

**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,

Respondent,

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

Intervenor Respondents.

NOTICE OF CLARIFICATION TO RESPONDENT'S BRIEF

Respondent United States Army Corps of Engineers (“Corps”) submits this Notice to clarify a statement made in its responsive merits brief concerning the proper scope of the Corps’ Section 404(b)(1) analysis for the Chatfield Reallocation project. In its Response Brief [Doc. 54], Respondent quoted from a May 2009 memorandum provided to the Omaha District Civil Works Branch reflecting the then-held view of staff in the Omaha District’s Regulatory Branch that the CWA Section 404(b)(1) analysis should not evaluate alternatives to the entire water reallocation project. Resp’t’s Resp. Br. at 24 (citing AR044652), 33 (citing AR040996). Respondent argued that “[t]his approach was ultimately reflected in the Corps’ determination that the Chatfield Reallocation was in compliance with Section 404 of the CWA,” *id.* at 24, but failed to note that the Omaha District Regulatory Branch subsequently changed its view.

As Petitioner Audubon Society of Greater Denver correctly pointed out in its Reply Brief, the Omaha District Regulatory Branch changed its view in subsequent memoranda. Pet’r’s Reply Br. [Doc. 58] at 7 (citing AR044706, AR44710). Petitioner characterized the Corps’ failure to inform the Court of these subsequent memoranda and change in position by the Omaha District Regulatory Branch in its Response Brief as an “oversight,” but “very misleading.” Pet’r’s Reply Br. at 8 n.6. Respondent agrees that it should have noted when discussing and citing to the May 2009 memorandum in its Response Brief the subsequent change in position by the Omaha District’s Regulatory Branch, both to provide the Court with a more complete and fulsome picture of the Administrative Record, and to better place the statements in Respondent’s Brief in context.¹ Accordingly, to more fully clarify the contents of the Administrative Record

¹ Of course, and as Petitioner notes, the Omaha District Regulatory Branch “w[as] not responsible for the ultimate decision,” Pet’r’s Reply Br. at 8. The Assistant Secretary of the Army for Civil Works approved the Chatfield Reallocation project and found it to be in

on this point in light of the inadvertent omission in its Response Brief, the Corps submits this Notice for the Court's benefit.

Dated: July 26, 2016

Respectfully Submitted,

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compliance with all applicable laws and regulations based upon the Final Report and EIS, AR041875, which included a Section 404(b)(1) Analysis which analyzed the effects and alternatives to the specific activities that discharged into waters of the United States, rather than the effects and alternatives to the overall water reallocation, AR038956, and determined the project to be in compliance with the CWA, AR038676. This approach to scoping the Section 404(b)(1) analysis is in the Administrative Record, which includes the May 2009 memorandum, and is in the final Section 404(b)(1) analysis in the record. That the approach taken in the Section 404(b)(1) analysis, which was relied upon and approved by the decisionmaker, was inconsistent with the Omaha District Regulatory Branch's later-suggested approach "does not render the decisionmaking process arbitrary and capricious." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007).

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2016, I electronically filed the foregoing Notice of Clarification to Respondent's Brief 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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