IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:14-cv-02749-PAB

AUDUBON SOCIETY OF GREATER DENVER,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondents.

RESPONSE BRIEF FOR RESPONDENT

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May 25, 2016

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this petition for review of agency action pursuant to 28 U.S.C. § 1331.

INTRODUCTION

The Audubon Society of Greater Denver ("Petitioner" or "Audubon Society") challenges the decision of the Assistant Secretary of the Army (Civil Works) approving the Chatfield Reservoir Storage Reallocation Final Integrated Feasibility Report and Environmental Impact Statement ("Final Report and EIS"). *See* AR041875-041876. In the Final Report and EIS, the United States Army Corps of Engineers ("Respondent" or "Corps") recommended increasing the availability of water for municipal and industrial water supply and other purposes through the reallocation of existing storage space in Chatfield Reservoir southwest of Denver to help meet existing and future water needs in the Denver metropolitan area. Petitioner argues that the approval of the Corps' recommendation violated Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1388, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h. The extensive administrative record concerning the Corps' recommendation, and the Assistant Secretary's decision approving that recommendation show, first, that the Corps properly focused its analysis under Section 404 of the CWA on the only activities that fell under the Corps' regulatory jurisdiction under the CWA, namely the Recreation Facilities Modification Plan and Compensatory Mitigation Plan. Second, the record also shows that, in recommending reallocation of water storage space in Chatfield Reservoir, the Corps complied with NEPA by considering a reasonable range of alternatives for the proposed project and fostering informed decisionmaking and providing sufficient information to foster public participation in compliance with NEPA.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Corps reasonably determined that the Chatfield Reallocation project was in compliance with Section 404 of the Clean Water Act, based on an evaluation of alternatives to the specific activities requiring a discharge into waters of the United States, rather than evaluating alternatives to relocating water for storage at Chatfield Reservoir, which does not require a discharge into waters of the United States.

2. Whether the Corps analyzed the environmental impacts from a reasonable range of alternatives to reallocating water storage at Chatfield Reservoir.

3. Whether the Corps' Environmental Impacts Statement provided sufficient information to the agency's decision-makers and the public regarding the potential environmental effects from the Chatfield Reallocation, thereby fostering informed decisionmaking and public participation.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Clean Water Act

The CWA establishes a comprehensive program designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA prohibits the discharge of pollutants, including dredged or fill material, into navigable waters unless authorized by a CWA permit. 33 U.S.C. § 1311(a). The CWA defines "navigable waters" as "waters of the United States," which, in turn, is defined by regulation. 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a).

Section 404 of the CWA authorizes the Corps to regulate discharges of dredged and fill material into "waters of the United States," through the issuance of permits. 33 U.S.C. § 1344. Subject to the guidelines "developed by the Administrator of the Environmental Protection

Agency [("EPA")] in conjunction with the Secretary of the Army," 40 C.F.R. § 230.2(a), and issued under Section 404(b)(1) of the CWA, 33 U.S.C. § 1344(b)(1) (referred to as the "Section 404(b)(1) Guidelines" and codified at 40 C.F.R. pt. 230), and other applicable criteria, the Corps will grant a permit application to discharge dredged or fill material into waters of the United States "unless the district engineer determines that [to do so] would be contrary to the public interest." 33 C.F.R. § 320.4(a)(1). The 404(b)(1) Guidelines provide that "[n]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). This requirement is commonly known as identifying the LEDPA (least environmentally damaging practicable alternative). A "practicable" alternative is one that is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2).

The Corps can reduce potential adverse impacts associated with a discharge by requiring mitigation as a condition of a permit. 33 C.F.R. § 325.4(a)(3); *see also* 33 C.F.R. § 320.4(r)(1) (resource losses are to "be avoided to the extent practicable"). "Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses." 33 C.F.R. § 320.4(r)(1). Mitigation to be accomplished through compensation "may occur on-site or at an off-site location." *Id.* While the Corps has authority to issue permits under Section 404, "[u]nder section 404(c) [of the CWA], the Administrator of [EPA] may exercise a veto over the specification by the U.S. Army Corps of Engineers . . . for the discharge of dredged or fill material." 40 C.F.R. § 231.1(a).

"Although the Corps does not process and issue permits for its own activities, the Corps authorizes its own discharges of dredged or fill material by applying all applicable substantive legal requirements, including public notice, opportunity for public hearing, and application of the section 404(b)(1) guidelines." 33 C.F.R. § 336.1(a). "Evaluation of the effects of the discharge of dredged or fill material, including consideration of the Section 404(b)(1) Guidelines, shall be included in an EA [Environmental Assessment], EIS [Environmental Impact Statement] or EIS Supplement prepared for all Corps actions in planning, design and construction where the recommended plan or approved project involves the discharge of dredged or fill material into waters of the United States." U.S. Army Corps of Engineers Planning Guidance Notebook, Engineer Regulation 1105-2-100, App. C., ¶ C-6(h), p. C-43, *available at* http://planning.usace.army.mil/toolbox/library/ERs/entire.pdf.

2. The National Environmental Policy Act

Congress enacted NEPA to establish a process for federal agencies to consider the environmental impacts of their actions. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). NEPA serves to inform agency decision-makers and the public regarding environmental effects from the proposed federal action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "In NEPA, Congress codified rules designed to 'focus[ ] both agency and public attention on the environmental effects of proposed actions' and thereby 'facilitate[ ] informed decisionmaking by agencies and allow[ ] the political process to check those decisions.'" *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 690 (10th Cir. 2015) (quoting *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009)). NEPA is thus an "essentially procedural" statute, *Citizens to Pres. Boomer Lake v. Dep't of Transp.*, 4 F.3d 1543, 1554 (10th Cir. 1993), in that it "does not mandate particular results, but simply prescribes the necessary process." *WildEarth Guardians*, 784 F.3d at 690

(quoting *Robertson*, 490 U.S. at 350); *Rags Over the Ark. River v. Bureau of Land Mgmt.*, 77 F. Supp. 3d 1038, 1053 (D. Colo. 2012) (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558 ("The purpose of NEPA is 'to insure a fully informed and well-considered decision,' not to dictate a particular outcome.")). *See also Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1166 (10th Cir. 2012) ("NEPA imposes procedural, information-gathering requirements on an agency, but is silent about the course of action the agency should take." (citation omitted)).

NEPA "requires only that [an] agency take a 'hard look' at the environmental consequences," *Rags Over the Ark. River*, 77 F. Supp. 3d at 1047-48 (quoting *Utah Shared Access All. v. U.S. Forest Serv.*, 288 F.3d 1205, 1207–08 (10th Cir. 2002)), before it takes "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). In order to satisfy this procedural requirement, before approving a project and commencing any major action, "an agency must prepare a 'detailed statement' . . . [on] the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented [and] alternatives to the proposed action." *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 868 (D.C. Cir. 1999) (citing 42 U.S.C. § 4332(2)(C)(i)-(iii)). *Accord Sierra Club v. Bostick*, No. CIV–12–742–R, 2013 WL 6858685, at *3 (W.D. Okla. Dec. 30, 2013), *aff'd by* 787 F.3d 1043 (10th Cir. 2015). The analysis and evaluation of "the projected environmental impacts of all '*reasonable* alternatives' for completing the proposed action" is '"at the heart of the environmental impact statement."' *City of Alexandria*, 198 F.3d at 866 (quoting 40 C.F.R. § 1502.14) (emphasis added).

Agency compliance with NEPA is bounded by a "rule of reason." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). Accordingly, in reviewing claims alleged under

NEPA, courts should consider only "whether [the] agency's decisions regarding which alternatives to discuss and how extensively to discuss them were arbitrary, keeping in mind that such decisions are 'necessarily bound by a rule of reason and practicality.'" *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) (quoting *Airport Neighbors All., Inc. v. United States*, 90 F.3d 426, 432 (10th Cir. 1996)).

B. Factual Background

Chatfield Reservoir is a water storage facility located within the South Platte River Basin and directly on the South Platte River southwest of Denver. AR036127. The Reservoir was constructed in 1973, AR036176, as part of the Chatfield Dam and Lake project, which Congress first authorized in 1950 for flood control purposes. *See* Flood Control Act of 1950, Pub. L. No. 81-516, 64. Stat. 163, 175; AR036125.[1]

In 1986, Congress legislated modifications of the Reservoir and authorized reassignment of a portion of the storage space "to joint flood control-conservation purposes, including storage for municipal and industrial water supply, agriculture, and recreation and fishery habitat protection and enhancement." Water Resources Development Act of 1986 ("WRDA"), Pub. L. No. 99-662, 100 Stat. 4082, 4168.[2] The WRDA authorized the Secretary of the Army to reassign storage space in the Chatfield Dam and Lake project "upon request of and in coordination with the Colorado Department of Natural Resources [("CDNR")]and upon the Chief of Engineers' finding of feasibility and economic justification." *Id.* Any reallocation was conditioned on agreement of the nonfederal parties (the water providers) to repay the costs of the reallocated

[1] "AR" means the index to the Administrative Record filed on April 1, 2015, and Supplement to the Administrative Record filed on April 21, 2015. *See* Dkt. Nos. 29, 31.

[2] In 2007, Congress amended the WRDA to add environmental restoration as a permitted purpose for reallocation of storage space in the Reservoir. Water Resources Development Act of 2007 ("WRDA 2007"), Pub L. No. 110-114, 121 Stat. 1041, 1116.

storage space in accordance with federal law. AR035125. In 2009, Congress authorized the CDNR to perform modifications of the Reservoir necessary for reassignment or reallocation of storage space and any required mitigation that might result from implementing reallocation, and it directed the Secretary to collaborate with the CDNR and other local interests to determine a method of calculating storage costs that would reflect the limited reliability of the resources. Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 116, 123 Stat. 524, 608.

1. History of the Project

Not long after construction of Chatfield Reservoir was completed, some local water providers began planning for the possibility that additional storage space might be reallocated. AR036178. Their efforts intensified in the 1990s with the creation of the Metropolitan Water Supply Investigation ("MWSI"), whose work focused on investigating possible cooperative solutions to future water supply needs in the Denver metropolitan area. AR036142. The MWSI's investigation identified Chatfield Reservoir "as an important potential source of water storage." *Id.* The Chatfield Work Group formed under the auspices of MWSI and worked with the Colorado Water Conservation Board ("CWCB"), a division of CDNR, and Corps to continue to investigate the possibilities for reallocation of flood storage or recreation storage. *Id.* In 2004, at the Corps' and the CWCB's request, a subcommittee of water providers was formed to determine the allocation among interested water providers of the potentially available storage space in the Reservoir. AR036151. In 2012, the CWCB asked the Corps to consider reallocating space in the Reservoir for a group of water providers who were requesting reallocated space. AR036126,[3] AR036558. The Corps and the CWCB then jointly conducted a

[3] Also in 2012, the CWCB, which is the local sponsor of the reallocation project, proposed to accomplish all of the modifications and mitigation required for the reallocation through its agencies and non-federal project partners, the water providers. *Id*.

study of the proposed reallocation, which addressed, *inter alia*, the water resource problem of the inadequacy of the water supply to meet increasing demand in the Denver metropolitan area over the next fifty years in conjunction with the opportunity for "[e]xpanding the use of an existing storage facility to provide additional water supplies." AR036127, AR036128.

2. The Final Report and EIS

The joint study by the Corps and the CWCB culminated in the Final Report and EIS, AR036104-036656, which integrates the Corps' analysis of possible effects of the proposed project under NEPA with the findings of feasibility and economic justification required by the WRDA into a single document. AR036125. The Final Report and EIS was first issued in July 2013, AR036104, and later supplemented by addenda dated March 2014, AR041265, and September 2014, AR041925. In the Final Report and EIS, the Corps defined the purpose and need of the proposed project as being "*to increase availability of water*, providing an additional average year yield of up to approximately 8,539 acre-feet of municipal and industrial . . . water, sustainable over the 50-year period of analysis, in the greater Denver Metro area so that a larger proportion of existing and future water needs can be met." AR036153 (emphasis added).

a) As Part of its NEPA Analysis, the Corps Considered Numerous Alternatives to the Preferred Alternative for the Chatfield Reallocation Project.

Pursuant to NEPA, the joint study analyzed the possible environmental impacts of various alternatives to reallocating storage space at Chatfield Reservoir that satisfied the purpose and need for the proposed project. AR 036131. The Corps and CWCB first explored a number of potential project concepts other than the Chatfield Reallocation, and engaged in rigorous screening of those concepts. All alternatives were evaluated in relation to four considerations: 1) ability to meet the project's purpose and need; 2) cost; 3) logistics and technology (including water rights and availability, land availability, permitting and mitigation feasibility, design and

construction feasibility, and operational feasibility); and 4) environmental impacts (including significance and ability to mitigate). AR036131-036132. This screening process led to the development of four main alternatives, the environmental effects from which were considered and compared in detail in the Final Report and EIS. AR036132; AR036203-AR036231 (Alternatives Considered in Detail). The four alternatives selected for further consideration were:

> **1. No Action—Penley Reservoir combined with Gravel Pit Storage**. Under the No Action Alternative flood control storage space within Chatfield Reservoir would not be reallocated to joint flood control-conservation storage (hereafter referred to as conservation or water supply storage/pool), and the operation of the reservoir would remain the same. For this alternative it was assumed the water providers would use Penley Reservoir and gravel pit storage to meet their future water needs. The water providers would newly construct Penley Reservoir and would install the infrastructure needed to convert existing gravel pits for water storage.
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> **2. Least Cost Alternative to Chatfield Reservoir storage reallocation—[Increased Non-Tributary Ground Water ("NTGW") use] combined with Gravel Pit Storage**. Normally the No Action Alternative is also the Least Cost Alternative. However, the water providers participating in the Chatfield Reservoir reallocation study are opposed to long-term use of NTGW due to water supply management strategies of becoming less dependent on non-renewable water supplies. For this study, it is assumed that NTGW could provide water to a significant part of upstream water providers through the 50-year planning period, and downstream water providers would be served by the development of gravel pits for water storage.
>
> **3. Reallocation to allow an additional 20,600 acre-feet of Water Supply Storage**. The 20,600 Acre-Foot Reallocation Alternative would reallocate storage from the flood control pool to the conservation pool. The additional storage would be used for M&I water supply, agriculture, recreation, and fishery habitat protection and enhancement purposes. Under this alternative, the base elevation of the flood control pool would be raised from 5,432 to 5,444 feet msl but the reallocation of storage for this proposal involves only the volume between 5,432 and 5,444 feet msl.

> **4. Reallocation to allow an additional 7,700 acre-feet of Water Supply Storage combined with NTGW and Gravel Pit Storage.** The 7,700 Acre-Foot Reallocation Alternative, like Alternative 3, would reallocate storage from the flood control pool to the conservation pool for multiple purposes. Again the additional storage would be used for M&I water supply, agriculture, recreation and fishery habitat protection and enhancement purposes. Because the average year yield from Chatfield Reservoir storage reallocation for Alternative 4 is less than the average year yield for Alternative 3, additional water supply sources (NTGW and downstream gravel pit storage) are also included in Alternative 4 so that the total average year yield equals 8,539 acre feet, but the reallocation of storage for this proposal involves only the volume between 5,432 and 5,437 feet msl.

AR036132-036133 (emphasis added).

These four alternatives were evaluated based on several different factors, including their environmental consequences (AR036369-036533) and financial effects (AR036539-036543). The proposed alternatives were compared by their contributions to the planning objectives, response to planning constraints, and their acceptability, completeness, effectiveness, and efficiency with respect to the planning objectives. AR036549-036550. The 20,600 Acre-Foot Reallocation Alternative (Alternative 3) was determined to be "the least cost alternative, the locally-preferred plan, and would provide $8.42 million in annual National Economic Development (NED) benefits."[4] AR036136. The Final Report and EIS also found that "[t]he adverse impacts to recreation and the environment [from Alternative 3] are mitigable and would be mitigated to the most sustainable alternative to below a level of significance." *Id.* Alternative 3 was designated as the Selected Plan, hereinafter the "Chatfield Reallocation." AR036557.

[4] "The total annual NED project cost would be $7.92 million." AR036136.

b) As Part of its NEPA Analysis, the Corps Examined the Proposed Alternative for the Project for Compliance with Other Environmental Laws.

The Corps determined that the Chatfield Reallocation would be in compliance with all relevant environmental laws, including the Clean Water Act. AR038675-038676 (Final Report and EIS, App. S – Compliance with Environmental Statutes). As an initial matter, the Corps determined that "[t]he increase in the pool elevation of Chatfield Reservoir will not discharge fill into any jurisdictional waters of the United States; and, therefore, a 404 permit and a 401 certification are not required for this aspect of the [Chatfield Reallocation]." AR038676. However, the Chatfield Reallocation "would involve relocation of recreation facilities (e.g., boat ramps, bike paths), and road and bridge construction, actions incidental to this alternative that would result in discharge of dredged or fill material into waters of the United States." *Id*. The Corps therefore conducted a CWA, Section 404(b)(1) Analysis (hereinafter "Section 404(b)(1) analysis") of the activities that would result in the discharge of dredged or fill material into waters of the United States. AR038956 (Final Report and EIS – App. W, CWA Section 404(b)(1) Analysis, Dredge and Fill Compliance).

The Corps reviewed two sets of proposed discharges for compliance with the 404(b)(1) Guidelines. First, the Corps reviewed discharges associated with relocating recreational facilities. AR038978-038981. The Corps determined that the purpose of this project was "to maintain the recreation experience following the reallocation of storage at Chatfield Reservoir by providing, to the maximum extent feasible, in-kind recreation facilities." AR038978-038979. The Corps reviewed a preliminary plan for the relocation of recreation facilities and made suggestions to revise the plan to avoid or minimize the discharge of fill material into wetlands. AR038979. The Corps concluded that, as required by the 404(b)(1) Guidelines, "[t]he proposed Recreation Facilities Modification Plan . . . avoids and minimizes the discharge of fill material

into waters of the U.S to the maximum extent practicable while still meeting the objective of providing recreation facilities that maintain the existing recreational experience." AR038981.

Second, the Corps reviewed a portion of the Compensatory Mitigation Plan ("CMP"), which would "involve the creation, enhancement, and protection of wetlands, riparian habitat, Preble's habitat, and bird habitat." *Id.* The CMP involved "minor discharges of fill material into waters of the U.S." AR038967. Although "[t]he proposed environmental mitigation could be implemented without the discharge of dredged or fill material into waters of the U.S.," these alternatives "would result in a greater area of net disturbance and environmental impact; and would complicate the construction, maintenance, and reliability of the mitigation." AR038982. Accordingly, the Corps determined that "[t]he CMP avoids and minimizes the discharge of fill material into waters of the U.S. [sic] to the maximum extent practicable while still meeting the objective of fully mitigating the impacts to wetlands, riparian habitat, Preble's habitat, and bird habitat impacted by the [Chatfield Reallocation]." *Id.*

The Corps concluded that the Chatfield Reallocation was in compliance with Section 404 of the CWA because the activities incidental to the reallocation involving discharges into waters of the United States would "have less adverse impact on the aquatic ecosystem and avoid and minimize the discharge of fill material into waters of the U.S to the maximum extent practicable while still meeting the objectives of providing recreation facilities that maintain the existing recreational experience and fully mitigate the impacts to wetlands, riparian habitat, Preble's habitat, and bird habitat." AR038984.

c) In the Final Report and EIS, the Corps Found the Proposed Chatfield Reallocation to Be Feasible and Economically Justified.

The Final Report and EIS also includes an economic analysis and comparison of the alternatives for the proposed project. AR036535-036565. In that section of the Final Report and EIS, the Corps reviewed the water supply yields for each alternative, compared the financial costs of water storage and addressed the maintenance, implementation, and operating costs associated with each alternative and the economic impacts of each alternative on the region. It also discussed other possible effects of each alternative on life, health, safety, and community cohesion and analyzed the possible impacts that each alternative might have on other operation purposes of the Chatfield Dam and Reservoir project. AR036535-036548. Based on this analysis, the Corps found that the proposed alternative, the Chatfield Reallocation: 1) satisfies the goals for the federal National Economic Development Account; 2) is the least costly alternative that provides the desired annual year yield; and 3) has a cost within the financial capabilities of the water providers. AR036558. Accordingly, as required under the WRDA, the Corps concluded that the proposed (and ultimately selected) alternative was economically justified. *Id.* Based on the evaluations of engineering, environmental, institutional, and social considerations in the Final Report and EIS, the Corps also concluded that the proposed alternative for the project was feasible. *Id.*

3. The Corps' Record of Decision

On May 29, 2014, the Assistant Secretary of the Army for Civil Works, Jo-Ellen Darcy, issued a Record of Decision approving the Chatfield Reallocation for implementation, and completing the NEPA compliance process. AR041875-041876. Based on the Final Report and EIS, review by other federal, state, and local agencies, public input, and her staff, the Assistant Secretary found that the Corps' proposed alternative for the project was "technically feasible,

economically justified, environmentally acceptable, and in the public interest." AR041875. The Assistant Secretary also found that the proposed alternative "incorporates all practicable means to avoid or minimize adverse environmental effects, and the unavoidable impacts are mitigated." AR041876. Accordingly, the Assistant Secretary concluded "that the benefits of the Chatfield Storage Reallocation Project outweigh the costs and any adverse effects." *Id.*

C. Procedural Background

On October 8, 2014, the Audubon Society filed the instant Petition for Review of Agency Action in this matter. Dkt. No. 1. The Corps filed its Answer to the Petition on December 8, 2014. Dkt. No. 9. On April 1, 2015, the U.S. Army Corps of Engineers filed the Administrative Record for its decision in this this matter. Dkt. No. 29. On April 21, 2015, the U.S. Army Corps of Engineers filed a Supplement to the Administrative Record. Dkt. No. 31.

On June 1, 2015, Petitioner filed a Motion to Complete and Supplement the Administrative Record. Dkt. No. 33. On March 2, 2016, this Court denied Petitioner's Motion to Complete and Supplement the Administrative Record in full.[5] Dkt. No. 48. Petitioner filed its opening brief in this matter on April 1, 2016. Dkt. No. 49.

SUMMARY OF THE ARGUMENT

Under Section 404 of the Clean Water Act, the Corps may approve of its own discharges of dredged or fill material into waters of the United States where there is no "practicable alternative to the proposed discharge" that is less environmentally damaging. 40 C.F.R.

[5] Petitioner included several declarations with its brief. *See* Dkt. Nos. 49-1 through 49-8. To the extent these declarations are used to establish the standing of Petitioner to bring this action, the Corps has no objection to their consideration. *See* Pet'r's Br. 12-13. However, as this Court explained in its Order, the instant review is limited to the administrative record. Dkt. No. 48 at 2-3. Accordingly, these declarations should be disregarded to the extent Petitioner seeks to use them for any purpose other than establishing standing.

§ 230.10(a). Here, Petitioner contends that the Corps, in conducting its Section 404(b)(1) analysis, was required to consider alternatives to the entire Chatfield Reallocation, rather than alternatives only to the activities that involved discharges into waters of the United States, *i.e.* the relocation of recreational facilities and certain environmental mitigation activities. However, the scope of a Section 404(b)(1) analysis is properly focused on the activities that involve discharges of dredged or fill material into waters of the United States, even where those activities are part of a larger project, here the water reallocation, which does not involve discharges into waters of the United States. Moreover, that the Corps was required to review alternatives to the larger project under NEPA for reasons unrelated to its regulatory authority under Section 404 of the CWA—in this case because the Corps was conducting the project under its civil works authority—does not require the Corps to look beyond the specific activities involving discharges into waters of the United States when conducting its Section 404(b)(1) analysis.

Petitioner also argues that the Corps violated NEPA by not giving detailed consideration to certain alternative concepts or potential water sources and by providing insufficient or confusing information to the public concerning the project and its potential environmental effects. To the contrary, however, the Corps' administrative record conclusively shows that the Corps rigorously examined a reasonable range of alternatives for the proposed project and provided a detailed explanation to both the agency decisionmaker and the public of its NEPA process and the comparative environmental effects of the alternatives it considered.

STANDARD OF REVIEW

Judicial review of an agency's "compliance with NEPA and the CWA [is conducted] pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06." *Greater Yellowstone Coal.*, 359 F.3d at1268. Under the Administrative Procedure Act ("APA"), a court may set aside

agency actions "found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Greater Yellowstone Coal*, 359 F.3d at 1268.

"Reviews of agency action in the district courts must be processed *as appeals*." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994). Accordingly, this Court's review is limited to the administrative record compiled and relied upon by the agency. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 744 (10th Cir. 2005) ("the court [appropriately] limited its review to the administrative record . . .") (citation omitted); *Ctr. for Native Ecosystems v. U.S. Fish & Wildlife Serv.*, 795 F. Supp. 2d 1199, 1201 (D. Colo. 2011) ("review is limited to the administrative record before the agency at the time the . . . decision was made" (citing 5 U.S.C. § 706)). And, as an appeal, "[the court] should not rely on evidence outside that record." *Id.* (citing *Olenhouse*, 42 F.3d at 1579-80).

"The APA's arbitrary and capricious standard is a deferential one; administrative determinations may be set aside only for substantial procedural or substantive reasons, and the court cannot substitute its judgment for that of the agency." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002), *modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) (citation omitted). "'A presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.'" *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) (quoting *Colo. Health Care Ass'n v. Colo. Dep't of Soc. Servs.*, 842 F.2d 1158, 1164 (10th Cir.1988)).[6]

[6] Petitioner states that "[the Corps] bear[s] the burden of proving that the chosen alternative is the LEDPA by explaining how other practicable alternatives are more environmentally damaging." Pet'r's Br. 16 (citing 40 C.F.R. § 230.10; *All. to Save the Mattaponi v. U. S. Army Corps of*

ARGUMENT

I. The Corps Properly Approved of its Discharges into Waters of the United States Under the Clean Water Act.

The Corps' determination that the Chatfield Reallocation satisfies the requirements Section 404 of the CWA, including the Section 404(b)(1) Guidelines, is reasonable, adequately supported by the administrative record, and must be upheld.

A. The Corps' Properly Decided to Evaluate Alternatives to the Proposed Discharges into Waters of the United States.

Under the Section 404(b)(1) Guidelines, the Corps is to evaluate "alternative[s] to the proposed discharge [into waters of the United States]." 40 C.F.R. § 230.10(a). In developing the alternatives, the Corps is to determine the overall project purpose for the activity requiring a discharge into waters of the United States. 40 C.F.R. § 230.10(a)(2). "[T]he determination of a project's purpose" is "[c]entral to evaluating practicable alternatives." *Nat'l Wildlife Fed'n v. Whistler*, 27 F. 3d 1341, 1345 (8th Cir. 1994).

Here, "[t]he proposed reallocation of storage and use of the reallocated storage will not require the discharge of dredge or fill material into waters of the U.S." AR038958. Importantly, this determination by the Corps was not in dispute during its decision-making process and Petitioner does not—and may not—challenge it now. *Cf. Hillsdale Envtl. Loss Prevention*, 702 F. 3d at 1176 n.14. Accordingly, the Corps did not define the overall project purpose for its Section 404(b)(1) analysis to be the purpose for which the overall water storage reallocation was proposed, *i.e.* "to increase availability of water . . . in the greater Denver Metro area so that a larger proportion of existing and future water needs can be met." AR036153. Instead, the Corps

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Eng'rs, 606 F. Supp. 2d 121, 130 (D.D.C. 2009)). Nothing in *Alliance to Save the Mattaponi*'s Standard of Review section supports this proposition. *See* 606 F. Supp. 2d at 127 (noting instead that "[a]gency actions are presumed to be valid").

determined the overall project purpose in its Section 404(b)(1) analysis to be the purpose for which discharges into waters of the United States were required. Specifically, with respect to the Recreational Facilities Modification Plan, the Corps found that "[t]he purpose of relocating the recreation infrastructure at Chatfield State Park is to maintain the recreation experience following the reallocation of storage at Chatfield Reservoir . . . ." AR038978-038979. With respect to the CMP, the Corps determined that the purpose of these environmental mitigation efforts was to "fully mitigat[e] the impacts to wetlands, riparian habitat, Preble's habitat, and bird habitat impacted by the Project." AR038982.

The Corps properly identified the overall project purpose as the purpose for the activities involving discharges into jurisdictional waters, even though these activities were part of a larger project that would not require discharges into waters of the United States. As the Corps' regulatory jurisdiction is limited, such an approach is permissible. *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co*. (*OVEC*), 556 F.3d 177, 195 (4th Cir. 2009) ("The Corps' jurisdiction under CWA § 404 is limited to the narrow issue of the filling of jurisdictional waters."); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2004) ("[T]he Corps' permitting authority is limited to those aspects of a development that directly affect jurisdictional waters.").

Moreover, several cases have specifically held that the Corps may limit the overall project purpose to the purpose behind the specific activities for which a Section 404 permit was sought, even if that activity supports a larger project. In *National Wildlife Federation v. Whistler*, a developer planned to build a housing development and re-open an old river channel to provide the development with boat access to the Missouri River, which would destroy existing wetlands. 27 F.3d 1341, 1343 (8th Cir. 1994) (footnote omitted). In conducting its Section 404(b)(1) analysis, "[t]he Corps concluded that the project's purpose was to provide boat access

to the Missouri River from [the] planned development," evaluated alternatives analysis based upon that purpose, and issued a permit. *Id*. at 1343-44. The Eighth Circuit upheld the Corps' decision, which was challenged on the grounds that the Corps should have deemed the project's purpose to be "to build a residential or 'high-end' residential development," and that alternatives to that residential development should have been considered in the Section 404(b)(1) analysis. *Id*. at 1345. The Corps' decision to limit its alternatives analysis only to the boat access project was appropriate because the overall housing development was located on uplands and could proceed without a permit from the Corps. *Id*.

In *Hoosier Environmental Council v. U.S. Army Corps of Engineers*, state and federal authorities proposed "an extension of Interstate 69 ('I–69') through the southwestern quadrant of Indiana." No. 1:11-cv-0202-LJM-DML, 2012 WL 3028014, at *1 (S.D. Ind. 2012), *aff'd*, 722 F.3d 1053 (7th Cir. 2013). The decisions related to the highway extension were made in two tiers. *Id*. The Tier 1 decision for the overall route was chosen by the Indiana Department of Transportation ("INDOT") and the Federal Highway Administration ("FHWA"), during which an EIS was conducted pursuant to NEPA. *Id*. Although the EIS stated that the decision was consistent with the Section 404(b)(1) Guidelines, the Corps noted that it had not made any such determinations that the overall route selected for the highway extension was consistent with Section 404 of the CWA. *Id*. at *2. The Tier 1 decision as to the overall route for the highway extension was challenged in federal court, though claims related to Section 404 of the CWA were dropped. *Id*. at *3. The district court upheld the selection of the overall route by INDOT and the FHWA. *Id*.

INDOT and the FHWA then conducted a Tier 2 analysis of the highway extension, in which it "broke [the overall route chosen] into five different segments, with a variety of

alternative routes within each segment." *Id*. A Section 404 permit application was submitted related to one of those segments, Section 3, in which the Corps determined that "'[t]he purpose of the proposed fill is to construct six separate and complete crossings for the construction of Section 3 of the Interstate 69 highway extension project . . . .'" *Id*. at *5 (quoting Corps decision document). Plaintiffs challenged this permit "assert[ing] that the CWA requires the Corps to undertake an analysis of whether there is a less damaging practicable alternative for the entire I–69 project," not just the activities related to Section 3. *Id*. at *10. The Court rejected this argument, noting that "Plaintiffs cite no law to support the proposition that the Corps must evaluate alternatives for the entire project when [an applicant] is only seeking a permit for one sub-section of the project." *Id*.

Similarly, where an applicant has already selected a site for a larger project, it is appropriate for the Corps to only review alternatives that are practicable at the already-selected site. *See Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409-10 (9th Cir. 1989) (appropriate to only look at alternatives to golf course next to an already-fixed resort site, as "[t]he location of the resort buildings was fixed by decisions [not requiring approval of] the Corps of Engineers"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 450 F. Supp. 2d 503, 526 (D.N.J. 2006)(finding appropriate the Corps' selection of a "location-specific overall project purpose definitions where the specific site was essential to the project purpose"), *vacated and remanded on mootness grounds*, 277 Fed. App'x 170 (3d Cir. 2008); *see also Great Rivers Habitat All. v. U.S. Army Corps of Eng'rs*, 437 F. Supp. 2d 1019, 1024 (E.D. Mo. 2006) (rejecting argument that "the Corps erred in its practicable alternatives analysis because it defined the project's purpose too narrowly, thereby manipulating the project purpose to exclude alternative sites.").

The Corps' decision to define the overall project purpose as the purpose for relocating recreational facilities and conducting environmental mitigation for evaluating alternatives under the Section 404(b)(1) Guidelines must be upheld, as its "statement of the project purpose was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Great Rivers Habitat All.*, 437 F. Supp. 2d at 1027.

B. The Corps Properly Selected the LEDPA in Its Section 404(b)(1) Analysis.

Petitioner's argument that the Corps did not select the LEDPA is solely based on its position that it should have evaluated alternatives to the overall reallocation project, *i.e.* Alternative 3 – Reallocation to allow an additional 20,600 acre-feet of Water Supply Storage at Chatfield. *See* Petitioner's Opening Brief ("Pet'r's Br.") 19-23 (Dkt. No. 49). To the extent the Corps appropriately exercised its discretion in deciding to analyze alternatives only to the discharges to waters of the United States in its Section 404(b)(1) analysis, Petitioner does not dispute that the Corps selected the LEDPA for both the proposed mitigation of environmental resources and modification of recreational facilities. *See* AR038956 (App. W to EIS).

Moreover, the Corps' analysis clearly shows it met the substantive requirements of the CWA and the Section 404(b)(1) guidelines. *See* 33 C.F.R. § 336.1(a). The Corps separately evaluated discharges associated with the Recreation Facilities Modification Plan and CMP. AR038978-038982. With respect to the Recreational Facilities Modification Plan, the Corps evaluated alternatives that could "maintain the recreation experience following the reallocation of storage at Chatfield Reservoir by providing, to the maximum extent feasible, in-kind recreational facilities." AR038978-038979. The Corps, however, rejected the "discharge avoidance alternative" because "it in effect negates the benefits of the [Land Use Development

Policy] waiver[7] and does not provide recreation facilities that maintain the existing level of recreational experience." AR038981. The approved Recreational Facilities Modification Plan did, however, require changes to "minimize[] the discharge of fill material into waters of the U.S. to the maximum extent practicable while still meeting the objective of providing recreation facilities that maintain the existing recreational experience." *Id*.

The CMP involved "the creation, enhancement, and protection of wetlands, riparian habitat, Preble's habitat, and bird habitat." AR038967. In order to create new wetlands, the CMP requires "[t]he redirection of surface water to mitigation areas [that] may require minor discharges of fill material into waters of the U.S." *Id*. In addition, certain environmental mitigation efforts will involve discharges of fill material into wetlands adjacent to Sugar Creek. AR038968. The Corps evaluated alternatives to the CMP focusing on whether they could "fully mitigat[e] the impacts to wetlands, riparian habitat, Preble's habitat, and bird habitat impacted by the Project." AR038982. In particular, the Corps evaluated a no-discharge alternative, but determined that "it would result in a greater area of net disturbance and environmental impact; and would complicate the construction, maintenance, and reliability of the mitigation." *Id*. Accordingly, the Corps approved the CMP, which "avoids and minimizes the discharge of fill material into waters of the U.S. to the maximum extent practicable." *Id*.

In sum, the Corps properly determined that there was "[no] practicable alternative to the proposed discharge[s]," the Recreation Facilities Modification Plan and CMP, "which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a).

[7] This waiver was separately granted by the Corps to the State of Colorado and Water Providers. AR038980.

C. The Corps' Section 404(b)(1) Analysis Was Permissible and Must Be Upheld, Even If It Could Have Conducted the Section 404(b)(1) Analysis Differently.

Although Petitioner frames the issue as a binary one—whether the Corps should have evaluated alternatives to the entire reallocation or alternatives to the activities that would discharge into waters of the United States—under the APA, "[a]s long as the agency provides a rational explanation for its decision, a reviewing court cannot disturb it." *Nat'l Wildlife Fed'n*, 27 F.3d at 1344 (citing *Overton Park*, 401 U.S. at 416). Indeed, "[t]he Corps' actions are presumptively valid under the APA, and [Petitioner] bears the burden of proving the agency acted arbitrarily and capriciously." *Hillsdale Envtl. Loss Prevention*, 702 F.3d at 1167 (citation omitted); *see also Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1363 (11th Cir. 2008) (admonishing the district court for failing to "view the CWA claims [challenging the Corps' determination of a Section 404 permit] through the deferential lens of the APA" (footnote omitted)). This means that this Court need not decide whether the Corps ***could*** have decided to evaluate the alternatives for the entire project—or even if it was the better choice—as long as the Corps has a rational explanation for its decision.

The Corps' decision to evaluate only alternatives to the proposed discharge—as compared to the entire reallocation—was made after it "considered 'all relevant factors and articulate[d] a rational connection between the facts found and the choice made.'" *Colo. Dep't of Soc. Servs. v. U.S. Dep't of Health & Human Servs.*, 29 F.3d 519, 522 (10th Cir. 1994) (quoting *Action, Inc. v. Donovan*, 789 F.2d 1453, 1457 (10th Cir. 1986)). In May 2009, EPA personnel sent correspondence to the Corps encouraging it to evaluate alternatives to the entire Chatfield Reallocation when conducting its Section 404(b)(1) analysis, rather than just the alternatives to the activities involving discharges to waters of the United States—essentially the position Petitioner advance here. AR038688; AR038691.

Personnel at the Corps considered EPA's suggested approach to the Section 404(b)(1) analysis and explained why it was inappropriate in this case.

> The references cited by EPA require compliance with the Guidelines, for Civil Works projects, if there is a discharge of dredged or fill material into a water of the U.S. The Corps does not dispute this point. However, the action under review by the Corps is the reallocation of water storage at Chatfield Lake. No discharge of dredged or fill material is necessary for this action to occur. Authorization of this action will result in indirect impacts to the aquatic resources mentioned in EPA's letter. In others words, the reallocation of storage (no 404 authorization necessary) will cause the inundation of aquatic resources (indirect impacts). While the relocation of recreation facilities, which may require a 404 authorization, may result in direct impacts to aquatic resources, the relocation will not cause the inundation of aquatic resources.
>
> Under 33 CFR 325, Appendix B, it is the Corps' responsibility to determine the appropriate scope of analysis for both NEPA and Section 404. However, the scope of analysis can be different for each statute. Historically, the Corps Regulatory Program has expanded the scope of analysis beyond the immediate permit area if our issuance of a permit would result in "environmental consequences" that are "essentially products of the Corps permit action." For Section 404, it would be incorrect to apply this principle in reverse; essentially expanding the scope of analysis backwards from the permit action to capture an action, as well as associated impacts, that did not require Section 404 authorization. However, the NEPA scope of analysis should, and does, cover all actions related to the reallocation of storage at Chatfield Lake.

AR044652. This approach was ultimately reflected in the Corps' determination that the Chatfield Reallocation was in compliance with Section 404 of the CWA. *See* AR038956.

Moreover, after further consultation between the agencies, EPA concurred in the Corps' Section 404(b)(1) analysis, stating that because the "reallocation of storage space will not require a discharge of dredge or fill material into waters of the U.S.," it was "comfortable with the approach taken by the Corps [in its] §404(b)(1) analysis." AR038701. Petitioner seeks to make hay out of the fact that the appropriate alternatives to be used in the Section 404(b)(1) analysis

were discussed within the Corps and between the Corps and EPA, Pet'r's Br. 25-26, but discussion does not diminish the deference the Corps is owed as to its ultimate decision. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007) ("[T]he fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious."). Indeed, "an effective deliberative process, by its very nature, requires the expression of open, frank and often contradictory opinions." *Ctr. for Biological Diversity v. Fed. Highway Admin.*, 290 F. Supp. 2d 1175, 1194 (S.D. Cal. 2003). And, in particular, that EPA "changed [its] mind" was something it was "fully entitled to do," and not a basis to invalidate the Corps' decision. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 658-59. In fact, this is often times the very function and result of such inter-agency review, comment, and consultation.

The Corps carefully considered its approach to the Section 404(b)(1) analysis, concluding that it should only evaluate alternatives to the proposed activities involving discharges into waters of the United States. There was a rational basis for the Corps' approach to its Section 404(b)(1) analysis, which was ultimately supported by EPA. Accordingly, the Corps' decision must be upheld. *See Hillsdale Envtl. Loss Prevention*, 702 F.3d at 1167.

D. Petitioner's Arguments Reflect a Profound Misunderstanding of the CWA and NEPA.

Petitioner's arguments regarding the Corps' evaluation of the Chatfield Reallocation under Section 404 of the CWA stem from its profound misunderstanding of the interplay between the CWA and NEPA, especially as these statutes apply when the Corps conducts a Civil Works project, the case here. Under the Section 404(b)(1) Guidelines, the Corps is to evaluate "practicable alternative[s] to the proposed discharge [into waters of the United States]." 40 C.F.R. § 230.10(a). Under NEPA, where an agency proposes a "major Federal action[]

significantly affecting the quality of the human environment," the agency must prepare an EIS on the proposed action, including an analysis of a reasonable range of alternatives to the proposed action. 42 U.S.C. § 4332(C). Although often conducted simultaneously, the scope and goals of each analysis is different, with the scope of the Section 404(b)(1) analysis tethered to the proposed discharge into waters of the United States, and the scope of the NEPA analysis tied to the effects from a proposed federal action.

As the Corps is conducting the Chatfield Reallocation through its Civil Works Program, pursuant to the Corps' regulations, the entire reallocation project and a reasonable range of alternatives that would achieve the project's purpose and need were properly the subject of the Corps' NEPA review in the EIS. *See* 33 C.F.R. §§ 230.1-230.26. However, only the relocation of recreational facilities and environmental mitigation plans involve discharges into waters of the United States, and thus the Corps properly focused its review of practicable alternatives under Section 404 of the Clean Water Act to those actions over which it had regulatory jurisdiction.

1. <u>The Corps Was Not Required to Use the Same Alternatives In Its Evaluations Under NEPA and the CWA.</u>

Despite asserting that the "the Corps failed to use the NEPA Project alternatives in evaluating the LEDPA *as required by law*," there is simply no law that supports this proposition. Pet'r's Br. 17 (citing 40 C.F.R. § 230.10(a)(4); emphasis added). Indeed, the primary authority Petitioner cites for this proposition is 40 C.F.R. § 230.10(a)(4), which states nothing of the sort.

> For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be

> necessary to supplement these NEPA documents with this additional information.

40 C.F.R. § 230.10(a)(4). This regulation simply states that a NEPA analysis "will in most cases provide the *information* for the evaluation of alternatives under these Guidelines," not the alternatives themselves. *Id*. (emphasis added). Moreover, the regulation specifically notes that "these NEPA documents may address a broader range of alternatives than required to be considered under [the CWA]." *Id*.

Petitioner's interpretation of this regulation as creating substantive obligations for a Section 404(b)(1) analysis is misguided. Indeed, Petitioner cites no case holding that the Corps is required "to evaluate and compare . . . the NEPA alternatives[] in selecting the LEDPA." Pet'r's Br. 18 (citing 40 C.F.R. § 230.10(a)(4)). The plain language of the regulation simply authorizes the Corps to pull information from an already completed NEPA analysis when completing its analysis under Section 404 of the CWA.

As the relevant actions being reviewed under NEPA and the CWA are different, it is unsurprising that the alternatives analyses conducted under these statutes would be different. Chatfield Reservoir is federally owned, Congress specifically authorized the additional reallocation of water for storage at Chatfield, and the reallocation will be carried out, at least in part, by the Corps' Civil Works Program. It is this broad involvement by the Corps in the Chatfield Reallocation that makes the entire reallocation the "major federal action" being reviewed under NEPA. *See Vill. of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1480 (10th Cir. 1990) ("The requirements of NEPA apply only when the federal government's involvement in a project is sufficient to constitute 'major federal action.'"). In contrast, "[t]he Corps' jurisdiction under CWA § 404 is limited to the narrow issue of the filling of jurisdictional waters." *OVEC*, 556 F.3d at 195.

Indeed, were the Corps not the owner and operator of the reservoir, and its sole involvement that of a regulator, the scope of its NEPA analysis may have been different. In this situation, the Corps, as a regulator, would only be reviewing Section 404 permit applications for the proposed discharges into waters of the United States related to the environmental mitigation plans and relocation of recreational facilitates. Where the Corps conducts a NEPA analysis related to its role as a regulator, the scope of the Corps' analysis is "to address the impacts of the specific activity requiring a [Section 404] permit *and* those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review," 33 C.F.R. pt. 325, App. B, § 7.b.(1) (emphasis added), which are defined as "portions of the project *beyond the limits of Corps [regulatory] jurisdiction* where the Federal involvement is sufficient to turn an essentially private action into a Federal action," *id*. at § 7.b(2)(emphasis added). The Corps' NEPA regulations for its regulatory role go onto specifically note that where a non-federal "permit applicant [] propose[s] to conduct a specific activity requiring a [404] permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area)," such activity does not necessitate the Corps to review the larger project, absent additional indicia of federal control.[8] *See* 33 C.F.R pt. 325, App. B, § 7.b.

Admittedly, in many situations in which the Corps is acting in its regulatory capacity, its review of alternatives under NEPA and its review of alternatives under Section 404 will be

[8] Although Petitioner attempts to frame the issue as "whether the Corps, in approving its own action under Section 404 of the Clean Water Act, is held to the same standard as it would apply to any permit applicant," Pet'r's Br. 16, it appears just the opposite. Petitioner attempts to tie the Corps' Section 404(b)(1) analysis to its NEPA analysis, but the Corps NEPA analysis was expanded to address the Corps' overall involvement in the project through its Civil Works Program, a position that no private permit applicant could ever be in.

similar or even the same; however, this is because often the sole federal involvement requiring review under NEPA is the issuance of a permit under Section 404.[9] *See* 33 C.F.R. Part 325, Appendix B, § 7.b.(1) ("The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a [Section 404] permit . . . ."). That the alternatives analyses are often similar does not create a requirement that they always be so, especially where, as here, the Corps' regulatory jurisdiction under Section 404 is limited to a small portion of a far broader federal project.

2. <u>This Court Should Not Address Which Alternative Reviewed Under NEPA Was the Least Environmentally Damaging Practicable Alternative.</u>

As discussed in Section I.A., *supra*, the Corps properly evaluated alternatives to the proposed discharges into waters of the United States, not alternatives to the entire Chatfield Reallocation project. If, however, this Court were to find that the Corps erred in failing to consider alternatives to the entire Chatfield Reallocation in its Section 404(b)(1) analysis, the

[9] Neither *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254 (S.D. Fla. 2009), *aff'd* 362 Fed. App'x 100, (11th Cir. 2010), nor *Utahns for Better Transportation* stand for the proposition that "[t]he Corps was required to evaluate and compare all practicable alternatives, including at least the NEPA alternatives." *See* Pet'r's Br. 18. *Van Antwerp*'s statement that, "[i]n issuing 404(b) permits the Corps' decisionmaking authority is governed substantively by the CWA and procedurally by both the CWA and NEPA," actually supports the Corps' decision in this case. *See Van Antwerp*, 709 F. Supp. 2d at 1259. Indeed, that is the very point the Corps makes here: NEPA, although creating procedural requirements, does not substantively change the scope of the Corps' permitting authority under Section 404 of the Clean Water Act.

With respect to *Utahns*, Petitioner incorrectly states that "the court held that the issuance of Section 404(b)(1) permit by the Corps for a highway project that did not utilize NEPA alternatives in its CWA analysis was arbitrary and capricious." Pet'r's Br. 18. Although the court did find that the Corps' issuance of the Section 404 permits was arbitrary and capricious, the federal agencies evaluated the same alternatives under both NEPA and the CWA. *Compare Utahns*, 305 F.3d at 1164-74 (NEPA alternatives) *with id*. at 1186-91 (CWA alternatives). Regardless, nothing in *Utahns* stands for the proposition that NEPA, a procedural statute, may substantively effect the scope of a Section 404(b)(1) analysis.

Court should remand this matter back to the Corps, as the Corps did not conduct a Section 404(b)(1) analysis in which it analyzed the alternatives used in the NEPA analysis, let alone determine what the LEDPA would be under such an analysis. There is simply no administrative record to review on this issue. *Cf. Ctr. for Native Ecosystems*, 795 F. Supp. 2d at 1201 ("review is limited to the administrative record before the agency at the time the . . . decision was made"). This Court should not, in the first instance, address Petitioner's argument that, amongst the alternatives evaluated under NEPA, the Chatfield Reallocation was the "most environmentally damaging practicable alternative," and thus could not have been selected as the LEDPA in a Section 404(b)(1) analysis. *See* Pet'r's Br. 21, *see also id*. at 19-23.

In particular, this means the Court need not address Petitioner's argument that the Corps, in conducting its Civil Works Projects, must consider alternatives "prior to mitigation when identifying the LEDPA."[10] Pet'r's Br. 5-6 (citing AR018022); *see also id.* at 22 ("The only potential way that the Corps might argue Alternative 3 is not the most environmentally damaging alternative is to argue that the impacts will all be fully mitigated; however, compensatory mitigation cannot be considered when selecting the LEDPA.").[11] Petitioner does not contend

[10] Although Petitioner makes this statement in its Statutory and Regulatory Background section, the statement does not cite to a statute or regulation, but instead to a letter by the Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, EPA Region 8. *See* AR0018022.

[11] The Corps notes that to the extent that the Petitioner relies on the *Memorandum of Agreement between the EPA and Department of the Army Concerning the Determination of Mitigation Under the CWA Section 404(b)(1) Guidelines* ("MOA") for the proposition that the Civil Works Program may not take into account mitigation prior to determining the LEDPA, the MOA states that "[it] is specifically limited to the Section 404 Regulatory Program." *See* MOA at 1 (Dkt. No. 33-2). Moreover, the portion of the MOA that Petitioner relies on to state that the Corps "intended to apply [the mitigation framework] to all Corps activities, including Civil Works program," Pet'r's Br. 22 (citing Dkt. No. 33-2 at 12) is not actually the MOA, but a separate "Questions and Answers" document attached to the MOA, which is not signed by either the Assistant Secretary of the Army or the Assistant Administrator of the EPA. *See* Dkt. No. 33-2 at 7 (Section 404(b)(1) Guidelines Mitigation MOA "Questions and Answers").

that the Corps improperly took into account mitigation when determining the LEDPA for the Section 404(b)(1) analysis it did conduct here, which is the only Section 404(b)(1) analysis properly before this court for review. *See generally* Pet'r's Br. 19-23; AR038956 (App. W, CWA Section 404(b)(1) Analysis). There is simply no basis for this Court to opine on the validity of a hypothetical Section 404(b) analysis doing otherwise. *See Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 244 (10th Cir. 1991) (hypothetical agency actions are not ripe for review).

3. The Corps Did Not Improperly Segment its Section 404(b)(1) Analysis.

Petitioner also contends that "[t]he Chatfield project was improperly segmented into recreational facilities modification, rising water levels, and environmental mitigation measures." Pet'r's Br. 23. Importantly, Petitioner appears to concede that courts have only applied the concept of segmentation in the NEPA context; none have applied it to Section 404 of the CWA. *See* Pet'r's Br. 26 (noting that "the Tenth Circuit has not commented on segmentation with regards to a CWA analysis"). This makes sense, given that the concept of improper segmentation arises from "[Council on Environmental Quality ("CEQ")] regulations [that] require [] 'connected' or 'closely related' actions 'be discussed in the same impact statement.'" *See Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1028 (10th Cir. 2002) (quoting 40 C.F.R. § 1508.25(a)(1)); *see also Hirt v. Richardson*, 127 F. Supp. 2d 833, 842 (W.D. Mich. 1999). Of course, these CEQ regulations—and the segmentations analyses courts use to apply them—govern only the Corps' analyses under NEPA, not analyses under Section 404 of the Clean Water Act. *See, e.g.*, 40 C.F.R. pt. 1501 (NEPA and Agency Planning).

In contrast, there are regulations and case law which discuss the appropriate scope of a Section 404(b)(1) analysis. *See supra* Section I.A. This Court need only apply those regulations and case law to assess the validity of the Corps' Section 404(b)(1) analysis. Although Petitioner

asserts that whether NEPA regulations creating the concept of improper segmentation should also be applied to analyses under Section 404(b)(1) of the CWA is an "issue of first impression under the [CWA]," Pet'r's Br. 27-28, there is no issue—NEPA regulations do govern Section 404(b)(1) analyses.

Moreover, Petitioner's attempt to apply the NEPA concept of segmentation to the Corps' Section 404(b)(1) analysis gets it backwards. When the Corps is determining the scope of its NEPA review based upon its role as a regulator, the Corps may be "considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction [under section 404 of the CWA]," which include "cases where the environmental consequences of the larger project are essentially products of the Corps permit action." 33 C.F.R pt. 325, App. B, 7.b.(2). Here, the Recreational Facilities Modification Plan and CMP, are indisputably "incidental to the proposed reallocation," AR038961, in that these discharges would only occur if the Corps chose to reallocate water storage at Chatfield Reservoir, and Petitioner concedes this very point when noting that "the relocation of recreational facilities and mitigation only occur to offset the harms of raising the water level at Chatfield Reservoir," Pet'r's Br. 23-24. In other words, "the environmental consequences of the larger project," in this case the overall reallocation, are not "essentially products of the Corps permit action," *i.e.* the Recreational Facilities Modification Plan and CMP. 33 C.F.R. pt. 325, App. B, 7.b.(2). Indeed, Corps personnel considered and rejected this very argument, noting that "[f]or Section 404, it would be incorrect to apply this [anti-segmentation] principle in reverse; essentially expanding the scope

of analysis backwards from the permit action to capture an action, as well as associated impacts, that did not require a Section 404 authorization."[12] AR040996.

Given this, it is unsurprising that nothing in the cases cited by Petitioner indicates that the anti-segmentation rule derived from NEPA regulations should be applied to alternative analyses under Section 404 of the CWA. Although the challenge in *Florida Wildlife Federation v. U.S. Army Corps of Engineers* involved both NEPA and the CWA, the court's segmentation analysis was limited to the NEPA claim. *See* 401 F. Supp. 2d 1298, 1313 (S.D. Fla. 2005) ("The anti-segmentation rule is generally that an agency cannot evade its responsibilities' under the National Environmental Policy Act . . . .") (internal quotations and citation omitted).

Save Our Sonoran addressed two issues. First, the Ninth Circuit upheld a finding that the Corps had improperly segmented its NEPA analysis, though it did not use the term segmentation. *Save Our Sonoran*, 408 F.3d at 1121-23. Second, the Ninth Circuit upheld the district court's decision to enjoin the entire development in question, even though the entire development would not have occurred on jurisdictional waters, "because the uplands are inseparable from the [jurisdictional] washes, [and thus] the Corps' permitting authority, and likewise the court's authority to enjoin development, extended to the entire project." *Id*. at 1124. In contrast, here the Corps specifically found that the reallocation itself would not require a discharge into jurisdictional waters.[13] AR038958.

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[12] Even if the Recreational Facilities Modification Plan and CMP are in some sense "integral" to the overall project, Pet'r's Br. 24, that does not mean the Corps was required to analyze the broader project in its Section 404(b)(1) analysis. Indeed, such an approach is foreclosed by cases such as *National Wildlife Federation v. Whistler*, 27 F.3d 1341 (8th Cir. 1994), *see* Section 1.A., *supra*, which held that the Corps, in its Section 404(b)(1) analysis, may review alternatives for activities involving discharges into jurisdictional waters, even if those activities are part of a larger project.

[13] Petitioner also argues that a "memorandum from Corps legal counsel to the Director of Civil Works," which discusses *Save Our Sonoran*, supports its contention that the entire reallocation

Petitioner also asserts that Corps guidance required the Section 404(b)(1) analysis to evaluate the entire Chatfield Reallocation. Pet'r's Br. 5. However, the Corps' *Planning and Guidance Notebook* "provides the overall direction by which Corps of Engineers Civil Works projects are formulated, evaluated and selected for implementation."[14] Nothing in this guidance substantively affects the appropriate scope of a Section 404(b)(1) analysis, which simply states that the Corps should "complete the investigations and analyses required by the Section 404(b)(1) Guidelines," and provides a "suggested format for the Section 404(b)(1) evaluation," which the Corps used here.[15] Similarly, nothing in the *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies* affects the appropriate scope of a Section 404(b)(1) analysis.[16]

Given that the Corps evaluated alternatives to the proposed discharges to waters of the United States in its Section 404(b)(1) analysis, and given that every court to look at Petitioner's anti-segmentation argument has done so when applying NEPA, this Court should decline Petitioner's invitation to "set [] precedent," Pet'r's Br. 30, and extend NEPA rules to analyses conducted under Section 404(b)(1) of the CWA.

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should have been analyzed in the Section 404(b)(1) analysis. Pet'r's Br. 28. However, that guidance was specifically on the appropriate scope of NEPA analyses; indeed, the subject line of the Memorandum was "Legal Guidance on the NEPA Scope of Analysis in Corps Permitting Actions." AR016156; *see also* AR016161 at n.7 (calling "[t]he Subsection 404(b)(1) alternatives analysis [] a separate inquiry").

[14] U.S. Army Corps of Engineers, *Planning Guidance Notebook*, ER 1105-2-100 (April 2000) at 1-1, *available at* http://planning.usace.army.mil/toolbox/current.cfm?Title=Planning%20Guidance%20Notebook&ThisPage=PlanGuideNotebook&Side=No

[15] *Id*. at C-41; *compare id*. at Ex. C-1 (Recommended Outline for Section 404(b)(l) Evaluation) with AR038956 (App. W, CWA Section 404(b)(1) Analysis).

[16] *See* U.S. Water Resource Council, *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies* (Mar. 10, 1983) (not mentioning Section 404 of the CWA).

II. The Corps Analyzed a Reasonable Range of Alternatives for the Proposed Reallocation Project.

NEPA requires federal agencies to explore and evaluate alternatives for proposed major federal actions. 40 C.F.R. § 1502.14. However, an EIS "need not include an infinite range of alternatives, but is required to cover those which are feasible and briefly explain why other alternatives, not discussed, have been eliminated." *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1175 (D.N.M. 2000) (citing *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); 40 C.F.R. § 1502.14(a)-(c)). "In determining whether an agency considered reasonable alternatives, courts look closely at the objectives identified in an EIS's purpose and needs statement." *Citizens' Comm. To Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002) (citing *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174-75 (10th Cir. 1999)). If an agency has appropriately defined the objectives of an action, '"NEPA does not require [the] agenc[y] to analyze 'the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective." *Id.* (quoting *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992)). Rather, the reviewing court should "apply a 'rule of reason test" that asks whether "the environmental impact statement contained sufficient discussion of the relevant issues and opposing viewpoints to enable the [agency] to take a hard look at the environmental impacts of the proposed [action] and its alternatives." *Id.* (citing *Colo. Envtl. Coal.*, 185 F.3d at 1174). "Alternatives that do not accomplish the purpose of an action are not reasonable," *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, Nos. 6:09–cv–00037–RB–LFG; 6:09–cv–00414–RB–LFG, 2011 WL 7701433, at *29 (D.N.M. Aug. 3, 2011) (quoting *Custer*

Cty. Action Ass'n v. Garvey, 256 F.3d 1024, 1041 (10th Cir. 2001), and such alternatives need not be studied in detail by the agency.[17]

In the Final Report and EIS, the Corps defined the purpose and need of the proposed project as being "*to increase availability of water*, providing an additional average year yield of up to approximately 8,539 acre-feet of municipal and industrial . . . water, sustainable over the 50-year period of analysis, in the greater Denver Metro area so that a larger proportion of existing and future water needs can be met." AR036153 (emphasis added). In identifying alternatives to the Chatfield Reallocation that could meet that purpose and need and would be considered in detail in the EIS, the Corps applied a rigorous screening process. The Corps first identified an initial set of concepts related to water supply based on the problems and opportunities associated with reallocating storage space in Chatfield Reservoir. AR036171.[18] These concepts, which fell within five broad categories, were then evaluated against four general

[17] The CEQ's regulations govern implementation of NEPA. The regulations require agencies to "'[r]igorously explore and objectively evaluate all reasonable alternatives,'" 40 C.F.R. § 1502.14 but they also allow agencies to eliminate alternatives that do not meet the reasonable objectives for the project from further study. *See City of Alexandria*, 198 F.3d at 867 (affirming FHWA's decision to eliminate ten-lane bridge alternative when only proposed twelve-lane bridge would meet project's capacity objectives); *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1541-42 (11th Cir. 1990) (same). *See also Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1140-42 (D.C. Cir. 1991) (Bader Ginsburg, J.) (upholding agency's decision to eliminate 13 of 14 alternatives after preliminary analysis for failing to meet project's purpose and need).

[18] The Corps identified the following three problems or "undesirable conditions to be solved" by the reallocation project: population growth resulting in increased municipal and industrial water demands; reliance of some water providers on non-renewable Denver Basin groundwater as the result of water need; agricultural water providers' need for augmentation water for alluvial wells. AR036172-036173. The Corps also identified four opportunities for improving positive conditions as being presented by the project, i.e., the opportunity to expand use of an existing facility to provide additional water supply; the opportunity to logistically and cost-effectively capture available flow by virtue of Chatfield Reservoir's on-channel location; the opportunity to deliver water via gravity flow because of Chatfield Reservoir's high elevation; and the potential Chatfield Reservoir offered for storage of augmentation water for future use. AR036173-036174.

evaluation criteria, including the completeness, efficiency, effectiveness, and acceptability of an alternative to meet the stated purpose and need of the project.[19] AR036179. The Corps then applied these "screening criteria" to thirty-eight potential "project concepts," *i.e.*, to sources of water potentially available to meet a substantial portion of the water providers' requests for increased water storage. AR036181. The Corps' initial screening process resulted in selection of the four alternatives (a no action alternative and three action alternatives) for further consideration, each of which was designed to meet the purpose and need of the project. *See* AR036203.

Notwithstanding the Corps' rigorous analysis and comprehensive discussion of alternatives, Petitioner contends that the Corps violated NEPA by failing to consider certain project concepts, specifically, enhanced water conservation and the use of either upstream gravel pits or another existing reservoir (Rueter-Hess) for water storage. Pet'r's Br. 30-31. Petitioner first argues that the Corps erred in eliminating enhanced water conservation and use of upstream gravel pits based on its determination that these potential concepts for the project could not alone satisfy the project's purpose and need. Petitioner contends that this is an improper basis for elimination or, alternatively, that the Corps should have considered combining the concepts as an additional alternative. *Id.* Petitioner is wrong

Petitioner relies heavily on the Tenth Circuit's statement in *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002), that the Federal Highway Administration's ("FHWA") failure to consider two alternatives to a highway construction project, (a Transportation Management System and

[19] As the Corps further explained, the general criteria encompassed several specific areas of consideration, including: ability to meet the purpose and need of the action; cost; logistics and technology; water rights and water availability; land availability and land use; permitting and mitigation feasibility; design and construction feasibility; and operational feasibility. AR036179-036180.

expansion of mass transit), either together or in combination with alternative proposals for road expansion, constituted "one of the most egregious shortfalls" of FHWA's environmental assessment for the project. But Petitioner's reliance is misplaced, in that the court's statement in *Davis* was based on considerably different facts.[20] Notably, in *Davis*, the Court found that FHWA had ultimately selected only two alternatives for the proposed project, the preferred alternative and a no-build alternative, for further examination and that it had dismissed, in what the Court found to be a "conclusory and perfunctory matter," other alternatives that evidence in the record suggested were reasonable. *Davis*, 302 F.3d at 1122.

In contrast, in this case, the Corps engaged in a detailed evaluation of each of thirty-eight potential concepts for the project pursuant to carefully identified concepts concerning water supply and specific evaluation criteria, and it explained the basis for the criteria and resulting analysis in the Final Report and EIS in great detail. *See* AR036177-AR036203. Moreover, following its thorough screening process, the Corps ultimately selected four different project concepts for a detailed alternatives analysis: a no action alternative, and three action alternatives, one involving reliance on non tributary ground water, and two involving reallocation. And, unlike the agency in *Davis*, the Corps did, in fact, carry other project concepts forward in combination with other alternatives that it analyzed in detail, by combining new construction with gravel pit storage (Alternative 1); use of non tributary ground water with gravel pit storage (Alternative 2); and reallocation of a lesser amount of storage with gravel pit storage (Alternative

[20] In addition, in *Davis*, the Court found the FHWA's alternatives analysis inadequate based in part on the requirements of section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c). *See Davis*, 302 F.3d at 1120 (discussion of alternatives under NEPA is "necessarily bound by rule of reason and practicality," whereas section 4(f) "requires the [agency] to consider all 'prudent and feasible alternatives.'"). The Department of Transportation Act is not at issue here and it does not set the standard for the Corps' NEPA analysis of alternatives for a proposed Civil Works project.

4).[21] And, finally, unlike in *Davis*, Petitioner here cites to no reports or other evidence in the record that shows that the concepts for the proposed project Petitioner insists should have been considered as part of the detailed alternatives analysis would have been feasible, practicable, or effective in meeting the project's purpose and need.

Petitioner's second argument is that the Corps should have given fuller consideration to enhanced water conservation as a practicable alternative to the Chatfield Reallocation. Here, however, what Petitioner fails to grasp is that the question presented to the Corps for analysis and recommendation was not reallocation of water storage space, but increasing water supply through reallocation or other means. Moreover, the Corps fully considered the effect of conservation to meet the increasing demand for water in the Denver area, and it properly concluded that "[c]onservation helps to stretch existing resources, but does not solidify additional needed water supplies." AR036187. Petitioner's suggestion that the Corps should be required to "analyze how much water supplies could be increased" through means other than reallocation of storage space, Pet'r's Br. 32, or that the purpose of the alternatives analysis should have encompassed "push[ing] and encourag[ing] the water providers to do more than they are already planning to do," *id.* n.5, is not consistent with the project's purpose and need.[22]

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[21] Thus here, unlike the situation in *Davis*, Petitioner does not allege that the Corps failed to consider alternatives in combination, only that the particular project concepts Petitioner favored were not carried forward in the Corps' detailed alternatives analysis.

[22] In fact, in the Final Report and EIS, the Corps did expressly encourage the water providers to continue and increase their existing conservation efforts. *See* AR036187 ("All 12 water providers recognize the importance of incorporating aggressive and meaningful water conservation efforts in their operations. Each of these entities is part of the reallocation project because they need additional water, which is ever increasingly costly and difficult to acquire. *Thus, these providers need to reduce their demands and stretch their supplies* and have therefore included water conservation,") (emphasis added); AR036188 (recognizing that" [m]ost of the water providers will, of necessity and with or without the Chatfield Reservoir storage reallocation project, develop even more stringent water conservation measures in the future to reduce their future water demands").

Rather, as the Corps properly concluded, although water conservation was a consideration in identification of the alternatives for the reallocation project that were analyzed in detail, which was "relied upon as "a major tool for reducing [the water providers'] future water demands," AR036193, it constitutes an important "parallel action" that "is not an equivalent practicable alternative to the proposed project." AR036188.

Petitioner's third argument is that the Corps' justification for eliminating the upstream gravel pits from consideration because of their more limited storage capacity was "incrediby thin" and that the Corps provided no explanation for drawing a line between the 7,835 acre-feet available downstream and 4,500 acre feet available at one of the upstream pits. Pet'r's Br. 33. This is simply untrue. The Corps did, in fact, explain that it drew a line at 7,700 acre-feet because the water providers, who are paying the costs for the reallocated space, considered that any lesser amount of storage space would offer too little benefit in relation to the associated costs. AR036176.

Finally, Petitioner argues that the Corps' elimination of the Rueter-Hess Reservoir from its detailed alternatives analysis on the basis that reallocation of that storage space would require action by a third party was "unlawful." Pet'r's Br. 34. Petitioner bases this argument on a statement by the United States Court of Appeals for the D.C. Circuit finding that where a "proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened." *See id.* at 41 (citing *Nat'l Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1972)). Like the appellee in a case later decided by the D.C. Circuit, however, in this argument, Petitioner "overread[s] *Morton*." *City of Alexandria*, 198 F. 3d at 868.

In *City of Alexandria*, the D.C. Circuit clarified that the "broad articulation of 'reasonable alternatives' [in *Morton*] was "compelled by the national scope of the problem being addressed"—(there, "a cross-agency effort . . . to increase American energy supplies" during the widespread energy crisis in the 1970s.). 198 F. 3d at 868. And, as the Court further clarified

> *Morton* thus stands for the proposition . . . that a 'reasonable alternative' is defined by reference to a project's objectives. *Morton* explained that, *within the context of a coordinated effort to solve a problem of national scope*, a solution that lies outside of an agency's jurisdiction might be a 'reasonable alternative' . . . [as] might . . . an alternative within that agency's jurisdiction that solves only a portion of the problem given that other agencies might be able to provide the remainder of the solution. Such a holistic definition of 'reasonable alternatives' would, however make little sense for a discrete project within the jurisdiction of one federal agency, as we recognized in *Morton* when we contrasted the Secretary's action with that of building a 'single canal or dam.'

City of Alexandria, 198 F.3d at 869 (quoting *Morton*, 458 F.2d at 835) (emphasis added).

In contrast to the national scope of the energy problem in *Morton*, here, the need for additional water supplies to meet anticipated, future water demand in the Denver metropolitan area is "primarily a non federal responsibility" in which, "based on current federal authorities, the Federal Government should participate and cooperate with states and local interests in developing such water supplies in connection with multi-purpose projects." AR036126. As with the regional traffic needs FHWA sought to address in *City of Alexandria*, here, the Corps is the sole federal agency with responsibility for assisting in addressing water supply issues in the Denver metropolitan area. Accordingly, it makes little sense to require the Corps to consider alternative solutions to this discrete, regional problem that are outside its jurisdiction.

III. The Corps' Thorough Analysis and Evaluation of the Possible Environmental Effects of the Chatfield Reallocation Satisfied NEPA.

In reviewing the adequacy of the Corps' Final Report and EIS, the Court's "only role . . . is to insure that the agency has considered the environmental consequences" of the challenged decision. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1983) ("A court reviewing the adequacy of an EIS merely examines 'whether there is a reasonable, good faith, objective presentation of" the topics NEPA requires an EIS to cover.") (quoting *Johnston v. Davis*, 698 F.2d 1088, 1091 (10th Cir. 1983)). Accordingly, as the Tenth Circuit has held, the court's objective in reviewing an EIS "is not to 'fly speck' the environmental impact statement, but rather, to make a 'pragmatic judgment whether [its'] form, content and preparation foster both informed decision-making and informed public participation.'" *Custer Cty. Action Ass'n.*., 256 F.3d at 1035 (quoting *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)). Thus in deciding whether the alleged deficiencies in the Corps' Final Report and EIS about which Petitioner complains "are merely flyspecks, or are significant enough to defeat [NEPA's] goals of informed decision making and informed public comment, the Court should apply [the] 'rule of reason standard.'" *Fuel Safe Washington v. F.E.R.C.*, 389 F.3d 1313, 1323 (10th Cir. 2004) (internal quotation and citation omitted)). *See also Rags Over the Arkansas River*, 77 F. Supp. 3d at 1048 ("The Court reviews an agency's NEPA process under the deferential abuse of discretion standard of review.") (citation omitted)).

Petitioner argues that the Corps violated NEPA by providing incomplete or insufficient information to the agency's decisionmakers and to the public, and by using confusing terminology concerning the water storage made available by the Chatfield Reallocation and the resulting water yield. Petitioner's arguments fail for several reasons.

A. The Final Report and EIS Provided Sufficient Information Concerning the Uncertainty about Participating Water Providers.

Petitioner first contends that the Corps did not provide adequate information about the environmental effects of the project "because for over 20% of the water storage . . . ," Pet'r's Br. 38, "[n]o one— not the Corps, nor the public—knows what water rights will be stored" there. *Id.* at 40. Petitioner therefore argues that "the Corps should have analyzed the potential impacts based on the "range of reasonable variation in seniority of the water rights" rather than relying on the information available to it at the time it made its recommendation. *Id.* at 44-45. Contrary to this argument, however, the Corps did not, as Petitioner suggests, rely on outdated assumptions about the identity of the water providers participating in the proposed reallocation or the seniority of their water rights. Indeed, in the first chapter of the Final Report and EIS (Purpose and Need for the Action), the Corps disclosed that, at the time of its recommendation, there was unassigned space in Chatfield Reservoir because certain providers were "in the process of withdrawing from the Project." AR036150-036151, (Table 1-1), & n.1.

Petitioner also ignores the effect of the "rule of reason," which governs both the Corps' NEPA analysis and the Court's review. An agency is entitled to rely on the best information available at the time it makes a decision and is not required to speculate or hypothesize about possible project participants or to conjure up every reasonable variation of the possible seniority rights of every possible unknown party or any potentially resulting environmental impacts. Rather, as the Tenth Circuit has held,

> the test that agencies must meet is anchored to the 'rule of reason' which broadly stated . . . may be said to be this: If the environmental aspects of proposed actions are easily identifiable, they should be related in such detail that the consequences of the action are apparent. If, however, the effects cannot be readily ascertained and if the alternatives are deemed remote and only speculative possibilities, detailed discussion of environmental effects is not contemplated under NEPA.

Envtl. Def. Fund v. Andrus, 619 F.2d 1368, 1375 (10th Cir. 1980) (internal citation omitted). *See also Johnston v. Davis*, 698 F.2d 1088 ((10th Cir. 1983) ("The EIS need not discuss every nuance of a proposed action, nor need it give various questionable effects the weight demanded by various proponents or opponents." (citation omitted).

Here, as Petitioner acknowledges, in the Final Report and EIS discussing the Chatfield Reallocation as the preferred alternative, the Corps disclosed the uncertainty about the identity of water providers who would ultimately use the water storage space. *See* Pet'r's Br. 41 (citing AR036371, 036372-036376). Petitioner complains, however, that this disclosure is not adequate and that changes in the identity of the water providers are "only listed with respect to operations of the reservoir and not with respect to the direct environmental impacts." Pet'r's Br. 41 (citing AR036376). This argument is a classic example of "flyspecking" the Final Report and EIS and elevating form over substance, and, moreover, it misreads the Corps' analysis and conclusions. The Corps did, in fact, recognize that the identity of the water providers could change and that this could affect the environmental impacts of any of the alternative proposals. AR036376. The Corps did not ignore this issue; to the contrary, it disclosed this uncertainty in its NEPA document.

In the section of the Final Report Petitioner references—Chapter 4 "address[ing] the environmental consequences of flood storage from the flood control pool to the conservation pool in Chatfield Reservoir . . . ." (AR036369)—the Corps discussed potential strategies for adaptive management "framed within the context of structured decision making with an emphasis on uncertainty about resource responses to management actions and the value of reducing that uncertainty to improve management." AR036370. Within that framework, the Corps disclosed "potential impacts to many resources based on the best available information,"

AR036371, including the fact that the possible impacts "depend on the timing and duration of pool level fluctuation under the two alternatives involving reallocation of storage space,"[23] *id.*, and that "[s]everal factors . . . *including reservoir operations*" could contribute to pool level fluctuations at Chatfield Reservoir. *Id.* (emphasis added). Consistent with this disclosure, the Corps proceeded to consider and disclose a number of uncertainties concerning reservoir operations, including "[c]hanges in the Chatfield water providers [and] [c]hanges in the Chatfield water providers' needs or relative allocations of storage," AR036376, that could "affect the environmental and recreation resources," and require adaptive management. *Id.*[24]

In sum, in this case, certain water providers requested reallocation of storage space in Chatfield Reservoir based on the need to "increase the availability and reliability of water supply by providing a potential additional average year yield . . . of up to approximately 8,539 acre-feet of [municipal and industrial] water sustainable over a 50-year period." AR 036174. The Corps gave detailed consideration to four alternatives, including the Chatfield Reallocation, that could satisfy this purpose and need and, in the alternatives analysis, it evaluated the identifiable environmental impacts of each of the alternatives and also disclosed uncertainties that could affect the potential environmental impacts. Accordingly, in both form and substance, the Final Report and EIS fostered informed decision-making and informed public participation.

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[23] Thus, the identity and relative seniority of the participating providers' water rights makes no difference to the decision that was before the Corps concerning the proposed project in that the uncertainty concerning water providers and resulting pool level fluctuations was common to the two alternatives that involved reallocation of storage space and the other alternatives considered were determined to be less desirable based on dependence on the requirement for new infrastructure (Alternative 1), and dependence on NTGW as a water source (Alternative 2).

[24] In Table 4-1, the Corps also discussed the fact that the potential changes in pool fluctuations resulting from either of the alternatives involving reallocation could have environmental impacts in terms of target environmental resources, tree clearing, weed control, water quality, and aquatic life and fisheries, and discussed adaptive management strategies to reduce the effects on those resources. AR036372-036376.

B. The Terminology in the Final Report and EIS Concerning Water Storage and Water Yield Satisfies NEPA's Goals of Fostering Informed Decision Making and Informed Public Comment.

Finally, Petitioner contends that the Corps violated NEPA by using nonstandard terminology, and that it thus misled the public concerning the possible environmental effects of the Chatfield Reallocation. Pet'r's Br. 42. In this argument, too, Petitioner is wrong.

First, the term "average year yield" is expressly defined in the Final Report and EIS, in Chapter 2, which constitutes the Corps' detailed analysis of four alternatives and their capability of satisfying the proposed project's purpose and need. There, the term is defined as "the average annual amount of water expected to result from the storage of available water rights with the largest Chatfield reallocation alternative . . . ." AR036174. The term is also defined in the Chapter 5 of the Final Report and EIS, which contains the Corps' economic analysis of the four alternatives for the project, as "as the average annual amount of water expected to result from the storage of available rights." AR036553. Petitioner contends that the term is used, but not defined in the executive summary, which is the opening chapter of the Final Report and EIS and that this, together with the reference to the Chatfield reallocation in the definition in the alternatives analysis, somehow shows that the term was "made up especially for the Chatfield Reallocation." Pet'r's Br. 43. These arguments obviously seek to elevate form over substance. The alternatives analysis in the body of the Final Report and EIS sets forth the Corps' detailed analysis of reasonable alternatives that satisfy the project's purpose and need and is "at the heart of the environmental impact statement," *City of Alexandria*, 198 F.3d at 866 (quoting 40 C.F.R. § 1502.14). Thus, information defining and clarifying the purpose and need is appropriately included there, and the placement provides sufficient information to the public. Moreover, the reference to the size of the Chatfield reallocation in that definition also makes sense because, as reflected in the executive summary, the Corps quantified the additional water supply required to

meet the purpose and need of the project, in part, by reference to an existing opportunity, i.e., the storage space available at Chatfield Reservoir. *See* AR036128-036129. It then proceeded, however, to analyze three other alternatives to satisfy the purpose and need, including two non-reallocation alternatives, before it determined the Chatfield Reallocation to be the preferred alternative. This does not show that the term "average year yield" was "made up" or intended to mislead the public about the amount of water storage at, or water yield from, the Chatfield Reallocation.

Second, in contrast to "average year yield," the terms "dependable" yield or "reliable" yield are not employed in the context of the Corps' NEPA analysis, but rather in the context of the determination of economic justification and feasibility that is required pursuant to the WRDA and the Omnibus Appropriations Act of 2009.[25] Thus, the facts concerning the lack of a reliable water yield from the Chatfield Reallocation do not relate to the Corps' analysis of environmental effects under NEPA, but are included as part of a request for a policy exception to allow a cost adjustment for the storage space at Chatfield Reservoir. *See* AR036924-036927. They are not, as Petitioner claims, "buried" in an appendix to the EIS; rather, like "average year yield," these terms are included in an appendix to the portion of the Final Report to which they are relevant.

Additionally, as the Corps explained in the Final Report and EIS, the purpose and need for the proposed project was for water storage space that could potentially generate a defined, approximate annual yield of "*up to approximately* 8,539 acre feet." AR036174 (emphasis added). The alternatives the Corps considered in detail were designed to meet that purpose and

[25] Notably, in the latter statute, Congress directed the Secretary to collaborate with the CDNR and other local interests to determine a method of calculating storage costs where necessary to "reflect[] *the limited reliability of the resources* and the capability of non-Federal interests to make use of the reallocated storage space . . . ." Pub. L. No. 111-8, § 116, 123 Stat. at 608 (emphasis added).

need, not a "dependable" or "reliable" yield. Thus, the fact that neither the storage space available through the Chatfield Reallocation nor any of the other alternatives may provide a dependable yield in any given year does not mean that they would not provide an annual average yield that is consistent with the purpose and need of the project.

Finally, it is Petitioner, not the Corps, who confuses the terms used in the Final Report and EIS concerning water supply and water yield. The terms "dependable" or "reliable" yield as used in the request for a policy exemption, AR036924-036927, represent an entirely different measure than average annual yield. Petitioner misreads the term "dependable yield" as a measure of the amount of *space* to be provided by the reallocation, *see* Pet'r's Br. 43; however, as reflected in the policy exemption request, it is, instead, a measure of the amount of *water* that can reliably be withdrawn from a given amount of storage. *See* AR036926 ("Due to water rights in the existing conservation pool and generally low rainfall and run-off, *the reliability of water as measured by dependable yield* is very low." (emphasis added)). The calculation of dependable yield is, in turn, generally used to "determine[] how much storage a water user would desire to purchase." *Id.* Thus, contrary to Petitioner's argument, the Corps did not conclude that the Chatfield Reallocation project "would reliably increase water storage by 0 acre feet," Pet'r's Br. 43 (emphasis omitted),[26] nor did the Corps bury or "obscure" the fact that the reallocation would provide an annual average yield, as opposed to a dependable yield. Rather, the Corps properly concluded that the proposed reallocation would satisfy the purpose and need for additional water

[26] Moreover, although the Corps found that all of the "common measurements of dependable yield . . . drought of record, 50-yr low flow; 2% chance; 98% reliability; 7 day-10 year flow. . . are 0," it also indicated that some of the water providers requesting space at Chatfield actually had reusable sources of water that would "be captured on a yearly basis" and generated through the Chatfield Reallocation. AR036926. Thus, Petitioner's conclusion that the dependable yield generated by the Chatfield Reallocation is "nonexistent or zero," Pet'r's Br. 44, is also not correct.

supply for the Denver metropolitan area by making available 20,600 acre-feet of additional storage with a potential average annual yield of up to 8,539 acre-feet of water, as requested by the water providers. It separately determined that, because "[a]t Chatfield all [common] measures of dependable yield are 0," the costs for reallocated storage space in Chatfield Reservoir, which will be borne by the water providers, were high and should be adjusted. AR036926. The latter determination thus does not mean, as Petitioner claims, that the Chatfield reallocation will "reliably increase water storage by . . . 0 acre feet," Pet'r's Br. 43 (emphasis omitted), or that it does not provide an annual average yield consistent with the purpose and need of the project.

In sum, Petitioner's complaint that the Corps relied on the annual average yield of the reallocated storage, rather than reallocating storage to provide a "dependable" or "reliable" yield does not show the Corps misled the public or that the Corps failed to provide information sufficient to satisfy the purposes of NEPA.

CONCLUSION

For the foregoing reasons, Audubon Society's Petition for Review of Agency Action should be denied.

ORAL ARGUMENT STATEMENT

The United States requests oral argument. Oral argument will be useful in clarifying the scope of the relevant statutes and regulations and explaining how the actions of the Corps complied with those statutes and regulations.

Dated: May 25, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2016, I electronically filed the foregoing Response Brief for Respondent with the Clerk of Court using the ECF system which will send notification of such filing to the following e-mail address:

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