IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-02749-PAB

AUDUBON SOCIETY OF GREATER DENVER, a Colorado non-profit corporation,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, Omaha District,
Respondent,

CASTLE PINES METROPOLITAN DISTRICT,
CASTLE PINES NORTH METROPOLITAN DISTRICT,
CENTENNIAL WATER AND SANITATION DISTRICT,
CENTER OF COLORADO WATER CONSERVANCY DISTRICT,
TOWN OF CASTLE ROCK, and
COLORADO DEPARTMENT OF NATURAL RESOURCES,
Intervenor Respondents.

PETITIONER'S REPLY BRIEF

INTRODUCTION

This Court is tasked with deciding an important issue of first impression: may the U.S. Army Corps of Engineers (Corps) simply ignore its National Environmental Policy Act (NEPA) alternatives to the Chatfield Reallocation Project (Project) in selecting the least environmentally damaging practicable alternative as required by Section 404(b)(1) of the Clean Water Act (CWA). This brief replies to the Corps' Response Brief for Respondent (Corps Br.) (ECF No. 54).[1]

Although the Corps asserts inflated notions of deference, this Court owes no deference to an agency violating the procedural requirements of the CWA, and therefore acting "not in accordance with law" under the Administrative Procedure Act (APA). As evidenced by the administrative record for this case, the Chatfield Reallocation Project, including the relocation of recreational facilities and environmental mitigation necessary to offset the harm caused by the Project, is an integrated whole over which the Corps has complete regulatory authority. The Project triggers the requirements of Section 404(b)(1) of the CWA because actions which are an essential part of the Project would destroy critical wetlands at Chatfield State Park, and therefore the Act mandates that the Corps select an alternative to the Project that avoids harm to the waters of the United States altogether.

The Corps analyzed several alternatives to the Project as part of the Environmental Impact Statement (EIS) it prepared to comply with NEPA. Just as the Corps could not

[1] Denver Audubon has focused this reply on its Clean Water Act claim, due to page limitations. Denver Audubon stands behind its NEPA claims as well and disputes much of the argument on those claims by the Corps and the Intervenors. Those disputes can be addressed in more detail during oral argument, should the Court agree to set a hearing in this case.

lawfully segment the Project into smaller parts to avoid detailed review under NEPA, so too it is unlawful for the Corps to break up the Project in an effort to hide the fact that the alternative ultimately selected by the agency is the **most** environmentally damaging alternative, rather than the least. Particularly where, as is the case here, the Corps has authority over the entire Project, the Corps was required to conduct a Section 404(b)(1) analysis for the **whole** Project, not simply small segments of its preferred alternative.

ARGUMENT

I. The Corps misstates the appropriate standard of review for the legal question presented by this case, and does not explain how its action meets the procedural requirements of the Section 404(b)(1) Guidelines.

This Court is required to engage in a "hard look" review of the Corps' action under the APA. While some deference may be due to its substance, an agency's decision is not in accordance with law if it did not follow procedures required by the CWA and the Section 404(b)(1) Guidelines. Despite the Corps' assertions to the contrary, Denver Audubon's legal claim does not concern factual issues on which the agency is due extreme deference. Rather, the question of whether the anti-segmentation rule applies under the CWA is a question of law on which the courts—not the agency—are the ultimate authority.

As explained in Audubon Society of Greater Denver's (Denver Audubon) Opening Brief (Opening Br.) (ECF No. 49), agency action shall be set aside under the APA not only if it is arbitrary and capricious, but also if it is "not in accordance with law." 5 U.S.C. § 706(2)(A); Opening Br. at 15 (citing *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994)). An agency action is not in accordance with the law if it "fails to meet procedural requirements," for example, those set out in the Section 404(b)(1) Guidelines.

See 42 F.3d at 1573–74. The test is not whether there was a "rational basis" for the agency's action, as the Corps asserts (Corps Br. at 25).[2] The Corps does not address the correct standard in its brief, erroneously focusing on the more lenient and deferential arbitrary and capricious standard. Indeed, the "exacting standard applicable in determining whether an agency has failed to comply with the **procedural** requirements for its action contrasts with the deferential standard applicable to **substantive** challenges to agency action." *NRDC v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982) (citing *NRDC v. SEC*, 606 F.2d 1031, 1049 (D.C. Cir. 1979)) (emphasis added).

Alliance to Save the Mattaponi, cited in Denver Audubon's Opening Brief, is instructive in this regard. Opening Br. at 16, 20-21. Although *Alliance* recounted all the usual caveats about deferential review under the APA, ultimately the court ruled against the Corps because it failed to follow the proper procedures for choosing the LEDPA. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 127, 130 (D.D.C. 2009). While the Corps argued in *Alliance* that its chosen project—notably analyzed as a whole under the CWA—was the LEDPA because other alternatives may not meet the needs of the project or could be more damaging, the court held the Corps must **actually explain** that the other alternatives were not practicable or that they would be more damaging, not just that they "may" or "could" be. *Id.* at 130. Put another way, although the

[2] *Olenhouse* explicitly recognizes this. 42 F.3d at 1574, n. 24. In any event, violating the principles of anti-segmentation to arrive at a desired result, which the Corps has done here, is not "a legitimate government purpose" to which the Corps should be striving.

Additionally, the case cited by the Corps, *Hillsdale Environmental Loss Prevention*, is inapposite. 702 F.3d 1156 (10th Cir. 2012). In the action being challenged in *Hillsdale*, the Corps appears to have used the same alternatives for both its NEPA and CWA analyses. *Hillsdale Envtl. Loss Prevention v. U.S. Army Corps of Eng'rs*, Nos. 10-2008-CM-DJW, 10-2068-JTM-DWB, 2011 WL 2579799, at *4–*6.

Corps gave some reasons for its action, those reasons did not meet the procedural requirements of the CWA. Thus, the proper test has nothing to do with a "rational basis," but instead is whether the Corps complied with the procedural requirements of the 404(b)(1) Guidelines. That is the standard under which the Corps' actions must be judged in this case as well.

This case presents a slightly different issue than that presented in *Alliance*, because Denver Audubon is challenging the scope of the LEDPA analysis, rather than the substance of it. As all parties seem to agree, whether the Corps may segment the project into smaller parts, and thereby avoid evaluating alternatives to the entire project as a whole under the CWA, is a question of first impression. There are no factual disputes to be resolved, as the record shows that the relocation of recreational facilities and the Compensatory Mitigation Plan (CMP), which trigger the requirements of Section 404, are an integral part of the broader Project. The question of whether the anti-segmentation rule recognized in NEPA caselaw also applies to the selection of the least environmentally damaging practicable alternative under the CWA is a legal question for the court to decide.

II. The Project was consistently found to be an integrated whole, including mitigation and recreational relocation, except when it was inconvenient.

As evidenced by the Administrative Record, the Chatfield Reallocation Project includes three primary components, each of which is part of the integral whole: the reallocation of capacity from flood control to water storage, the relocation of recreational facilities, and the environmental mitigation necessary to compensate for the many harms of the Project. *See* Opening Brief at 23-25. The Corps states expressly in the EIS that the relocation of recreational facilities are "integral to the reallocation project" and "essential

components of the Selected Plan." AR036105, 036560. The CMP was also explicitly described as "an integral part of the Selected Plan, and as such, its implementation must be carried out concurrently as part of the overall project." AR036573. Additionally, each of the three components of the Project was specifically described in the Record of Decision (ROD), further highlighting that each portion was part of the overall project. AR041881. Tim Carey and the Omaha District Regulatory Branch, whom the Corps has quoted extensively in its brief, stated elsewhere in the record that "the reallocation of water storage and relocation of recreational facilities roads are inextricably linked, administratively, due to how Civil Works must authorize the Reallocation Project." AR044710. Furthermore, even the chief of the Regulatory Branch in Washington, D.C. noted—as recently as 2014—that the recreational modifications were "direct impacts resulting from the project that was evaluated." AR044852. The Corps has failed to provide a sufficient evidentiary basis to counter overwhelming record evidence that the Project, including recreation and compensatory mitigation, was a single project and not a myriad of separate small projects.[3]

The Corps itself admits that the broader Project could not proceed if the recreational facilities were not relocated and compensatory mitigation was not done to offset some of the many harms caused by raising the reservoir level. This is the reason why the Corps

[3] The only place in its brief that the Corps appears to address this point is footnote 12, where the Corps mistakenly argues that a case from the Eighth Circuit forecloses the argument that the Corps must analyze an integral project in its Section 404(b)(1) analysis. Corps Br. at 33 n.12. However, as explained later in this brief, the *Whistler* case relied upon by the Corps presents a very different fact pattern because the larger project at issue in the case was not subject to the jurisdiction of the Corps, while the Chatfield Reallocation Project as a whole is unquestionably under the control of the Corps.

consistently refers to the Project in the EIS as part of an integral whole. Only in Appendix W of the EIS does the Corps attempt to minimize the critical importance of both the CMP and the relocation of recreational facilities by dismissing them as "incidental" to the larger project. Corps Br. at 32; AR038961. Yet, throughout the entire EIS, the Corps explains that both environmental mitigation and maintenance of recreational facilities **were required to be included under Corps planning guidance**. AR036155; AR036370; AR038958.

Regardless the record does not support the agency counsel's *post-hoc* contention during briefing that "'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 the CMP." Corps Br. at 32. It is quite the contrary. Both parties agree that the reallocation can only proceed if the compensatory mitigation and recreational facilities modification are authorized. For this reason, Denver Audubon urges this Court to hold that the entire Chatfield Reallocation Project must be considered as a whole, for the Section 404(b)(1) analysis as well as the NEPA analysis.

The primary document relied upon by the Corps to explain its rationale for choosing to segment the project for the CWA analysis actually serves to undermines the agency's position that that 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." Corps Br. at 25. While virtually every other citation to the Administrative Record was to Appendix W,[4] the Corps relies on

[4] The Corps' CWA argument is contained on pages 17-34 of its response brief. In that section, the Corps cites to Appendix W numerous times. The brief cites one time to the Purpose and Need Statement from the Environmental Impact Statement. Corps Br. at 17

one document in the record in an attempt to explain the Corps' rationale for choosing to segment the project for the CWA analysis. Corps Br. at 24 (citing AR044652); 33 (citing AR040996, an identical copy of the same document). The Corps' counsel presents this document as definitive proof that "[p]ersonnel at the Corps considered EPA's suggested approach to the Section 404(b)(1) analysis and explained why it was inappropriate in this case." Corps Br. at 24.[5] Yet even a cursory review of the administrative record shows that the same Corps Regulatory personnel—specifically Tim Carey, who apparently prepared the document relied upon by the Corps during briefing—ultimately repudiated that justification and instead adopted the same position that Denver Audubon advocates in this litigation. AR044688. Initially, it is odd for the Corps to rely on statements by Corps

(citing AR036153). The brief also cites to letters sent by EPA to the Corps regarding the project, which while illuminating regarding EPA's evolving position on the matter, do nothing to explain the Corps' reasoning for why it segmented the project. Corps Br. at 23 (citing AR038688; AR038691), 24 (citing AR038701). The only other record citation in the entire section is to the curious Carey document discussed in the remainder of this paragraph.

[5] With regards to EPA's concerns about the 404(b)(1) approach in this case, Denver Audubon does not argue that intra-agency debate by itself makes the Corps' ultimate action arbitrary and capricious. *Contra* Corps Br. at 24-25. Of course EPA was entitled to change its mind, but the record does not contain sufficient explanation for **why** EPA's earlier-expressed concerns, which Denver Audubon shares, do not render the Corps' actions unlawful. In a brief one-page letter, EPA gave no reasons for its reversal of position, instead simply stating that now "EPA is comfortable with the approach taken by the Corps in the preliminary draft CWA §404(b)(1) analysis." AR038701. EPA's abrupt change of position should be contrasted to the detailed critiques it gave to the Corps' proposed approach in its letters dated May 13, 2009 and May 18, 2010. AR038688-94, AR038698-700. EPA's failure to disclose its reasoning on the record might be excusable if the Corps itself had sufficiently documented a response to all the earlier concerns voiced by EPA and the Corps Regulatory Program. However, as explained elsewhere in this brief, the only justification on the record that the Corps relies on was later repudiated by the same Corps Regulatory staff, who appear to support Denver Audubon's position instead. The Corps' response to EPA's concerns instead focused on the issue of when mitigation should be considered in the LEDPA determination process, AR038695-97, which the Corps now says "the Court need not address." Corps Br. at 30.

Regulatory staff when those staff were not responsible for the ultimate decision and ended up opposing the Corps' approach to the Section 404(b)(1) analysis for the Chatfield Reallocation Project.[6] The Corps neglects to explain why the Court should not look to later-dated documents from September 4, 2009 where the same Corps regulatory staff and their counsel expressed concerns that "the preferred alternative may not be LEDPA," AR044705, and that the plan to segment the project "is incorrect and may lead to an erroneous 404(b)(1) analysis that cannot be supported by either the District Regulatory staff or Counsel." AR044706. Elsewhere in the record, Carey and the Omaha District Regulatory Branch made clear their position that "a Section 404(b)(1) analysis should be done for the entire Reallocation Project, not just for the relocation of recreation facilities/roads." AR044710. For these reasons, the May 14, 2009 document is anomalous and simply does not support the Corps' theory. Thus there is no support from the administrative record for the Corps' position that it can legally narrow the scope of the analysis for the CWA to be much more constrained than the detailed analysis of alternatives under NEPA.[7]

The Corps' analysis of its own regulations is also unpersuasive and contradicted by the same Corps regulatory personnel. As an initial matter, 40 C.F.R. § 230.10(a)(4) states "**analysis of alternatives** required for NEPA … will in most cases **provide the**

[6] The Corps' brief does not inform the Court of this important fact, instead simply referring to "Personnel at the Corps" or "Corps personnel." Corps Br. at 24, 32. This oversight is very misleading given the divergence of opinion between Civil Works and Regulatory personnel over how this Project should have been analyzed for Section 404(b)(1) compliance.

[7] While the Regulatory Program did not prevail in the inter-agency dispute, the record does not disclose any justification for **why** Civil Works' approach was chosen. Instead, when the Commander of the Omaha District of the Corps resolved the dispute, the focus was again on the question of how mitigation should be considered in selecting LEDPA. AR017069-70. The Corps has now deemed this issue to be irrelevant to this case. *See supra* note 5.

information for the **evaluation of alternatives** under [Section 404(b)(1)] Guidelines." (emphasis added). This regulation establishes a clear connection between the alternatives analyzed under NEPA and the alternatives evaluated under the CWA. *Cf.* Corps Br. at 26-27. The major difference, of course, is that while NEPA imposes "only" a procedural requirement to analyze the environmental impacts of alternatives to the project, the CWA imposes a substantive duty to choose the least environmentally damaging alternative that is also practicable. Thus, while the NEPA analysis is not identical to the CWA, the analysis of NEPA alternatives necessarily informs comparison and selection of the LEDPA from among those alternatives. Under the Corps' approach, instead, the agency would be free to ignore the agency's extensive alternatives developed pursuant to NEPA. This simply makes no sense. Additionally, Tim Carey provided a detailed analysis of applicable regulations to show why they require the Corps to conduct a Section 404(b)(1) analysis that evaluates alternatives to the entire Project. AR044712-14.

In sum, the Court should find, just as the Corps did, that the Chatfield Reallocation Project is an integral project. The Project should not be broken into smaller segments to avoid an unfavorable regulatory outcome. The record in this case simply does not support the Corps' proffered rationale for segmenting the project.

III. The same reasons supporting the anti-segmentation rule for NEPA also apply to the CWA analysis here, therefore the Corps should be required to conduct its CWA analysis on the entire project.

None of the cases cited by either party are directly on point for the key issue in this case: whether the Corps can segment the broader Project to avoid analyzing alternatives to the Project as a whole during the LEDPA analysis. That is why Denver Audubon advised

this Court that the issue is one of first impression. Although the Corps repeatedly points out no cases have ever directly supported Denver Audubon's position (*e.g.*, Corps Br. at 27, 33), the reverse is also true. The Corps cannot cite to any case that has approved segmentation of a larger project, over which the Corps has sufficient federal authority, to apply the Section 404(b)(1) analysis to only a small portion of the project. However, even though no cases are directly on point, the cases that do discuss the anti-segmentation rule in the NEPA context—some of which also involved CWA claims—support application of the anti-segmentation rule to the 404(b)(1) analysis for the Chatfield Reallocation Project.

One key distinction makes this case different from the cases relied upon by the Corps: the Corps has authority over every aspect of the Chatfield Reallocation Project. The cases relied upon by the Corps involved situations where Corps regulatory authority was limited to the action requiring a Section 404 permit itself. In *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, the court explained that the Corps did not control the entire project because the broader surface mining project was regulated by another federal agency under the authority of the Surface Mining Control and Reclamation Act. 556 F.3d 177, 195 (4th Cir. 2009). In *National Wildlife Federation v. Whistler*, the larger project was private development—not subject to federal control—that would have proceeded even if the Corps denied the Section 404 permit. 27 F.3d 1341, 1345 (8th Cir. 1994). In *Hoosier Envt'l Council v. U.S. Army Corps of Engineers*, the Corps only had authority (based on Section 404) over one segment of a highway project, and the entire project was under the authority of the Indiana Department of Transportation and the Federal Highway Administration. No 1:11-cv-0202-LJM-DML, 2012 WL 3028014 (S.D. Ind. 2012). Here, the Corps is the agency

with jurisdiction over both the reallocation and the required mitigation and relocation of facilities. Finally, *Sylvester v. U.S. Army Corps of Engineers*, which the Corps misleadingly cites for the proposition that "it is appropriate…to only review alternatives that are practicable at the already-selected site" (Corps Br. at 20), is inapposite. In that case, a private developer's site was "fixed by decisions [not requiring approval of] the Corps." Corps Br. at 20 (citing 882 F.2d 407, 409–10 (9th Cir. 1989)). In this case, there is no fixed site to which the Corps can restrict its 404(b)(1) analysis. As demonstrated by two of the Corps' NEPA alternatives **not** involving reallocation in the Chatfield Reservoir, the Corps cannot credibly argue that its 404(b)(1) analysis can be restricted solely to its preferred alternative.

The key test becomes, then, not what is the smallest portion of a project that triggers applicability of Section 404, but instead whether the portion triggering Section 404 is part of a larger project over which the Corps has sufficient control, such that it must consider alternatives to the entire Project in evaluating the LEDPA. The Corps regulatory program has authority over "those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." Corps Br. at 28 (citing 33 C.F.R. pt. 325, App. B, § 7.b(1)). Corps regulations lay out factors to consider in deciding whether there is federal control going beyond the limits of regulatory jurisdiction. 33 C.F.R. pt 325, App. B, § 7.b(2); *see also Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1121 (9th Cir. 2005).[8] However for Corps Civil Works projects, the question is much simpler, because Corps regulatory authority covers the entire project.

[8] Similar to its position in this case, the Corps also argued in *Save Our Sonoran* that the washes which required a 404 permit to be filled should essentially be segregated out from the broader development. 408 F.3d at 1118. While the cases raise slightly different issues,

The policy reasons behind the anti-segmentation rule also support its application to the 404(b)(1) analysis. The purpose of the anti-segmentation rule is to ensure that an agency does not "evade [its] responsibilities" by "artificially dividing a major federal action into smaller components, each without a 'significant' impact." *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1313 (S.D. Fla. 2005) (quoting *PEACH v. U.S. Army Corps*, 87 F.3d 1242, 1247 (11th Cir. 1996)). In the NEPA context, this means that agencies are not allowed to divide up one project into smaller actions until each action "has an insignificant environmental impact" thus avoiding the need for a more detailed NEPA analysis. *Id.* But the reasoning did not end with the anti-segmentation rule, as the court also faulted "manipulation of a project design to conform to a concept of independent utility, particularly with the intention that a [CWA] permit be expedited." *Id.* at 1323. *Florida Wildlife* makes clear that it is problematic for a project to be conceptualized as an integrated whole, yet have smaller portions "never intended to stand alone" segmented out when "time [comes] to apply for a CWA permit." *Id.* at 1318. Thus, even though the Corps tries to distinguish this case by saying the anti-segmentation rule only applies to NEPA (Corps Br. at 33), the anti-segmentation rule was justified by the Corps' attempt to avoid a

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the differences favor Denver Audubon's position, not the Corps'. In *Save Our Sonoran*, the court had to overturn the Corps' decision to only analyze a subset of the project in question. 408 F.3d at 1121–23. In this case, the Corps itself already completed a NEPA alternatives analysis based on the entire Chatfield Reallocation Project, both because the relocation of recreational facilities and the compensatory mitigation were integral to the broader project, **and** because the Corps had clear regulatory authority over the whole Project. It is immaterial whether the reallocation itself would not require a discharge into waters of the United States (*contra* Corps Br. at 33) because the reallocation could not proceed without the mitigation of recreational and environmental harms.

difficult and time-consuming CWA review. *Id.* at 1323.[9] Furthermore, the resemblance between these cases is striking in that the Corps treated the project as a unified whole in both cases until it came time to conduct the CWA Section 404 analysis.

The consistent theme behind these cases is that the Corps should not be able to avoid difficult environmental reviews by breaking a project up into smaller pieces, unless a sufficient basis for federal authority over the entire project is lacking. No case before this one has presented the issue of whether the Corps, after conducting a NEPA analysis for an entire project within its jurisdiction, can then subvert the Section 404(b)(1) analysis by contriving alternatives to portions of the agency's preferred NEPA alternative with no independent utility whatsoever. The cases where both NEPA and the CWA were at play all involved challenges to the scope of the NEPA analysis, and the CWA claims were bundled together in that. *See, e.g., Fla. Wildlife Fed'n,* 401 F. Supp. 2d 1298. This case, because it involves a project authorized by the Corps Civil Works program, clearly presents that issue for a decision by this Court.

IV. The Corps' regulatory authority over the entire Project argues in favor of a broader CWA analysis, not against it.

The Corps Civil Works program's broad authority over the projects it authorizes counsels for a broad scope of CWA analysis, rather than narrow. As recognized by Corps regulatory staff, "[w]hile there are historical differences between how Civil Works and Regulatory approach water supply projects, when it comes to compliance with Federal law

[9] "Corps personnel" noted some of the difficulties that would follow if the Section 404(b)(1) analysis was conducted for the entire Project: "additional documentation may be needed to support a finding that the preferred alternative is the least environmentally damaging practicable alternative (LEDPA); EPA could elevate the decision; and there may be political fallout from the water providers/congressional interests." AR044688.

(Section 404 of the CWA), it is imperative that the Corps be consistent, especially when a large number of major projects are being evaluated concurrently in one region." AR044707. Denver Audubon asks this Court to provide a clear interpretation of the requirements of Section 404 of the CWA, the 404(b)(1) Guidelines, and the related guidance documents to ensure that all parties seeking approval of water supply projects by the Corps will be treated fairly and consistently by Regulatory or Civil Works review.

The proper question for the Court, in assessing whether the scope of the Corps' LEDPA analysis was at the proper level, is whether the Corps has sufficient federal control over the project to require an alternative that is practicable and less environmentally damaging. *See* 33 C.F.R. pt. 325, App. B, § 7.b(1); *cf*. *Save Our Sonoran*, 408 F.3d at 1123. This comports with both the goals of the CWA and the intent of the 404(b)(1) Guidelines.

The Corps' primary explanation for why the anti-segmentation rule should not apply to CWA analyses improperly shifts the focus away from the key question of federal control. The Corps argues that the scope of the CWA analysis should not be expanded "backwards from the permit action to capture an action, as well as associated impacts, that did not require a Section 404 authorization." Corps Br. at 32-33. Even putting aside that "Corps personnel" later repudiated this line of reasoning, this argument holds no water. The project that the Corps approved through the ROD in this case was the Chatfield Reallocation Project. The Project required Section 404 authorization because integral components of the Project involved discharges into the waters of the United States. There is no question that the Corps has authority over the entire Chatfield Reallocation Project; it could deny the Project if practicable alternatives would be less environmentally damaging.

By splitting the Project into smaller pieces, however, the Corps authorizes discharges that could have been, and therefore must be avoided, in violation of the 404(b)(1) Guidelines. It does not matter if the Corps is initially involved only because of its regulatory authority over an activity requiring a Section 404 permit or the Corps is responsible for the broader project from the outset. If the Corps is determined to have authority over the whole project—whether imputed (as in *Save Our Sonoran*) or explicit (as with this Project)—then both the NEPA and the CWA analyses should evaluate alternatives to the **entire** project.

V. The appropriate remedy is to vacate the ROD, enjoin any implementation of the Project, and order a 404(b)(1) analysis be conducted for the entire Project.

Denver Audubon argued that preferred NEPA Alternative 3 was not the LEDPA for two reasons: (1) the Environmental Impact Statement confusingly stated that "Alternative 3 is also the Least Environmentally Damaging alternative", AR036557; and (2) because this inconvenient fact helps to explain why the Corps went to such great lengths to avoid conducting a Section 404(b)(1) analysis on the entire Project. Now that the Corps has clarified that it did not select Alternative 3 as the LEDPA, Corps Br. at 30, this Court need not decide the question of whether the Corps **could have** selected Alternative 3 as LEDPA. Denver Audubon therefore requests that the Court vacate the record of decision, enjoin any implementation of the Project, and order the Corps to correct its CWA analysis. As construction on the Project has not yet commenced, no party will suffer any harm.

Dated: June 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 17, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such to the attorneys of record.

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