

**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.

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**RESPONDENT U.S. ARMY CORPS OF ENGINEERS' RESPONSE TO PETITIONER'S  
REQUEST FOR A STATUS CONFERENCE AND SITE VISIT**

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The Corps submits that a status conference is unnecessary because this case is fully briefed on the merits and there are no other open issues that are before the Court. The Corps further submits that a visit to the project site would amount to improper discovery and would be unduly burdensome. Accordingly, Petitioner's Request for a Status Conference and Site Visit ("Request for Status Conference") [Doc. 63] should be denied.

Petitioner challenges a decision of the Assistant Secretary of the Army (Civil Works) approving a Final Integrated Feasibility Report and Environmental Impact Statement ("FR/EIS"), in which the Corps recommended approval of a project involving reallocation of existing water storage space in Chatfield Reservoir ("the Chatfield Reallocation Project"). Petitioner contends the decision violates the National Environmental Protection Act ("NEPA") and the Clean Water Act ("CWA"). *See* Pet'r's Opening Br. at 1 [Doc. 49]. Judicial review of an agency's "compliance with NEPA and the CWA [is conducted] pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06," *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1268 (10th Cir. 2004), and the Court's "review is limited to the administrative record before the agency at the time the . . . decision was made," *Ctr. for Native Ecosystems v. U.S. Fish & Wildlife Serv.*, 795 F. Supp. 2d 1199, 1201 (D. Colo. 2011). The Corps' Administrative Record for the challenged decision has been lodged with the Court, *see* [Doc No. 30], and the parties' briefs on the merits of Petitioner's claims have been submitted, [Doc. Nos. 49, 24, 56, and 58]. This case is now ripe for a ruling by this Court, and there is no need for any additional action by, or information from, the parties. Despite the foregoing, Petitioner requests a status conference and a site visit for the purpose of "appris[ing] all parties of the current timeline and plan for carrying out the Chatfield Reallocation Project [with the goal of] reveal[ing] information

that would alleviate Denver Audubon's concerns [that irreparable harm will occur before the Court rules], thereby obviating a request [by Petitioner] for a preliminary injunction." Request for Status Conference at 1-2.

**I. A Site Visit Is Unnecessary and Would Be Unduly Burdensome.**

Petitioner's request for a site visit at Chatfield State Park in conjunction with its proposed status conference is entirely inappropriate and would impose an unnecessary burden on the parties and the Court. Petitioner contends that a status conference is necessary to ensure it has enough information to determine whether to move for a preliminary injunction, but it frames the need for a site visit as being designed to assist the Court to assess the *merits* of a potential motion for a preliminary injunction. Petitioner states that "[a] site visit would allow *the Court* to clearly assess what activities are slated to occur in the near future and whether those activities will pose a risk of irreparable harm." Request for Status Conference at 4 (emphasis added). For purposes of its pending determination concerning the merits of Petitioner's claims, however, the Court's review is properly focused on whether Petitioner has met its burden to show that the Corps' decision approving the FR/EIS was arbitrary or capricious, based on the Corps' Administrative Record,<sup>1</sup> and the timing of approved activities occurring at Chatfield Park has no bearing on this question.<sup>2</sup> Petitioner's request for a site visit to allow "counsel for the Corps and the Intervenors

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<sup>1</sup> See *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002), *modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) ("The APA's arbitrary and capricious standard is a deferential one; administrative determinations may be set aside only for substantial procedural or substantive reasons, and the court cannot substitute its judgment for that of the agency.") (citation omitted).

<sup>2</sup> As discussed above, briefing on the merits of Petitioner's claims was submitted in June 2016. Thus, if Petitioner believes it can establish a need for moving this case forward more quickly, a

[to] explain [the reallocation project] plans,” and thus allow the Court “to visualize how [the] plans will impact the park,” Request for Status Conference at 4, is tantamount to inviting the Court to consider extra-record evidence in its review of Petitioners’ claims. Under the Administrative Procedure Act’s (“APA”) record review standard, this is entirely inappropriate. *See Ctr. for Native Ecosystems*, 795 F. Supp. 2d at 1201 (in cases brought under APA, “review is limited to the administrative record before the agency at the time the . . . decision was made . . . and [the court] should not rely on evidence outside that record”) (citing 5 U.S.C. § 706; *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579-80 (10th Cir.1994)).

Moreover, the site visit requested by Petitioner will be unduly burdensome for the parties and the Court. First, the proposed site visit would require the participation and attendance of the Corps’ program staff, which would impose a considerable burden on the agency’s time and resources. Second, as the Intervenor noted in their submission on Petitioner’s request, Chatfield Reservoir Mitigation Company, not the Corps, “is responsible for implementing the Project.” Intervenor’s Response Opposing Petitioners’ Request for Site Visit at ¶ 4 [Doc. 67]. Thus requiring Corps personnel in particular to provide information on activities occurring at Chatfield Park, would be especially burdensome, especially given that Petitioner is seeking to obtain discovery and extra-record evidence, which is improper under the APA’s record review standard. Finally, the proposed site visit would require the Corps’ primary counsel, both of whom are located in Washington, D.C., to travel to Colorado,<sup>3</sup> and would require the Court to expend

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motion for expedited consideration of the merits is seemingly a more efficient course than a motion for preliminary injunction.

<sup>3</sup> Should the Court determine that a status conference is appropriate, the Corps respectfully asks that the Court permit its counsel to attend via teleconference.

considerable time in traveling to and examining the project site, even though none of the information that might be obtained is relevant to the pending merits briefing, which is fully submitted. A site visit in these circumstances is unduly burdensome.

**II. A Status Conference At This Time Is Neither Proper Nor Necessary.**

Status conferences are generally requested when there is a need to inform the Court about new legal or factual developments that may affect the course or outcome of pending litigation. Here, Audubon's Petition has been fully briefed and submitted and there is no new legal or factual development of which the Court needs to be apprised in order to render its ruling on the merits, nor is there any issue as to which any party requests or requires the Court's guidance. Instead, Petitioner is requesting a status conference so it can collect improper discovery to enable it to better determine whether to file a request for preliminary injunction. Request for Status Conference at 1-2.

The Corps opposes Petitioner's request for a status conference for two reasons. First, a status conference is not the proper vehicle for Petitioner to obtain formal or informal discovery concerning "the current timeline and plan for carrying out the Chatfield Reallocation Project," Request for Status Conference at 1-2, or to seek discovery concerning a potential motion for preliminary injunction. The timeline for carrying out the Chatfield Reallocation Project is not currently an issue for judicial review, which is solely focused on whether the Administrative Record sufficiently reflects that the Corps' decision was "based on a consideration of the relevant factors," *McAlpine v. United States*, 112 F.3d 1429, 1435 (10th Cir. 1997) (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)), and thus should be upheld pursuant to the APA. In

the interest of cooperation, counsel for the Corps have responded to questions from Petitioner as to the status of activities for the Chatfield Reallocation Project, but because the Court's review is limited to the Administrative Record, Petitioner is not entitled to discovery. Moreover, the Corps is under no obligation to provide Petitioner with "concrete information" that could either support or "alleviate [its] concerns of irreparable harm," Request for Status Conference at 4, to better inform the Petitioner's decision about whether to file a motion for preliminary injunction.

Petitioner's attempt to frame its request for a status conference as an effort to save the Court and the parties the time and effort it would require to address a preliminary injunction motion fails to recognize one key point—Petitioner does not suggest that a preliminary injunction is actually warranted. In order to obtain a preliminary injunction, Petitioner "must establish that he is likely to succeed on the merits that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Petitioner's request for a status conference to obtain evidence concerning this standard, on the other hand, assumes that Respondent and Intervenor have some current obligation to provide Petitioner with information relating to its burden, which they do not. Moreover, any such information would constitute extra-record evidence, which is not relevant to the Court's review of the merits of Petitioner's claims. Such an approach is inappropriate and should be rejected.

Second, as a practical matter, a status conference is not the best way for Petitioner to obtain information about the status of the Chatfield Reallocation Project. Petitioner states that it is "confused as to what information is accurate [on the Chatfield Reallocation website] and concerned that a preliminary injunction is necessary." Request for Status Conference at ¶ 6. To

the extent Petitioner is confused by the information about work being done at the project site that is provided on the Chatfield Reallocation website, Petitioner could obtain clarification simply by contacting the Chatfield Reservoir Mitigation Company.<sup>4</sup> For example, Petitioner states that it is confused about when tree-cutting operations at the site will begin based on two documents on the website that present seemingly conflicting information as to this issue, *see* Request for Status Conference ¶¶ 5, 6, but the Corps respectfully submits that there is no need to burden the Court or the parties by holding a status conference to clear up Petitioner’s confusion on this issue. Instead, Petitioner could simply telephone or e-mail the Chatfield Reservoir Mitigation Company and inquire about the reason for any discrepancy in the dates in the two documents and which document contains the correct dates. To the extent that Petitioner “is in the dark as to when and where operations will occur,” that is because it apparently has declined to do anything to shed light on the planned operations beyond looking at a website and requesting information from opposing counsel. In these circumstances, a status conference—which would surely be more “taxing on the Court’s time and on all parties,” Request for Status Conference at 4—is neither appropriate nor necessary.

In sum, Respondent submits that the reasons proffered by Petitioner for seeking a status conference and a site visit are unjustified, that a status conference and site visit are inappropriate in view of the nature of this case and its current posture, and that a site visit is unduly

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<sup>4</sup> The company is not a party to this case, but it specifically invites questions about the status of its work at its website. *See* Chatfield Storage Reallocation Project Website, Contact Us, <http://chatfieldreallocation.org/contact-us/> (last visited February 14, 2017) (“For information about the Chatfield Reallocation Project please submit an email to: [info@chatfieldreallocation.org](mailto:info@chatfieldreallocation.org). Your inquiry will be routed to the appropriate project member and responded to within 48 hours.”).

burdensome on all Parties and the Court. For these reasons, Respondent respectfully asks that Petitioner's Request for a Status Conference and Site Visit be denied.

Dated: February 17, 2017

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 17, 2017, I electronically filed the foregoing Respondent U.S. Army Corps of Engineers' Response to Petitioner's Request for a Status Conference and Site Visit using the ECF system which will send notification of such filing to the following e-mail address:

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