

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,

Intervenors-Respondents; and

COLORADO DEPARTMENT OF NATURAL RESOURCES,

Intervenor-Respondent.

INTERVENORS-RESPONDENTS' JOINT RESPONSE BRIEF

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TABLE OF CONTENTS

	PAGE
Introduction	1
I. The Corps Properly Approved the Discharges into Waters of the United States under the Clean Water Act.	2
II. The Corps Analyzed a Reasonable Range of Alternatives for the Proposed Reallocation Project.	3
III. The Corps Promoted Informed Decision Making and Enhanced Public Participation during the Reallocation Study and Draft FR/EIS Process.	7
A. The FR/EIS supports a ROD that provides flexibility in the use of reallocated storage space by existing and future Project Participants and water rights.	8
B. The FR/EIS disclosed and appropriately analyzed the possibility of changes in the identity of Project Participants and water rights that might be stored in the Project.	10
1. The FR/EIS identified known Participants and water rights and disclosed that they could change.	10
2. The Corps’ impact analysis and scope of approval were not dependent on the specific Project Participants or water rights within the allowable range of reservoir operations for the Project.	11
3. The FR/EIS addressed future uncertainties by portraying impacts and imposing mitigation requirements based on the maximum possible environmental effects of the Project.	14
IV. The Terminology Employed in the FR/EIS was Appropriate because it was Tailored to the Purpose and Need of the Project and was within the Corps' Discretion.	19
Conclusion	23

TABLE OF AUTHORITES

	PAGE
Cases	
Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1030 (10th Cir. 2002).....	20
Comm. to Pres. Boomer Lake Park v. Dep't of Transp., 4 F.3d 1543, 1553 (10th Cir. 1993).....	21
Dubois v. U.S. Dep't of Agriculture, 102 F.3d 1273, 1292 (1st Cir. 1996)	19
Forest Guardians v. U.S. Forest Serv., 495 F.3d 1162, 1172-73 (10th Cir. 2007).....	21
Friends of Marolt Park v. U.S. Dep't of Trans. 382 F.3d 1088, 1097 (10 th Cir. 2004)	18
Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998).....	20
Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1276 (10th Cir. 2004).....	16
Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs, 702 F.3d 1156, 1172 (10th Cir. 2012).....	17
Lee v. U.S. Air Force, 354 F.3d 1229, 1241 (10th Cir. 2004)	15
New Mexico ex rel. Richardson, 565 F.3d 683, 705 (10th Cir. 2009).....	18
Operation of Miss. River Sys. Litig., 516 F.3d 688, 693 (8th Cir. 2008).....	19
Prairie Band Pottawatomie Nation v. Federal Highway Admin., 684 F.3d 1002, 1013-14 (10th Cir. 2012).....	21
Silverton Snowmobile Club v. U.S. Forest Service, 433 F.3d 772, 780 (10th Cir. 2006).....	19
Utah Environmental Cong. v. Bosworth, 439 F.3d 1184, 1195 (10th Cir. 2006).....	20
Wyoming v. U.S. Dep't of Agriculture, 661 F.3d 1209, 1253 (10th Cir. 2011).....	14, 16
Statutes	
§ 37-60-120.1(2), C.R.S. (2015).....	10
Regulations	
40 CFR § 1502.14(a).....	3
40 CFR § 1502.22.....	14
40 CFR § 1502.22(b).....	15

INTRODUCTION

The Colorado Department of Natural Resources (“State”) 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, and Town of Castle Rock (“Chatfield Participating Entities” or “Project Participants”) submit this Joint Response Brief on behalf of the collective Intervenors-Respondents, in the interest of efficiency and to avoid duplication among the Intervenors in this case. Pursuant to the Court’s Orders of January 22, 2015 and February 6, 2015, the undersigned counsel certify they conferred with counsel for Respondent United States to determine whether their positions could be set forth in a consolidated fashion. This Joint Response Brief addresses matters not covered in Respondent United States’ Response Brief or supplements points made by the United States with additional record citations.

Colorado faces the reality of a significant water supply shortfall within the next few decades, even with aggressive conservation, reservoir reallocations, and new water projects. The Chatfield Reservoir Reallocation Project (“Project”) is one of many pieces needed to fill that gap. *See Statewide Water Supply Initiative*, AR002494- AR003031. It was undertaken by Intervenors to meet the current and future needs of the State for the benefit and enjoyment of its citizens and visitors. The State and Project Participants are responsible to ensure an adequate water

supply for Colorado's present and future growth. The seriousness with which Intervenor-Respondents embrace this responsibility is evidenced by the decades' long effort we have invested to make this Project a reality. The planning and investigation stage of this Project began with the Metropolitan Water Supply Investigation in 1993 to explore cooperative approaches to meeting future water supply needs of the Denver Metro area. After more than a decade of information gathering and collaboration, the second phase of the Project was initiated in 2004 with the scoping process under the National Environmental Policy Act ("NEPA") to identify reasonable alternatives and evaluate their impacts. After nearly ten more years of cooperative planning and study, in 2013 the U.S. Army Corps of Engineers ("Corps") released the final Feasibility Report and Environmental Impact Statement ("FR/EIS") selecting the Project for implementation. The Record of Decision ("ROD") was approved in 2014.

Intervenor-Respondents respectfully request the Court find the Corps properly complied with the requirements of the Clean Water Act and NEPA so that this Project can now proceed.

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

Intervenor-Respondents endorse the United States' position that the Corps reasonably determined the Project was in compliance with Section 404 of the Clean Water Act based on its evaluation of alternatives to the activities requiring a discharge into waters of the United States. AR038983- AR038984. The two federal

agencies with jurisdiction and regulatory authority to interpret and implement the Clean Water Act – the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency – have concurred in the approach taken by the Corps in its Section 404(b)(1) analysis for this Project. AR038701.

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

NEPA requires the federal agency to “rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 CFR § 1502.14(a). Petitioner alleges the Corps violated these requirements by failing to consider Project alternatives for enhanced water conservation, upstream gravel pit storage, and Rueter-Hess Reservoir storage. Br. at 30. Contrary to Petitioner’s argument, the Corps explored 38 alternative concepts in the FR/EIS, including the three alternatives Petitioner identified. Table 2-2, AR036181-AR036185. The alternative concepts were identified by their ability to meet a substantial portion of the Project purpose and need; namely, increasing the availability of water supply by providing an additional average year yield. AR036126, AR036174, AR036177.

The 38 alternative concepts identified as meeting this general criterion were then subjected to two screening processes as described in Chapter 2 of the FR/EIS. AR036171-AR036254. First, the Corps applied preliminary screening criteria to all

38 alternative concepts. *See* Table 2-1, AR036180-AR36185. The screening criteria included: 1) ability to meet purpose and need; 2) cost; 3) logistics and technology, including water rights/water availability, land availability, permitting and mitigation feasibility, design and construction feasibility, and operational feasibility; and 4) environmental impacts, their significance, and ability to mitigate them. AR036131-AR036132. The Corps' thorough evaluation explained the rationale for eliminating an alternative or screening it forward. *See* Table 2-4, AR036200-AR36202.

The three alternatives the Petitioner identifies were each independently and objectively evaluated and the reasons for eliminating them were stated clearly in the FR/EIS. AR036181, AR036187-AR036193 (enhanced water conservation); AR036183, AR036197 (upstream gravel pit storage); AR036184, AR036197-AR036198 (Rueter-Hess Reservoir storage). Further explanation for eliminating these alternatives and not carrying them forward for additional evaluation was stated in the Corps' response to comments on the draft FR/EIS. AR037182 (general); AR037183-AR037184 (enhanced water conservation); AR037195 (upstream gravel pit storage); AR037196-AR037197 (Rueter-Hess Reservoir storage).

The Corps did not eliminate an alternative solely because it failed to meet the entire purpose and need of the Project, as alleged by Petitioner. Br. at 30. Instead, the Corps considered partial alternatives in combination with other actions so long

as the alternatives provided a reasonably sufficient portion of the total requested average year yield. AR036180. Three of the four alternatives considered in detail utilize just such a strategy by combining gravel pit storage with other actions. *See* AR036203 (Alternative 1 – No Action, Penley Reservoir combined with Gravel Pit Storage; Alternative 2 – Non-Tributary Ground Water (“NTGW”) combined with Gravel Pit Storage; Alternative 4 – Reallocation of 7,700 acre-feet to Storage, use of NTGW, and Gravel Pit Storage).

Nor did the Corps reject an alternative because it required action by a third party, or because it required additional infrastructure. Br. at 30-31. The Rueter-Hess Reservoir was eliminated as an alternative based on current storage commitments and the unavailability of additional capacity. AR036202. *See also* AR036184, AR037196-AR037197. Upstream gravel pits were eliminated due to limited storage capacity and the logistics of combining that alternative with the other small capacity reservoirs in the area. AR036201. Since alternatives requiring additional infrastructure – Penley Reservoir (Alternative 1) and downstream gravel pits (Alternatives 1, 2 and 4) – were not eliminated but instead received detailed analyses, the Petitioner’s assertion to the contrary is baseless. AR036203-AR036231. *See also* AR037195 (downstream gravel pits were “screened forward for detailed analysis because of their relative proximity, sufficient storage and reasonable cost and logistics for piping and related appurtenances.”).

Finally, Petitioner's claim that the Corps did not consider the use of enhanced water conservation is unsupportable. Br. at 32. The Corps committed an entire appendix to summarizing conservation plans, analyzing current and future plans, and determining their role in increasing water supplies. AR0036844-AR036861; AR036187-AR036193. Following that analysis, the Corps concluded that although conservation can reduce future demands, "further conservation measures alone will not be adequate to make up for the shortfall in water needed by the water providers to meet current and future water needs over the next 50-year period." AR036193. The Corps did not further analyze enhanced water conservation in combination with other alternatives because "[w]ater conservation and reuse practices of the water providers constitute an independent parallel action and therefore were not explicitly included as components of all alternatives selected for detailed evaluation." AR036203. And even more importantly, water conservation measures "do not result in the elimination or lessening of the dependence on the groundwater supplies," AR036187, which is a major goal of the Project. AR036172.

Thus contrary to Petitioner's argument, other potential alternatives, including the three identified by Petitioner, were rigorously explored and objectively evaluated prior to selecting the four main alternatives for more detailed evaluation in the FR/EIS.

III. The Corps Promoted Informed Decision Making and Enhanced Public Participation during the Reallocation Study and Draft FR/EIS Process.

Early in the process, the Corps engaged in robust outreach and garnered extensive stakeholder participation in the Chatfield Reservoir Reallocation Study and Draft FR/EIS. During the Reallocation Study a Work Group was formed. It included representatives from the Colorado Water Conservation Board (“CWCB”), Colorado State Parks, State Division of Wildlife, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers Omaha District, consultants, water users, environmental groups, and the Petitioner. AR003041, AR003044. *See also* AR001984-002007 (Work Group Meeting Minutes, August 7, 2003). The goal of the Work Group was to keep open communication and coordination among these governmental agencies and interested parties. AR003041.

In 2006-07, the Corps invited various federal, state, and local government agencies, and special interest groups to participate in the Chatfield Reservoir Storage Reallocation Study (“Reallocation Study”) as cooperating agencies or special technical advisors. AR009633-AR009635, AR0036127. The Corps invited the Petitioner to participate as a Special Technical Advisor on March 1, 2006. AR004324-AR004325. The Petitioner accepted the invitation on July 30, 2007. AR006932.

In all, 26 cooperating agencies and 11 special technical advisors participated in Reallocation Study, attended Project meetings, and engaged in early review and comment on draft documents, including preliminary chapters of the FR/EIS. AR036127, AR036596-AR03697. Between 2003 and 2013, the Corps and the State held over 100 meetings at which information was exchanged, comments were taken, and questions answered.¹ AR001984, AR032054. The Corps' efforts to involve stakeholders in the process were unassailably inclusive. Issues raised throughout the NEPA process were fully vetted. The Corps, with full appreciation of the positions taken by all stakeholders, made reasoned decisions throughout the process to arrive at a defensible FR/EIS and ROD.

A. The FR/EIS supports a ROD that provides flexibility in the use of reallocated storage space by existing and future Project Participants and water rights.

The "Purpose and Need" for the Project "is 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. The purpose and need are *not* to increase the availability of water for specific water providers or water rights. While

¹ "The Corps solicited and welcomed collaboration with 26 Cooperating Agencies and 11 Special Technical Advisors as well as several contractors due to the complexity of this project and the many issues involved. Seamless and transparent communication and integration was provided by holding project progress meetings in the Denver area so all collaborators had the opportunity to attend and having these collaborators and their attorneys review and comment on chapters of the Preliminary Draft FR/EIS as they were completed by the Corps and its contractors." AR036248. *See also* AR036561-AR36562. The Administrative Record reveals the stakeholder meeting dates and contains minutes from most of the meetings. *See* AR Index.

the Corps disclosed detailed information on existing Project Participants and water rights, its analysis of the environmental impacts of the alternatives was structured to recognize that individual Project Participants and water rights could change over time. This approach was required by the very nature of the Project.

Petitioner was fully aware from the outset of the Reallocation Study that Project Participants could change over time. That issue was discussed at the Work Group Meeting on December 7, 2004. AR003042 (“There was discussion about water users not wanting the storage space at some point in the future but before final agreements are executed with the state and Corps. The resolution was the storage amount would be turned into the CWCB and the CWCB will maintain list of interested parties.”). AR003042 (“In discussions it was agreed . . . that when storage space is transferred or changes hands it will be consistent with the New Corps Water Control Plan.”). AR003043 (“Water Users discussed the idea of sub leasing agreements needing to go through CWCB Board Member approval.”). In addition, the law authorizing the Project in Colorado contemplated the CWCB would hold any shares in the Project not held by participating water providers for future allocation. House Bill 08-1346, enacted by the General Assembly, states “[t]he board has the express authority, in equitable partnership with the participants, to undertake such action as is necessary, including the award of contracts to public and private entities, to undertake mitigation construction and long-term operation and maintenance and related activities; *to lease, sublease, or*

assign storage space rights; and to otherwise effectuate the storage of water in the reservoir.” AR009623 (emphasis added). AR009621-AR009625 (§ 37-60-120.1(2), C.R.S. (2015)).

B. The FR/EIS disclosed and appropriately analyzed the possibility of changes in the identity of Project Participants and water rights that might be stored in the Project.

The FR/EIS was carefully designed to inform the public and support decision making by: (1) identifying the known Project Participants and water rights and disclosing that those were anticipated to change over time; (2) limiting the scope of approval to a defined range of reservoir operations that might occur under the scope of approval by the Corps; and (3) evaluating effects and basing mitigation requirements on the maximum impact to environmental resources. This analysis fully complies with the Council on Environmental Quality regulations that apply to the analysis of federal actions anticipating future changes in a Project. NEPA requires no more.

1. The FR/EIS identified known Participants and water rights and disclosed that they could change.

The FR/EIS expressly disclosed the known Project Participants and their water rights. It also disclosed that both the identity of individual Project Participants and that the water rights to be stored in Chatfield Reservoir could change in the future. The FR/EIS explained the process used to allocate Project capacity between the CWCB and individual Project Participants, and disclosed the

process, later set forth in binding agreements, which included a mechanism to transfer allocation ownership. AR036151-AR036152. The table of Project Participants in the FR/EIS showed approximately 20% of the reallocated storage space was unassigned and would be allocated to entities to be determined in the future. Table 1.1, AR036150-AR036151. The FR/EIS recognized portions of the Project capacity had previously been reallocated based on a change in Project participation, and some of the capacity would be “reassigned to one or more of the water providers or others at a future date.” AR036152. The FR/EIS disclosed “Water Providers would need to hold existing or newly acquired water rights...” AR036130. *See* AR038875 (“the reallocated storage space in Chatfield Reservoir would be filled using existing or new water rights, including wastewater return flows and other decreed water rights, belonging to a consortium of water providers.”). *See also* AR036153, AR036176, AR036257. The FR/EIS included a list of the existing water rights then planned to be used in the Chatfield Reservoir Reallocation. *See* AR038939-AR038940. That list also recognized some of the water rights to be used in the Project were “TBD [to be determined].” *Id.*

2. The Corps’ impact analysis and scope of approval were not dependent on the specific Project Participants or water rights within the allowable range of reservoir operations for the Project.

A review of the Corps’ analysis of the alternatives considered in the FR/EIS reveals it considered the environmental impacts of storing water in and releasing

water from Chatfield Reservoir regardless of the identity of specific Project Participants or water rights. The FR/EIS disclosed that “key risks and uncertainties include modeling of elevations and downstream flows, mitigation and modification plans, and impacts of flood control benefits.” AR036134. The Corps’ analysis also disclosed “[t]he operation of the reservoir and the resulting water levels is based on a number of factors including the water elevation at the time, flow conditions downstream, the priority of water rights of downstream water providers, requests for release of stored water, precipitation, and evaporation.” AR36231-AR36232. Due to these complexities, the Corps utilized historical data which “will reflect any impacts to the river flows over time, including changes in available water rights, water supply needs, timing of runoff, or additional reservoirs constructed upstream.”² AR036391.

The Corps then used a computer model to “describe the behavior of water levels in the reservoir” and to “determine how the reservoir would behave” under the action alternatives....”³ AR036232. The Corps estimated that the annual impact of Alternative 3 on downstream flows would be 19 acre feet at critical low flow periods. AR036417. The Corps explained, in response to comments, that “from

² The Corps concluded that “[t]he simplest way of looking at water levels in the reservoir under the different alternatives, as well as outflows from the reservoir and flow conditions downstream, is to look at how these factors would appear when considered against historical flow data.” AR036232.

³ Table 2-8 portrays modeled “Monthly Pool Fluctuations (High, Average, Low) within Chatfield Reservoir over the Period of Record (1942-2000) for each Alternative.” AR036232.

an ecological standpoint, the differences [in downstream flows] were considered insignificant.” AR037210-AR037212.

The Corps took two specific measures to ensure the impacts on environmental and recreational resources were fully disclosed and analyzed in the FR/EIS given the unpredictable fluctuations in water levels and operational impacts of storage under Alternatives 3 and 4. AR036134, AR036376. The Corps first imposed specific operational constraints on the Project by limiting the range of reservoir elevation levels within which the Reallocation operations could occur. *Id.* For Alternative 3, which was selected by the Corps and incorporated in its ROD, the FR/EIS states that “the reallocation of storage for this project only involves the volume between 5,432 and 5,444 feet msl [mean sea level].” AR036405. Hence, the ROD does not authorize storage of additional water in Chatfield Reservoir or authorize storage of water at an elevation above 5,444 feet msl. AR041875-041876.

Second, the Corps elected to take “a conservative approach to the impact analysis ... to reflect the maximum potential impacts that might be associated with the inundation of environmental resources” and to “ensure adequate mitigation could be planned and subsequently reasonably attained for any potential impacts that may develop.” AR036134. The analysis in the FR/EIS of environmental impacts associated with storage of the Project Participants’ water rights in the reallocated space addressed the entire potential range of operations by using a maximum effects scenario. Regardless of the ultimate mix of water rights and

operations in the reallocated storage space, water would not be stored by the Participants above 5,444 feet msl.

If future changes in the Participants or their water rights threaten to cause significant impacts beyond or different from the range of impacts analyzed in the FR/EIS, the Corps acknowledged a supplemental FR/EIS could be required to analyze these impacts: “A change in water rights does not in itself require a supplement; however, if water rights changes lead to significant effects not originally identified in the EIS, a supplement would be warranted.” AR037202. *See also* AR037201 (“The providers...are aware that ultimately, if the agency makes substantial changes in the proposed action that are relevant to environmental concerns or there are substantial new circumstances or information relevant to environmental concerns...a supplemental FR/EIS may be necessary”). That future scenario is speculative at this stage and need not be covered by this EIS.⁴

3. The FR/EIS addressed future uncertainties by portraying impacts and imposing mitigation requirements based on the maximum possible environmental effects of the Project.

The regulations addressing unavailable information, 40 CFR § 1502.22, do not require analysis of a “range of reasonable variation” as the Petitioner alleges,

⁴ The Corps is not required to speculate as to all future possible combinations of Project Participants and water rights. “In general, we have not required agencies to consider ‘speculative’ impacts or actions in an EIS, whether it be in the context of the reasonable alternatives analysis or the reasonably foreseeable impacts of the proposed project or other projects.” *Wyoming v. U.S. Dep’t of Agriculture*, 661 F.3d 1209, 1253 (10th Cir. 2011).

but rather require the agency to “follow four specific steps” if the costs of obtaining the information are exorbitant or the means to obtain it are not known. *Lee v. U.S. Air Force*, 354 F.3d 1229, 1241 (10th Cir. 2004). These steps include: (1) disclosing “that such information is incomplete or unavailable;” (2) discussing its relevance; (3) summarizing existing credible evidence relevant to “reasonably foreseeable significant adverse impacts on the human environment;” and (4) evaluating these impacts using generally accepted methods. 40 CFR § 1502.22(b). Each of these elements was addressed by the FR/EIS.

The description of the Alternatives (FR/EIS Ch. 2), analyses of the Affected Environment (FR/EIS Ch. 3), and Environmental Consequences (FR/EIS Ch. 4) all incorporated this information. The Corps specifically discussed the relevance of this information, and assessed and evaluated the reasonably foreseeable adverse impacts of the hydrology on a wide range of resources. Chapter 4.3 of the FR/EIS discussed in great detail “the impacts of implementing the alternatives on the hydrological conditions of Chatfield Reservoir and the South Platte River downstream of the reservoir.” AR036388. Additional discussions of the relevance of hydrology and the reasonably foreseeable adverse impacts of the Alternatives on the human environment are found throughout the 165 page discussion of “Environmental Consequences” contained in Chapter 4.

Particularly relevant here is the fact the Corps ensured that the FR/EIS captured the maximum effect of the Reallocation Project on environmental

resources by assuming the total loss of vegetation and other environmental assets below 5,444 feet above msl. AR037227-AR037228, AR37247-AR037248, AR037377. The Corps further explained “[s]ubstantial uncertainty with regard to water level fluctuations is handled via a worst case analysis. *The worst case at a minimum ensures that sufficient mitigation is provided for impacts that would occur under the worst condition.*” AR037259 (emphasis added). This approach is explained in more detail in Appendix K to the FR/EIS, which sets out the compensatory mitigation plan (“CMP”) for the Project. “The CMP is based on the following conservative assumptions: [a]ll of the existing target environmental resources will be lost below 5,444 feet in elevation (Alternative 3); [n]one of the target environmental resources will reestablish below 5,444 feet in elevation ...” AR037924.

The Corps’ approach here is consistent with other EISs that have been upheld as covering adjustments to proposed actions occurring within the breadth of the impacts analyses. *Wyoming v. U.S. Dep’t of Agriculture*, 661 F.3d 1209, 1262 (10th Cir. 2011). The Tenth Circuit has approved other NEPA analyses with uncertain impacts where the agency in question analyzed reasonable worst-case impacts and then imposed monitoring and mitigation requirements on those impacts. For example, in *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1276 (10th Cir. 2004), the court considered an Environmental Assessment (“EA”) for a proposed construction project adjacent to the Snake River in Wyoming, which was a “well known and extensively studied bald eagle habitat area.” Neither the Corps

nor the U.S. Fish and Wildlife Service, which provided a Biological Opinion for the EA, could “predict with certainty how the resident bald eagles would react to the [proposed] development” because “[r]esponses of eagles to human disturbances vary depending on the eagle individual/pair.” *Id.* For this reason, the court found “further assessment of impacts in an FR/EIS before the project’s implementation is unlikely to be productive.” *Id.* But because the Corps conservatively estimated the loss (of up to 6 adult bald eagles and 12 juveniles) and then imposed terms and conditions designed to mitigate this loss (including prohibiting construction within 400 meters of eagle nests, close daily monitoring of eagle activity for signs of disturbance, and immediate modification of construction activities if eagle disturbance was observed), the Court upheld the adequacy of the Corps’ analysis. *Id.* at 1276.

Similarly, in *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, 702 F.3d 1156, 1172 (10th Cir. 2012), the Corps’ analysis of the construction of a facility designed to transfer cargo between freight trains and trucks revealed that the construction and operation of the facility would produce dust emissions. Although the exact amount of dust emissions was uncertain, particularly during the construction phase of the project, the Corps relied on worst-case estimates by the EPA showing dust emissions had the potential to locally exceed Clean Air Act limits by “four to ten times.” *Id.* at 1173. In response to this uncertainty, the Corps required the facility’s proponent to enter into a monitoring

and mitigation agreement with the Kansas Department of Health and the Environment, with binding mitigation requirements if dust emissions exceeded specified levels. *Id.* Again, the court declined to order additional analysis, finding the monitoring and mitigation requirements were sufficient to support the Corps' conclusion. *Id.* at 1173-74.

Petitioner requests this Court to vacate the ROD and instruct the Corps to “supplement the EIS to assess how the environmental impacts might vary based on the water rights eventually stored, or to place limitations on what water rights can actually be stored in the Project.” Br. at 42. A supplement is not required here in light of the extensive disclosure and analysis of the environmental impacts of the Chatfield Reallocation Project and the requirements of the mitigation plan based on the maximum impacts to environmental resources. *See Friends of Marolt Park v. U.S. Dep’t of Trans.*, 382 F.3d 1088, 1097 (10th Cir. 2004) (holding that a supplemental EIS is not required if “the relevant environmental impacts have already been considered” during the NEPA process).

The Corps' FR/EIS analysis for Chatfield – scoped to accommodate future changes in the makeup of Project Participants and water rights – is consistent with the mandates of NEPA to disclose and analyze the spectrum of impacts associated with a proposed action and its alternatives. Future variation in Project participation and water rights is qualitatively within that spectrum. *See New Mexico ex rel. Richardson*, 565 F.3d 683, 705 (10th Cir. 2009) (quoting CEQs Forty

Questions, 46 Fed. Reg. at 18,035); *see also Operation of Miss. River Sys. Litig.*, 516 F.3d 688, 693 (8th Cir. 2008); *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1292 (1st Cir. 1996).

In summary, the Corps fulfilled its obligation to take a “hard look” at the environmental consequences of the Project because it disclosed that not all of the Project Participants and water rights that would be stored in the Project were known, acknowledged the impact this could have on reservoir operations, specified elevational constraints within which the reallocation could operate, analyzed the most significant possible environmental impacts from those operations, and imposed monitoring and binding mitigation requirements,. *See Silverton Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 780 (10th Cir. 2006). Once the “environmental concerns [of an action] are adequately identified and evaluated by the agency, NEPA places no further constraint on agency actions.” *Id.*

IV. The Terminology Employed in the FR/EIS was Appropriate because it was Tailored to the Purpose and Need of the Project and was within the Corps' Discretion.

Part III of Petitioner’s Opening Brief asserts “[t]he Corps violated NEPA’s requirement to foster informed decision making and public participation when they ... used misleading, non-standard terms regarding water yield during the creation of the FR/EIS.” Br. at 38. Petitioner asserts this violation occurred because the Corps arbitrarily substituted standard terms for terms of their own creation – specifically using “average year yield” instead of “firm yield” or “safe yield.” Br. at

43. It is difficult to understand how the use of the term “average year yield” is incorrect or misleading when the purpose of the Project is to provide average year water supplies. AR036126.

Petitioner’s assertions ignore the identified purpose and need for the proposed action, which is the fundamental underpinning for NEPA’s impacts and alternatives analysis. The purpose and need for the Chatfield Project is “to increase the availability of water, providing an additional *average year yield* of up to approximately 8,539 AF... so that a larger proportion of existing and future water needs can be met.” AR036126 (emphasis added). Petitioner is not free to substitute its preferred purpose and need of a “dependable water supply.” An agency has considerable discretion to define the purpose and need of the proposed action. *Utah Environmental Cong. v. Bosworth*, 439 F.3d 1184, 1195 (10th Cir. 2006); *see also Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (stating that agencies have “considerable discretion to define the purpose and need of a project,” as long as it is reasonable).

Moreover, as is the case with the present Project, where the purpose and need is based on a non-federal objective, an action agency may “give substantial weight to the goals and objectives” of the non-federal project sponsors. *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002). Here, the non-federal objective included increasing the water supply in the greater Denver Metro area by providing an average year yield that could be used

when available for the purpose of reducing reliance on non-renewable groundwater resources. AR036195.

The standard of review by this Court is whether the Corps had a rational basis for the terms it chose to use. As stated in *Prairie Band Pottawatomie Nation v. Federal Highway Admin.*, 684 F.3d 1002, 1013-14 (10th Cir. 2012), “[w]e are not in a position to decide the propriety of competing methodologies in the transportation analysis context, but instead, should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors.” *Id.* (citing *Comm. to Pres. Boomer Lake Park v. Dep’t of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993)) (“We find the EIS’s use of accidents per year instead of accidents per million vehicle miles was not arbitrary and capricious.”). Nor does the Corps have the obligation to use precise phrasing.⁵ AR000505 (“NEPA imposes no obligation to use precise phrasing”). By including this language in the final EIS, USFS put the public on notice this project, and its attendant truck traffic, would have negative consequences); *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1172-73 (10th Cir. 2007).

As the United States explains in its Response Brief, the term “average year yield” is clearly defined in the EIS. AR036174. The term “average year yield” was

⁵ Further, contrary to Petitioner’s argument, the Corps Handbook on Water Supply Planning and Resource Management does not establish any policy or practice nor does it require use of particular terminology. AR000505 (“Information in this handbook is intended for easy access and reference purposes only, and is not intended as a substitute for Headquarters U.S. Army Corps of Engineers policy or implementation guidance.”).

used consistently throughout the EIS and each alternative was designed to provide the same average year yield. This allowed the Corps and members of the public to easily compare the environmental impacts for each alternative. “For consistent comparison purposes each alternative was designed to provide an average year yield of 8,539 acre-feet which corresponds with the yield under the maximum 20,600 acre-feet reallocation alternative (Alternative 3).” AR036133.

There is also a rational basis for the use of the term “average year yield” by the Corps in the FR/EIS. Most of the Project Participants rely on a combination of junior surface water rights and rights to non-tributary groundwater. One of the objectives of the Project is to reduce reliance of municipal water providers on nonrenewable Denver Basin groundwater and secure augmentation water for alluvial wells. AR036128. The “average year yield” approach is consistent with this. In average and above average surface water supply years many Chatfield Participants will store or use the available surface water supplies, but rely on groundwater when the average year surface water supply sources are not available. Average year surface water supplies are valuable to these water providers because they use surface water when available and groundwater when surface water is not available. *See* AR036126, AR036128, AR036166, AR036172, AR036187, AR036193, AR036195, AR037198, AR037294. As the Corps explained in its response to a number of comments, “[t]he value of storage is to capture water during times of plenty so that it can be used during times of scarcity.” AR037288.

CONCLUSION

The Chatfield Reservoir Reallocation Project has been objectively vetted through a lengthy and rigorous FR/EIS process. The Corps, cognizant of the issues that are the bases of Petitioner's claims, made reasoned choices about what was needed to support meaningful public disclosure and provide a sound basis for its substantive decision making. The Corps fulfilled its obligation to take a "hard look" at alternatives to the Project and the environmental consequences of the Project. The FR/EIS and ROD are defensible and should be sustained by this Court.

ORAL ARGUMENT REQUESTED

Dated this 2nd day of June 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2016, I electronically filed the foregoing INTERVENORS-RESPONDENTS' RESPONSE BRIEF with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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