No. 18-1004

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AUDUBON SOCIETY OF GREATER DENVER,
Petitioner-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Federal Respondent-Appellee,

and

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-Appellees.

On Appeal from the U.S. District Court for the District of Colorado, No. 1:14-CV-20749-PAB (Hon. Philip A. Brimmer)

FEDERAL RESPONDENT-APPELLEE'S OPPOSITION TO PETITIONER-APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL

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GLOSSARY

APA	Administrative Procedure Act
Audubon	Audubon Society of Greater Denver
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act

INTRODUCTION

This case concerns the approval by the U.S. Army Corps of Engineers ("Corps") of the Chatfield Reservoir Storage Reallocation Project ("Project" or "Chatfield Reallocation"), which was designed to help municipal water suppliers meet increasing demands for water in the Denver, Colorado metropolitan area. The Corps conducted an extensive and thorough environmental analysis of the Project, including under both the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, and Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344.

The Audubon Society of Greater Denver ("Audubon") filed a petition for review in the district court, claiming that the Corps' analysis and approval of the Project did not comply with NEPA or the CWA and that the Project will irreparably harm its interests. The court denied Audubon's petition on the merits and entered judgment for the Corps. It also denied Audubon's request for injunctive relief. Audubon appealed and now asks this Court to enjoin ongoing construction of the Project pending appeal.

Audubon is not entitled to this extraordinary relief. It was unable to succeed on the merits in the district court, and it is not likely to succeed in this appeal. Audubon is also unable to establish that it is likely to suffer irreparable harm, or that the balance of the equities and the public interest favor an injunction. Its motion should be denied.

BACKGROUND

I. Legal Background

a. NEPA

NEPA requires that federal agencies prepare an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This procedural requirement ensures that agencies will take a "hard look" at their actions, but it does not compel particular substantive results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

b. CWA

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. The Corps will grant a permit to discharge dredged or fill material into waters of the United States unless it "determines that [the permit] would be contrary to the public interest." 33 C.F.R. § 320.4(a)(1). The Corps evaluates permit applications pursuant to guidelines issued under Section 404(b)(1). These "Section 404(b)(1) Guidelines" were developed jointly by the Environmental Protection Agency and the Corps, and they are codified at 40 C.F.R. Part 230.

The Section 404(b)(1) Guidelines provide that "no 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." *Id.* § 230.10(a)(2).

"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://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1105-2-100.pdf (last visited Jan. 16, 2018).

II. Factual Background

a. Project background and NEPA analysis

Chatfield Reservoir is a water storage facility located within the South Platte River Basin southwest of Denver. GA22.[1] The Reservoir was constructed in 1973 as part of the Chatfield Dam and Lake Project, which Congress authorized for flood control and other purposes. GA20; Flood Control Act of 1950, Pub. L. No. 81-516, § 204, 64 Stat. 163, 175.

Consistent with Congressional direction to provide recreation at the facility, *see* Pub. L. No. 93-251, § 88, 88 Stat. 12, 38 (1974), the Corps leased the area surrounding the Reservoir to the State of Colorado to form Chatfield State Park. GA37. The Park is a popular recreation site with hiking trails, picnic areas, and boating facilities. GA21. The Park also provides habitat for a variety of animals and plants. GA49.

[1] The Corps provides cited pages from the administrative record in the accompanying Government Appendix, cited as "GA[number]." The Corps has included additional pages not specifically cited for context and completeness.

In 1986, Congress authorized the Corps, "upon request of and in coordination with the Colorado Department of Natural Resources," and following the Corps' "finding of feasibility and economic justification," to reallocate some of the storage space in Chatfield Reservoir 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, Pub. L. No. 99-662, § 808, 100 Stat. 4082, 4168.

In 2012, the Colorado Water Conservation Board—a division of the Colorado Department of Natural Resources—asked the Corps to consider reallocating space in the Reservoir to permit a consortium of twelve municipal and industrial water providers to store additional water. GA44-45; GA21. Colorado's population is projected to nearly double by 2050, and the water providers were already turning to nonrenewable groundwater sources to meet municipal water needs. GA48. Reallocating water storage within Chatfield Reservoir would help the water providers meet demand with a more reliable surface water supply. GA48-49; GA67.

In accordance with NEPA and other applicable law, the Corps and the Colorado Water Conservation Board conducted a joint study of the proposed reallocation, which culminated in a Final Feasibility Report and an Environmental Impact Statement (together, "EIS"). The Corps first explored and screened nearly 40 potential project concepts before identifying four primary alternatives for more detailed consideration. GA27; GA76. The Corps ultimately determined that the third alternative would fully meet the purpose and need for the project, provide the requested water at the lowest cost, and cause the least environmental damage. GA111-12. Alternative three would permit the reallocation of 20,600 acre-feet of water supply storage in the Reservoir for municipal and industrial use, agriculture, recreation, and fishery habitats. The reallocation would enable water providers to store 8,539 acre-feet of water in an average year. GA86-87.

Because this additional storage would raise the Reservoir's water level by twelve feet and thereby flood surrounding areas, GA117, the Corps required the Colorado Department of Natural Resources and its partners to undertake a variety of mitigation measures to ensure that the project's adverse effects would not be significant. GA120. Trees and

large plants in newly flooded areas would be removed to ensure that they would not endanger boats. GA83; GA110. A Recreation Facilities Modification Plan ("Recreation Plan") was developed because recreation facilities in the flood zone would also be removed and rebuilt at higher elevations. GA118-20. A separate mitigation plan—the "Compensatory Mitigation Plan"—was developed to "creat[e], enhance[], and protect[] wetlands, riparian habitat, Preble's habitat, and bird habitat." GA158.

b. The Corps' CWA Section 404 analysis

Under the Section 404(b)(1) Guidelines, the Corps must evaluate "alternative[s] to the proposed discharge" into waters of the United States. 40 C.F.R. § 230.10(a). To develop the alternatives, the Corps must first determine the overall project purposes for the proposed activity requiring such a discharge. *Id.*

Here, the Corps determined that the reallocation itself would *not* require a Section 404 permit or an analysis under Section 404(b)(1). GA123 ("The 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]."). However, both the

Recreation Plan and the Compensatory Mitigation Plan "would result in discharge of dredged or fill materials into waters of the United States" and would therefore require a separate analysis. GA123; GA135.

The Corps thus determined that the "overall project purposes" under the Section 404(b)(1) Guidelines were the purposes of the projects for which discharges into waters of the United States were required, *i.e.*, the Recreation Plan and the Compensatory Mitigation Plan. Specifically, with respect to the Recreation Plan, the Corps found that the "purpose of relocating the recreation infrastructure at Chatfield State Park is to maintain the recreation experience following the reallocation of storage at Chatfield Reservoir by providing, to the maximum extent feasible, in-kind recreation facilities." GA155-56. With respect to the Compensatory Mitigation Plan, 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." GA159.

The Corps did not use the purpose of the proposed reallocation—"to increase availability of water . . . in the greater Denver Metro area so that a larger proportion of existing and future water meets can be

met"—in its analysis under the Section 404(b)(1) Guidelines because the reallocation itself did not involve a discharge under Section 404. GA48.

The Corps accordingly conducted a Section 404(b)(1) analysis of the activities proposed by the Recreation Plan and the Compensatory Mitigation Plan. GA133-63 (Final Report and EIS—App. W, CWA Section 404(b)(1) Analysis, Dredge and Fill Compliance). The Corps concluded that both plans complied with Section 404. GA161.

c. Project approval and Audubon's challenge

The Corps ultimately determined that the Project would comply with all relevant environmental laws. GA122-23. The Corps then issued a Record of Decision approving the Project in May of 2014. It explained that the proposed Project was "technically feasible, economically justified, environmentally acceptable, and in the public interest." GA168-69. It also explained that the Project "incorporates all practicable means to avoid or minimize adverse environmental effects, and the unavoidable impacts are mitigated." GA169.

Audubon petitioned the district court for review of this decision in October of 2014. ECF 1. The parties briefed Audubon's motion for

summary judgment in 2016. ECF 49, 54, 56, 58. On December 8, 2017, Audubon moved for a preliminary injunction or, in the alternative, an injunction pending appeal. ECF 75. On December 12, the district court affirmed the Corps' decision. In a separate order issued that same day, the court—treating it as a motion for injunction pending appeal—denied Audubon's motion for injunctive relief. ECF 77, 78. The court held that Audubon had not carried its burden to show that it was likely to succeed on the merits on appeal. ECF 78 at 2. Audubon appealed on January 2, 2018, and it moved for an injunction pending appeal in this Court on January 8. ECF 80, Doc. No. 01019926441.

ARGUMENT

In considering a request for injunction pending appeal, this Court applies the same standard as it would when reviewing a district court's grant or denial of a preliminary injunction. *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 n.1 (10th Cir. 1996). Under that standard, Audubon must show that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm absent relief; (3) the balance of equities tips in its favor; and (4) the injunction is in the public interest. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 19-20

(2008). Because an injunction "is an extraordinary remedy," *id.* at 22, "the right to relief must be clear and unequivocal," *Beltronics USA v. Midwest Inventory Dist.*, 562 F.3d 1067, 1070 (10th Cir. 2009).

An agency's compliance with the CWA is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1268 (10th Cir. 2004). This Court therefore considers the likelihood of success on the merits in the context of the APA's deferential standard of review. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994). "The scope of review under the [APA] is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983). Moreover, 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) (internal quotation marks omitted).

I. Audubon Has Not Established a Likelihood of Success on the Merits.

Audubon argues it is likely to succeed on the merits of only one issue: whether, in determining the scope of required analysis under

CWA Section 404, the Corps reasonably defined the "overall project purposes" as the purposes of the proposed activities requiring a discharge of fill or dredged materials into waters of the United States. As explained below, the Corps' decision was reasonable and was consistent with applicable laws, guidance, and the Corps' past practice. Audubon presents but a single argument to the contrary, which is that the Corps' *CWA* analysis was arbitrary and capricious because it violated *NEPA's* anti-segmentation rule. But Audubon offers no legal authority for this argument. Accordingly, Audubon has failed to demonstrate a likelihood of success on the merits, and this failure alone requires the Court to deny the motion for injunctive relief.

As explained above at 8-10, the "proposed reallocation of storage and use of the reallocated storage" itself did not require a Section 404 authorization or analysis, even though both the proposed Recreation Plan and Compensatory Mitigation Plan did so require. In this circumstance, the Corps properly identified the overall project purposes as the purposes for the activities involving discharges into jurisdictional waters (i.e., the Recreation Plan and the Compensatory Mitigation Plan), even though these activities were part of a larger project (i.e., the

Chatfield Reallocation) that would not require discharges into waters of the United States. Because the Corps' regulatory jurisdiction is limited, such an approach is permissible. *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 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.").[2]

The Recreation Plan and Compensatory Mitigation Plan are indisputably "incidental to the proposed reallocation," GA138, in that the discharges pursuant to those plans would only occur if the Corps

[2] Although a full explanation is beyond the scope of this response to Audubon's motion, we briefly note that 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. The Civil Works Program is distinct from the Corps' regulatory authority under Section 404. Because only the Recreation and Compensatory Mitigation Plans involve discharges into waters of the United States, only those proposed activities fall within the Corps' regulatory jurisdiction. The Corps properly focused its review of practicable alternatives under Section 404 on those actions over which it had regulatory jurisdiction under the CWA.

chose to reallocate water storage at Chatfield Reservoir. But even if the two plans are "integral" to the overall project—as Audubon contends, Mot. at 12—there is no authority requiring the Corps to analyze the broader project in its Section 404(b)(1) analysis.

Indeed, the relevant authority is to the contrary. The Eighth Circuit affirmed the Corps' approach in an analogous situation in *National Wildlife Federation v. Whistler*, 27 F.3d 1341 (8th Cir. 1994). There, the Corps conducted a Section 404(b)(1) analysis of one component (involving the discharge of fill into waters of the United States) of a larger housing development project. *Id.* at 1343-44. Like Audubon here, the plaintiff there argued that the Corps should have considered the project as a whole in conducting its Section 404(b)(1) analysis. *Id.* at 1345. But because the larger housing development project did not require a Section 404 permit, the Eighth Circuit affirmed the Corps' decision to analyze only the component that required Section 404 authorization. *Id.* The Southern District of Indiana rejected the same argument in a different context, noting that plaintiffs there cited "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." *Hoosier Envtl. Council v. U.S. Army Corps of Eng'rs*, No. 1:11-cv-0202-LJM-DML, 2012 WL 3028014, at *10, *aff'd*, 722 F.3d 1053 (7th Cir. 2013).

In its motion, Audubon borrows a regulatory requirement from NEPA to argue that the Corps improperly segmented the project. Mot. at 11-14. By way of background, NEPA regulations "require that 'connected' or 'closely related' actions 'be discussed in the same [environmental] impact statement.' " *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)). As this Court has explained, this regulatory requirement is intended to "prevent agencies from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting *NEPA review*) by segmenting or isolating an individual action that, by itself, may not have a significant environmental impact." *Id.* (emphasis added).

The anti-segmentation rule is a NEPA regulation that applies only to the Corps' NEPA analysis. It does not apply to CWA Section 404 analyses. *See, e.g.*, 40 C.F.R. pt. 1501 (NEPA and Agency Planning). Audubon concedes that "the issue of whether anti-segmentation applies

to the CWA is . . . a matter of first impression." Mot. at 10. Respectfully, however, there is no real issue: *NEPA* regulations simply do not govern *Section 404(b)(1)* analyses. The district court correctly held that "there is no legal basis for applying the NEPA anti-segmentation rule to analysis under the CWA," ECF 77 at 37, and to counsel's knowledge, no court has ever agreed with Audubon's argument. Moreover, Audubon itself proffers no judicial authority in support of its argument.

The Corps considered and rightly rejected this argument during the administrative process. As the Corps explained, it would apply NEPA's anti-segmentation concept in reverse by "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." GA166. The Recreation Plan and the Compensatory Mitigation Plan are the actions requiring Section 404 analysis and authorization; thus, applying NEPA's anti-segmentation requirement would require the Corps to expand the analysis to encompass the proposed reallocation, which does *not* require a Section 404 analysis and authorization. Therefore, the Corps has not improperly segmented the project, but rather has properly limited the application of its

regulatory authority under Section 404 to only those activities that require a Section 404 authorization.

Indeed, the district court correctly observed that the "policy underlying the anti-segmentation rule is not implicated" by the Corps' decision. ECF 77 at 36. Rather, the district court found that the Corps considered the actions in the Recreation Plan and Compensatory Mitigation Plan and associated discharges as a whole, including the cumulative impacts of those actions. *Id.* at 36-37. "Such consideration of the cumulative impact of connected actions is what the anti-segmentation rule is intended to require." *Id.* at 37.

Audubon attempts to find support for its argument in two authorities, but they do not provide the support it seeks. First, Audubon points to the Corps' *Planning Guidance Notebook*. Mot. at 12. This guidance "provides the overall direction by which Corps of Engineers Civil Works projects are formulated, evaluated and selected for implementation." *Planning Guidance Notebook* at 1-1. Nothing in this guidance substantively affects the appropriate scope of a Section 404(b)(1) analysis. It simply provides 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. *Id.* at C-41.[3]

Audubon contends that the Corps acted inconsistently with the instruction in the *Planning Guidance Notebook* to integrate the NEPA review process with assessing compliance with other applicable environmental statutes, including the CWA. Mot. at 12 (citing *Planning Guidance Notebook* at 2-16). But the cited provision of the guidance offers no support for applying NEPA regulations to other statutes; it merely prescribes conducting an integrated review "to reduce process overlap and duplication" and "help assure . . . thorough assessments of the environmental, social, and economic resources affected by the proposed activity are incorporated into planning decisions." The Corps did just that here, and the fact that the Corps' Section 404(b)(1) analysis is discussed and incorporated into the Project's EIS demonstrates that Audubon's argument that the Corps acted inconsistently with its guidance lacks merit. *See* GA133 (App. W, CWA Section 404(b)(1) Analysis).

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[3] *Compare Planning Guidance Notebook* Ex. C-1 (Recommended Outline for Section 404(b)(l) Evaluation) with GA133 (App. W, CWA Section 404(b)(1) Analysis).

Second, Audubon points to a provision in the Section 404(b)(1) Guidelines:

> 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 provision lends no support to Audubon's argument. Rather, it simply authorizes the Corps to use the information from an already-completed NEPA alternatives analysis when analyzing alternatives under Section 404. It does not mandate that the same alternatives analyzed for NEPA purposes be analyzed under Section 404 as well. To the contrary, as the district court observed (ECF 77 at 34), this provision contemplates that a NEPA analysis may consider a *broader* range of alternatives than what is required under Section 404, underscoring the fact that NEPA and the CWA are two distinct

statutory and regulatory regimes.[4] That the Corps efficiently conducts its environmental review in one integrated set of documents does not mean the requirements of one statute or set of regulations apply to another. Nothing in this provision suggests NEPA's anti-segmentation rule applies to Section 404; if anything, this provision supports the Corps on the merits.[5]

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[4] Under the Section 404(b)(1) Guidelines, the Corps must 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 regarding 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 are 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.

[5] Audubon briefly refers to the consideration of alternatives under Section 404, specifically the selection of the "least environmentally damaging practicable alternative," or "LEDPA." Mot. at 11; *see supra* at 3-4. Audubon has forfeited this argument for purposes of its motion by failing to fully present it in its motion. *Fulghum v. Embarq Corp.*, 785 F.3d 395, 410 (10th Cir. 2015) (rejecting attempt to incorporate by reference arguments made before the district court as "not acceptable appellate procedure" and deeming said arguments waived). Even if the argument were properly presented, the district court correctly rejected it and in failing to offer any reasons why the district court's holding was wrong, Audubon has not and cannot demonstrate a likelihood of success on the merits of that argument. *See* ECF 77 at 32-35 (district court opinion); ECF 54 at 17-22 (Corps' district court brief).

The Corps' decision regarding the scope of its Section 404(b)(1) analysis was well-reasoned and entitled to deference under the APA's standard of review, and Audubon has not demonstrated a likelihood of success of showing otherwise. *See Nat'l Wildlife Fed'n*, 27 F.3d at 1344 ("As long as the agency provides a rational explanation for its decision, a reviewing court cannot disturb it." (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))).[6]

II. Audubon Has Not Demonstrated a Likelihood of Irreparable Harm.

An injunction may issue only if it is "needed to guard against any present or imminent risk of likely irreparable harm." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162-63 (2010). Audubon bears the burden to demonstrate that the Project is likely to cause concrete and actual injury that is also "irreparable," meaning it is "both certain and great," and not "merely serious or substantial." *Prairie Band of*

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[6] Audubon's motion refers in passing to the Corps' compliance with NEPA, but it cannot rely on passing references and undeveloped arguments to show it is likely to succeed on the merits. *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016). Furthermore, the Corps responded to Audubon's NEPA arguments below, *see* ECF 54 at 35-49 (Corps' district court brief), and the district court properly determined that they were without merit, *see* ECF 77 at 10-30 (district court opinion).

Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250 (10th Cir. 2001) (citations omitted). Harm is not presumed in cases that involve alleged violations of environmental statutes. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544-45 (1987).

Many of Audubon's alleged harms are tied to ongoing construction, which is temporary, not irreparable. "Irreparable harm" is *permanent* or at least of sufficiently long duration to make it effectively permanent. *Amoco Prod. Co.*, 480 U.S. at 545. Audubon alleges that construction will result in area closures and noise impacts, but it offers no evidence that these harms will extend beyond the end of construction. Mot. at 15-16, 19. Project construction will occur in phases; the current phase, for example, is projected to finish by summer 2018. *See* GA170-71. These temporary harms do not warrant injunctive relief.

Many of the harms Audubon alleges also lack sufficient support. For example, as evidence that the Project will permanently harm bird and wildlife habitat, Mot. at 16, Audubon offers the declaration of Norm Lewis, which vaguely references impacts to "all" habitat and lacks specific analysis of the impacts from construction, such as even an

approximate quantification of harm. These statements are at odds with the Corps' determination that the Compensatory Mitigation Plan would "fully mitigat[e] the [Project's] impacts to wetlands, riparian habitat, Preble's habitat, and bird habitat." GA159.

Audubon also fails to offer evidence to support its claims that: (1) the park will be less utilized after the project is completed; (2) park revenues will decrease (or how that would harm Audubon); (3) relocation (as opposed to removal) of recreational facilities will irreparably harm Audubon's educational programs; or (4) the Project will render Audubon "no longer able to fulfill its mission." Mot. at 17-18.

Audubon's harms are also speculative. Declarant Norm Lewis asserts that if bird habitat is destroyed, "it will *likely* take decades for a similar ecosystem to develop." Lewis Declr. ¶ 7 (emphasis added). He also asserts that construction "will likely cause a disturbance" that will prompt birds to leave. *Id.* ¶ 8. Such statements, without more, do not carry Audubon's burden to show irreparable harm. *See N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1253-54 (10th Cir. 2017). (explaining that "the mere possibility of an unidentified class and degree of harm" is insufficient). Audubon has not provided

sufficient evidence to identify harm that is "certain, great, actual, and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003).

III. The Balance of the Equities and Public Interest Require Denying the Injunction.

A party seeking injunctive relief pending appeal "must establish . . . that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Because Audubon has failed to establish either a substantial likelihood of success on the merits or irreparable harm, it is not entitled to an injunction pending appeal, and this court need not consider these remaining factors. *See N.M. Dep't of Game & Fish*, 854 F.3d at 1255-56.

In any event, the equities and public interest both favor denying Audubon's requested relief. Audubon claims that an injunction would "vindicate the public interest served by the CWA and NEPA." Mot. at 21. But Audubon does not challenge the Corps' NEPA analysis in its motion, *see* note 6, *supra*, and it has not demonstrated a likelihood of success on the merits on its CWA claim, *see* Argument § I, *supra*. As a result, granting injunctive relief would not further the goals of either statute. *See Coal. of Concerned Citizens to Make Art Smart v. Fed.*

Transit Admin., 843 F.3d 886, 915 (10th Cir. 2016) (applying same logic).

CONCLUSION

For the foregoing reasons, the Court should deny the motion for injunction pending appeal.

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE, SERVICE, DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that this response complies with the type-volume requirements of Fed. R. App. P. 27(d) and Circuit Rule 32 because it contains 5,034 words in 14-point type.

I hereby certify that on this 19th day of January, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via the appellate CM/ECF system. The parties in this case will be served electronically by that system.

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