires full disclosure and analysis of their costs.").

While USDOT's new traffic study shows it "was aware of [Sierra Club's] concern…awareness is not itself an explanation." *Ohio v. EPA*, 144 S. Ct. 2040, 2054 (2024). Nowhere in the EA did USDOT explain why it did not account for the increased traffic that would result from the commercial development that is a primary purpose. *Id.* Instead, USDOT "sidestep[ped]" the issue. *Id.* at 2055. *See also Calumet Shreveport Ref., LLC v. EPA*, 86 F.4th

[63] AR 11950–51 [Doc 47-2, pgs. 28-29]
[64] AR 18335 [Doc 53-20, pg. 82]

1121, 1140–43 (5th Cir. 2023) (agency does not provide reasoned response where it "glosses over" and "leaves unrebutted" commenters' specific data). The agency is required to provide "high quality" information and "[a]ccurate scientific analysis." 40 C.F.R. § 1500.1.

The EA's findings on traffic congestion are arbitrary and capricious and must be reversed on this basis.

VII. DOT's EA and Finding of No Significant Impact Is Arbitrary and Capricious Because the Administrative Record Does Not Include Information About How Impacts of the Project to Wetlands and Streams Will Be Mitigated.

A. Statement of Undisputed Material Facts

1. The Airport Extension Road will directly destroy at least 96 acres of wetlands and at least 1,450 linear feet of streams.[65] These wetlands are in the Big Lake-Bernard Bayou watershed, which has been designated as a priority watershed by the Mississippi Department of Environmental Quality and the EPA.[66]

2. The wetlands that will be destroyed for the Airport Extension Road "provide important biological and hydrological functions that assist in the sustenance of the ecological community and the human environment. The functional value of the on-site wetlands is important to the Turkey Creek watershed."[67] Ephemeral streams in the footprint of the road may contain floodplains that have not been mapped on FEMA maps.[68]

3. The Plaintiffs and other commenters specifically noted that there was no specific information about how these direct wetland and stream impacts would be mitigated and whether mitigation would be in the watershed.[69]

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[65] AR 15626 [Doc 53-5, pg. 169]
[66] AR 6693 [Doc 37-2, pg. 102]
[67] AR 6694, 18315 [Doc 37-2, pg. 103], [Doc 53-20, pg. 62]
[68] AR 18506 [Doc. 64-4, p. 8].
[69] AR 11514, 18290 [Doc 46-3, pg. 8], [Doc 53-20, pg. 37]

4. However, the EA contains no specific information about what mitigation will be provided. The EA simply states that "[u]navoidable impacts will be subject to compensatory mitigation to fully offset lost functions in accordance with applicable permit conditions issued by the [U.S. Army Corps of Engineers].[70]

5. The responses to comments repeat this statement with no firm information on what mitigation would take place or where it would be. *E.g.*,[71] ("mitigation would be performed in the Turkey Creek watershed pending availability… and/or any other wetland mitigation banks as required by USACE.");[72] (79 credits available from mitigation banks in the direct vicinity of Turkey Creek and approximately 1,000 credits available in the watershed, no wetland type or location stated).

6. The EA states that "the major long-term impact… of taking natural habitat and biotic communities and the associated displacement of wildlife… is expected to be mitigated by conservation of lands along and adjacent to Turkey Creek. These lands would be protected in perpetuity," AR 15623 [Doc 53-5, pg. 166], but no such lands or protection measures are identified in the EA.

B. **Analysis.**

As the Court stated in a previous decision concerning a road project in this area, the Fifth Circuit and other courts accept that reliance on mitigation measures may reduce a project's impacts below the level of significance that requires an EIS. *Ward Properties Gulfport, LLC et al. v. U.S. Army Corps of Eng'rs*, No. 10-cv-00008 at 25 (S.D. Miss. Nov. 21, 2012). An EA does not require as full a discussion of mitigation measures as required in a full EIS, but "mere

[70] AR 15588 [Doc 53-5, pg. 131]
[71] AR 15535 [Doc 53-5, pg. 78]
[72] AR 18335 [Doc 53-20, pg. 82] (same); AR 12515 [Doc 48-2, pg. 5] (same); AR 15623 [Doc 53-5, pg. 166]

perfunctory or conclusory language will not be deemed to constitute an adequate record and cannot serve to support the agency's decision not to prepare an EIS." *O'Reilly*, 477 F.3d at231.

O'Reilly is directly on point for this case. There the EA stated "compensatory mitigation for wetland functionality losses will be required" and "the permittee must purchase credits for 47.5 acres of pine flatwood/savannah wetlands, which will be acquired from 'an approved site within the same USGS hydrologic watershed.'" *Id.* at 233. The Fifth Circuit found this language "fails to sufficiently demonstrate that the mitigation measures adequately address and remediate the adverse impacts so that they will not significantly affect the environment." *Id.* at 233–34.

The language USDOT used here is even more conclusory. The amount of mitigation acreage is not identified, the mitigation may not even be within the watershed, and the type of mitigation required is not identified. *See also Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (a perfunctory description of mitigating measures is inconsistent with the "hard look" required by NEPA); *Ward Properties Gulfport, LLC*, No. 10-cv-00008 at 25 (administrative record devoid of evidence explaining whether mitigation area actually constituted wetlands).

At bottom USDOT is saying that another agency – the U.S. Army Corps of Engineers – will make sure that the admitted impacts of the project will be mitigated below the level of significance. As stated earlier, reliance on some later review by another agency to establish mitigation has been repeatedly rejected by the courts. *See supra* p. 16.

There is a good reason that NEPA does not allow agencies to simply rely on another agency to mitigate impacts in an unspecified way at some unspecified point in the future. Statutes governing aquatic resources, air pollution and other issues do not prohibit significant impacts to the human environment. Instead they apply whatever standards the statutory scheme

provides, which may well allow impacts that are significant. *E.g.*, *Makua v. Rumsfeld*, 163 F.Supp.2d 1202, 1218 (D. Ha. 2001) ("no jeopardy" opinion under the Endangered Species Act is not the equivalent of a finding of no significant impacts under NEPA).

The problem with deferring to unspecified mitigation inside or outside of the watershed is particularly acute in this case. The wetlands that will be destroyed by the construction of the Airport Extension Road have specific value "on-site."[73] Mitigating in some unspecified way in some other part of the watershed, or even outside the watershed, cannot replace these on- site values.

In addition to wetlands impacts the proposed project will potentially impact 1,450 linear feet of intermittent or ephemeral streams.[74] The EA and the administrative record contain no information of any kind about mitigation for the loss of 1,450 linear feet of streams. The EA also relies on some completely unspecified permanent protections for completely unspecified property along Turkey Creek to mitigate the admittedly major impacts on wildlife habitat.[75] In addition, the Final EA contains no information about the impacts of construction of the Airport Extension Road on adjacent wetlands, for example by disrupting the hydrology necessary for ecosystem health.

The EA contains only conclusory and unsupported statements that mitigation will reduce to insignificance the destruction of 96 acres of nationally important wetlands. It contains no information at all about mitigation of affected stream segments. The impact of the road on wildlife habitat is said to be mitigated by permanent conservation of lands along Turkey Creek, but no such lands are identified in the EA. For all these reasons, the discussion of impacts and

[73] AR 6694, 18315 [Doc 37-2, pg. 103], [Doc 53-20, pg. 62]
[74] AR 15588 [Doc 53-5, pg. 131]
[75] AR 15623 [Doc 53-5, pg. 166]

the finding that there will be no significant impacts from the project has no rational basis in the record, and is arbitrary and capricious.

VIII. Conclusion

As the Fifth Circuit has stated, "a decision to forego preparation of an EIS may be unreasonable either because the record shows that the project *may* have a significant impact on the human environment, or the review in the EA was flawed so that the Court cannot tell whether the project may have a significant impact. *Fritiofson et al. v. Alexander*, 772 F.2d at 1243.

In this case the record shows that the project will directly destroy almost 100 acres of wetlands that are acknowledged to have national significance and are critical to the Turkey Creek watershed. The project is intended to bring about 380 acres more of development in the same area. This is without doubt a significant impact on the human environment. The appropriate remedy is to vacate the Finding of No Significant Impact, invalidate the EA and remand for preparation of an EIS. Vacatur of an invalid agency decision remains the prescribed remedy in the Fifth Circuit. *Tex. Med. Ass'n v. United States HHS*, 110 F.4th 762, 779 (5th Cir. 2024).

To the extent injunctive relief is required, Plaintiffs request the Court convene an additional hearing on remedy. Alternatively, if the Court finds that the flaws in the Final EA prevent a determination whether the Airport Road Extension will lead to significant impacts on the human environment, the USDOT's decision should be vacated and the matter remanded to the agency for further proceedings.

Respectfully submitted this 18th day of October 2024,

/s/ Robert B. Wiygul
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Certificate of Service

I, Robert B. Wiygul, hereby certify that on this day, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice to all counsel of record.

Dated: October 18, 2024.

/s/ Robert B. Wiygul
Robert B. Wiygul