UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-1004

AUDUBON SOCIETY OF GREATER DENVER,
Petitioner – Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent – Appellee,

and

CASTLE PINES METROPOLITAN DISTRICT, et al.,
Intervenor – Appellees

On appeal from the United States District Court for the District of Colorado, Civil Action No. 1:14-CV-02749 (Hon. Phillip A. Brimmer)

APPELLANT'S OPENING BRIEF

February 27, 2018

Respectfully Submitted,
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***Oral Argument is requested.**

Corporate Disclosure Statement

The Audubon Society of Greater Denver has no parent companies, and there are no publicly traded companies that have any ownership interest in Denver Audubon.

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Statement of Related Cases

There are no prior or related appeals to this case.

Glossary

AF – Acre Feet
APA – Administrative Procedure Act
EIS – Environmental Impact Statement
CWA – Clean Water Act
Corps – United States Army Corps of Engineers
Denver Audubon – The Audubon Society of Greater Denver
LEDPA – Least Environmentally Damaging Practicable Alternative
NEPA – National Environmental Policy Act
Park – Chatfield State Park
Project – Chatfield Reallocation Project
ROD – Record of Decision

Jurisdictional Statement

The United States District Court for the District of Colorado exercised subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). The Audubon Society of Greater Denver challenged the United States Army Corps of Engineers' compliance with the Clean Water Act, 33 U.S.C. § 1344, and the National Environmental Policy Act, 42 U.S.C. § 4331. This action was brought pursuant to the Administrative Procedure Act. 5 U.S.C. § 704.

The Tenth Circuit Court of Appeals has jurisdiction over this appeal because it is taken as of right, pursuant to 28 U.S.C. § 1291 (appeals from final district court decisions), from the order and final judgment issued by the district court on December 12, 2017 and December 15, 2017, respectively. Notice of Appeal was timely filed in the district court on January 2, 2018.

Issues Presented

1. The objective of Section 404 of the Clean Water Act is to restore and maintain the composition of our nation's navigable waters through the avoidance and minimization of discharges into those waters. In its 404(b)(1) analysis, the Corps segmented the Project into portions, which prevented the Corps from evaluating alternatives that avoid discharges into waters of United States. Should the Corps be allowed to segment the Project in this manner? This issued was raised at PAA0311-25 and ruled on at PAA0529-38.

2. NEPA requires a thorough analysis of all reasonable alternatives to a proposed major federal action. In its alternatives analysis, the Corps dismissed the use of upstream gravel pits, Rueter-Hess Reservoir, and enhanced water conservation measures from detailed analysis even though there is evidence that these could accomplish the Project's purpose and need. Did the Corps violate NEPA by failing to subject these alternatives to detailed analysis? This issue was raised at PAA0325-33 and ruled on at PAA0509-29.

3. The NEPA exception allows consideration of extra-record evidence in APA cases to ensure that the court has adequate information available to assess whether the agency evaluated all reasonable alternatives. Here, the court failed to consider information related to Rueter-Hess Reservoir and enhanced water conservation, which was critical to evaluate the adequacy of the alternatives analysis because the Corps gave conclusory explanations for dismissing those alternatives that was not supported by evidence in the record. Should the court supplement the administrative record with this information under the NEPA exception? This issue was raised at PAA0131-55 and ruled on at PAA0277-88.

Legal Background

I. Clean Water Act

The CWA was enacted in an effort to protect the waters of the United States, which it accomplishes by regulating pollutant discharges into water sources. The primary purpose of the CWA is to eliminate discharges. *See Rapanos v. United States*, 547 U.S. 715, 722-23 (2006). Section 404 of the CWA authorizes the Corps to issue permits to discharge dredged or fill material into waters of the United States. 33 U.S.C. § 1344. When the Corps is the party engaging in the discharge of

dredged or fill material, it does not issue itself a 404(b)(1) permit, but it must apply the 404(b)(1) guidelines as if it were in order to accomplish the objective of the CWA. 33 C.F.R. § 335.2.

Under the 404(b)(1) guidelines, the Corps may not approve a discharge if there is a practicable alternative which would have a less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10 (a). A practicable alternative is one that is capable of being performed after taking into consideration cost, technology, and logistics in light of the overall project purposes, and the Corps has a duty to take into account the objectives of the project when evaluating potential alternatives. 40 C.F.R. § 230.10 (a)(2); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269-70 (10th Cir. 2004). This process is referred to as choosing the least environmentally damaging practicable alternative (LEDPA). In cases where a party is challenging an agency's determination of the LEDPA, agencies bear the burden of proving that the chosen alternative is the LEDPA by explaining how there is no less damaging alternative. 40 C.F.R. § 230.10; *Alliance to Save the Mattaponi v. U. S. Army Corps of Eng'rs*, 606 F. Supp.2d 121, 130 (D.D.C. 2009). In calculating the environmental impacts of a project, impacts can be offset by mitigation only when complete avoidance of discharges is impossible. *North Idaho*

Community Action Network v. Hoffman, No. 08-181-N-EJL, 2009 WL 1076165 *7 (D. Idaho). For actions subject to NEPA, the NEPA alternatives will in most cases provide the information for the evaluation of alternatives under Section 404. 40 C.F.R. § 230.10(a)(4). On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under the CWA. *Id.* However, this contemplates large projects that have portions with independent utility that require a discharge. *See Hoosier Envtl. Council v. U.S. Army Corps of Eng'rs*, No. 1:11-cv-0202-LJM-DML, 2012 WL 3028014, at *11 (S.D. Ind.)

The Corps Regulatory Program is the party that issues 404(b)(1) permits. *See MOA Between Department of the Army and the EPA* (Feb. 6, 1990), https://www.epa.gov/cwa-404/memorandum-agreement (describing permits granted by the Regulatory Program as "standard" permits). When it does so, it must analyze the potential impacts of an entire project through a NEPA analysis when that project hinges on the issuance of a 404(b)(1) permit. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 194 (4th Cir. 2009); *Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1121 (9th Circ. 2005). When issuing these permits, the Regulatory Program must analyze the potential impact of the portions

of the proposed project over which the district engineer has sufficient control and responsibility to warrant federal review. 33 C.F.R. pt. 325, App. B, § 7(b)(2); *Save our Sonoran*, 408 F.3d at 1121. The Corps is said to have control of and responsibility for portions of the project in which the federal involvement is sufficient to turn an essentially private action into a federal action. 33 C.F.R. pt. 325, App. B, § 7(b)(2). In these cases, the Corps must take control of and responsibility for the entire project because the environmental consequences of the entire project are essentially the product of the permitting process. *Ohio Valley*, 556 F.3d at 194. This occurs with such frequency that the Corps and EPA developed factors to determine when the Corps has control of and responsibility for environmental consequences on non-jurisdictional land. 33 C.F.R. pt. 325, App. B, § 7(b)(2); *See Save our Sonoran*, 408 F.3d at 1121. The court looks to: (1) whether the regulated activity comprises merely a link in a corridor type project (e.g. a transportation or utility transmission project); (2) whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity; (3) the extent to which the entire project will be within Corps jurisdiction; and

(4) the extent of cumulative federal control and responsibility. 33 C.F.R. pt. 325, App. B, § 7(b)(2).

The court applied this principle in a situation where a private applicant tried to avoid the expanded jurisdiction of the Corps by breaking down a project into small segments with zero independent utility. *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1313-23 (S.D. Fla. 2005). The court held that the Corps should have analyzed the environmental impacts of the project as a whole because the applicant's attempt to segment the project in order to expedite the 404(b)(1) permitting process was impermissible. *Id.* On the other hand, if the portions of the project the private applicant seeks a permit for have independent utility, then the Corps is not required to analyze the environmental impacts of the larger project. *See Hoosier*, 2012 WL 3028014, at *11.

Furthermore, the Corps' primary goal when crafting its 404(b)(1) alternatives is to avoid or minimize discharges when analyzing the potential impacts of a project that it has control and responsibility over. 40 C.F.R. § 230.10(a); *MOA Between Department of the Army and the EPA* (Feb. 6, 1990), https://www.epa.gov/cwa-404/memorandum-agreement. During its 404(b)(1) analysis, the Corps must first attempt

to choose alternatives that avoid discharges altogether. 40 C.F.R § 230.10(a). If the Corps cannot avoid discharges, it must minimize discharges to the maximum extent possible. *Id.* The Corps can consider alternatives that require discharges, the effects of which could be mitigated, only after first attempting to find alternatives to a proposed course of action that avoid discharges or minimize any necessary discharges. *Id.* The Corps, along with the EPA, have developed these regulations and guidelines to restore and maintain the integrity of the nation's waters. 33 U.S.C. § 1251. Although the Corps Civil Works program is not directly bound by the MOA, it must follow the 404(b)(1) guidelines, which require avoidance of discharge whenever possible, and no Corps guidance document disputes this central requirement.

II. National Environmental Policy Act

In evaluating a proposed major federal action, NEPA requires agencies to take a hard look at the action's potential environmental impacts by conducting an environmental impact statement (EIS). 42 U.S.C. § 4332(C)(ii). The EIS ensures that the policies and objectives of NEPA are being carried out by the government. 40 C.F.R. § 1502.1. The goal of NEPA is to "avoid or minimize any possible adverse effects of [an

agency's] actions upon the quality of the human environment." 40 C.F.R. § 1500.2(f).

To accomplish this goal, agencies are required to perform an EIS in which they are required to rigorously explore and objectively evaluate all reasonable alternatives to a proposed action. 40 C.F.R. § 1502.14(a); *Utahns for Better Transportation v. U. S. Dept. of Transportation*, 305 F.3d 1152, 1166 (10th Cir. 2002). Alternatives that accomplish the purpose of the project and are not too remote, speculative, impracticable, or ineffective are reasonable. *Wyoming v. U.S. Dep't of Agriculture*, 661 F.3d 1209, 1244 (10th Cir. 2011).

When considering alternatives, an agency cannot eliminate alternatives from detailed analysis because, standing alone, they do not fulfill the project's objectives. *Davis v. Mineta,* 302 F. 3d 1104, 1122 (10th Cir. 2002); *Utahns*, 305 F.3d at 1170; *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972). In *Utahns*, the court held that an agency's failure to consider the combination of two potential alternatives as a reasonable alternative to a highway project was a violation of NEPA. *Utahns*, 305 F.3d at 1170-71. The EIS in *Utahns* was also inadequate because the Corps and Federal Highway Administration erroneously dismissed a regional transit option

alternative because it did not "address [the] need for new road construction now," even though the focus of the EIS and its evaluation of alternatives was actually "to provide a solution to meet the 2020 transportation needs." *Id.*

In *Davis*, the court held that rejecting options because they could not meet the purpose and need of a project by themselves was one of the most "egregious shortfalls of the environmental assessment." *Davis,* 302 F. 3d at 1122. Instead of rejecting an alternative on these grounds, the agency should consider how that alternative could be combined with others to achieve the project's purpose. *Id.* The NEPA alternatives requirement is bound by a rule of "reason and practicality." *Id.* However, that rule does not permit an agency to dismiss alternatives unless they are too remote, speculative, impracticable, or ineffective. *Airport Neighbors Alliance v. U.S.*, 90 F.3d 426, 432 (10th Cir. 1996).

Furthermore, an agency may not dismiss an alternative because it requires action by a third party. *Morton*, 458 F.2d at 835. In *Morton*, the court dismissed the argument that the only alternatives that need to be considered are those which the agency could put into effect itself. *Id.* at 835. Rather, the court stated that when the action is an integral part of a broad problem, the range of alternatives must be broadened. *Id.*

The requirement to objectively evaluate all reasonable alternatives through an EIS is intended to inform decisionmakers and the public of alternatives to an action which would avoid or minimize adverse impacts to, or enhance the quality of, the human environment. 40 C.F.R. § 1502.1. The "purposes of NEPA are frustrated when consideration of alternatives and collateral effects is unreasonably constricted." *Greene Country Planning Bd. v. Federal Power Comm'n*, 559 F.2d 1227, 1232 (2d Cir. 1976). To combat constriction, the Council on Environmental Quality promulgated the NEPA anti-segmentation rule. *See* 40 C.F.R. § 1508.25. To prevent agencies from frustrating the purposes of NEPA by minimizing the potential environmental impacts of a project, the anti-segmentation rule requires agencies to evaluate connected actions in a single EIS. *See Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1028 (10th Cir. 2002). Under this rule, actions are connected when one action could not occur but for the occurrence of the other. *Id.* at 1029.

III. Administrative Procedure Act

The Administrative Procedure Act (APA) permits judicial review of final agency action, 5 U.S.C. § 704, and requires that an agency action be set aside if it is "arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious if the agency: (A) entirely failed to consider an important aspect of the problem; (B) offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise; (C) failed to base its decision on consideration of the relevant factors; or (D) made a clear error of judgment. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009). Further, an agency's action is not in accordance with the law if the action: (A) fails to meet statutory requirements; (B) fails to meet procedural requirements; (C) fails to meet constitutional requirements; or (D) is unsupported by substantial evidence. *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1574 (10th Cir. 1994).

Under the APA, supplementing the administrative record is appropriate in certain situations. Review of an agency's decision is generally confined to the administrative record compiled by the agency and presented to the reviewing court. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). However, the court must nevertheless conduct a thorough, probing, in-depth review of the agency action.

Olenhouse, 42 F.3d at 1574. The court should supplement the record when it is impossible for it to determine if the action is the product of informed decisionmaking because materials the agency did not consider, which are necessary for the court to conduct a substantial inquiry, were omitted from the record. *Olenhouse*, 42 F.3d. at 1575; *Colorado Wild v. Vilsack*, 713 F. Supp.2d 1235, 1238 (D. Colo. 2010). Although supplementing the record is only appropriate in certain circumstances, the court has acknowledged various exceptions to the presumption that extra-record evidence should not be considered. *Vilsack,* 713 F. Supp.2d at 1239 (citing *Americian Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985)). The most relevant of these is the NEPA exception. *See Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004). The NEPA exception exists because the nature of NEPA is such that an agency's failure to include all relevant information in the record may prevent an adequate review. *Lee*, 354 F.3d at 1242. In these cases, it may be necessary to "illuminate whether an [EIS] has neglected to mention a serious environmental consequence, failed to adequately discuss some reasonable alternative, or otherwise swept stubborn problems or criticism … under the rug." *Citizens for Alternatives to*

Radioactive Dumping v. U.S. Dep't of Energy, 485 F.3d 1091, 1096 (10th Cir. 2007) (citing *Lee*).

IV. Standard of Review

The standard of review of the lower court's decision in an APA case is de novo. *Defs. of Wildlife v. U.S. Envtl. Prot. Agency*, 415 F.3d 1121, 1126 (10th Cir. 2005). This court gives no deference to a district court's review of agency action. *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1182 (10th Cir. 2013). On appeal, this court applies the same standard of review to the record as did the district court. *Utahns*, 305 F.3d at 1164. The reviewing court shall hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(a). If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course is to remand to the agency for additional investigation or explanation. *Utahns*, 305 F.3d at 1164.

The Tenth Circuit has yet to rule on the standard of review for a denial of a motion to supplement the record. However, the D.C. Circuit

reviews the district court's refusal to supplement the administrative record for abuse of discretion. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). In the D.C. Circuit, a district court abuses its discretion if it fails to consider extra-record evidence that meets one of the exceptions explicitly recognized by that court. *See Id.*

Statement of the Case

Since its creation 45 years ago, Chatfield State Park (Park) has matured into one of the most cherished natural environments in the state with over 1.5 million visitors annually. Pet.-Aplt. App. at PAA0628. Chatfield is one of the most diverse parks in the state. PAA0747. It provides recreational opportunities to outdoor enthusiasts interested in a range of activities, including the members of Denver Audubon who have a particular affinity for the birding opportunities provided by the Park's unique habitats. PAA0747-52; PAA0371. The Park also has exceptionally developed infrastructure and is close to Denver. PAA0747; PAA0371. Both of these characteristics make the Park accessible to individuals who might not otherwise be able to enjoy the natural beauty of Colorado. PAA0371. Denver Audubon has its offices and a nature center at the Park and relies on the Park to further its mission of conservation, education, and research. PAA0356-57.

The Chatfield Reallocation Project (Project) was proposed as a means of providing water storage for 16 water providers, five of which had dropped out by the time it was approved. PAA0646. It will reallocate 20,600 acre feet (AF) of storage from the flood control pool to the conservation pool in the reservoir, which will raise the base elevation of the flood pool from 5,432 to 5,444 feet above sea level. PAA0625. However, after detailed analysis, the Corps determined that over the past 59 years, the water providers involved in this Project would only have been able to store 20,600 AF in the reservoir in 16 of those years. PAA0648. This means that if the water rights of these providers were the same over the next 59 years, the water levels in the reservoir would only reach 5,444 feet above sea level in 16 of those years.

The stated purpose and need of this project is to increase the availability of water, providing an additional average year yield of 8,539 AF of municipal and industrial water. PAA0628. Average year yield is a calculation of the average amount of water that the water providers involved in this project could have stored during the years 1942-2000 if

20,600 AF of storage space was available during that time. PAA0648.[1] This calculation is based on inflows during each year, the water rights of the providers, and whether the providers had effluents from water rights upstream that could be recaptured in Chatfield for later use. PAA0648; PAA0966.

In its EIS, the Corps performed a detailed analysis on four different alternatives. PAA0634-35. Alternative One is the no-action alternative which requires construction of a new reservoir and the use of downstream gravel pits to accommodate the water providers. PAA0634. Alternative Two requires the use of non-tributary groundwater combined with downstream gravel pit storage. PAA0634. Alternative Three reallocates 20,600 AF of storage at Chatfield Reservoir from the flood control pool to the municipal use pool. PAA0634-35. Lastly, Alternative Four reallocates 7,700 AF of space at

[1] Although not challenged in this appeal, this term is misleading to the public. It is a departure from the standard terms that usually describe water storage projects. Typically, projects such as this one are described using the terms firm, dependable, or safe yield. In this case, it seems that because the dependable yield is zero acre feet, the Corps came up with this new terminology to attempt to illustrate that the Project will be more beneficial than it actually is.

Chatfield combined with the use of non-tributary groundwater and gravel pit storage. PAA0635.

The Corps chose Alternative Three as its preferred alternative, PAA0636, even though it results in the most severe impacts to the Park. *See* PAA0721-31. These impacts include the removal of 269.5 acres of trees, 26.8 acres of which are hundred-year-old cottonwoods. PAA1103. The alternative also calls for the flooding of 586 acres of parklands and wildlife habitat along with the dredging and filling of 6.89 acres of natural wetlands. PAA0725; PAA1100. The dredge and fill activities as well as the removal of vegetation are direct results of the recreational modifications and compensatory mitigation associated with the alternative. PAA0829; PAA0840. "The [recreational modifications and compensatory mitigations] that CDNR proposes to perform for the recreation modifications and environmental mitigation are integral to the project." PAA0848. This is because one of the objectives of the Project is "to ensure the provision of in-kind recreation facilities and experiences." PAA0631. Therefore, the need for dredge and fill is a direct result of the alternative chosen because according to the Recreation Facilities Modification Plan:

> By modifying the reservoir storage and management practices, operations of park facilities and use areas will need to deal with potential water surface elevations regularly ranging from 5444' to 5426'. This creates a need to relocate major facilities above the 5444' water level.

PAA1048.

After completion of the Draft EIS, the public was allowed to comment on the Corps' analysis, methodology, and conclusions. PAA0824. Denver Audubon raised five concerns, two of which are relevant to this appeal. The first is that the scope of the CWA 404(b)(1) analysis was improper because it did not consider the effects of the entirety of the Project, PAA0991. The second is that the Corps did not sufficiently explain its reasoning for eliminating viable alternatives, including increased water conservation, upstream gravel pit storage, and storage at the Rueter-Hess Reservoir. PAA0990.

The Corps did not substantively address these public comments to the Draft EIS in the Final EIS. Instead, it restated its rationale for dismissing the alternatives from detailed consideration, and it continued to narrowly define the purpose of its CWA 404(b)(1) analysis. *See* PAA1094. After the Corps issued its Record of Decision (ROD) approving the Project PAA1147, Denver Audubon filed its petition for appeal. PAA0012.

After receiving the Certification of the Administrative Record, Denver Audubon noticed serious deficiencies in the record. The record lacked critical information regarding two of the three alternatives that Denver Audubon believed the Corps inadequately discussed in the EIS. To attempt to correct these deficiencies, Denver Audubon filed a motion to Complete and Supplement the Administrative Record. PAA0130. The district court denied Denver Audubon's motion to supplement the record. PAA0276. It denied Denver Audubon's request to supplement the record with information regarding Project WISE and its relation to Rueter-Hess Reservoir. PAA0284. This information was essential to address the Corps' claim that the reservoir was eliminated due to its existing storage commitment. PAA0284. Also, it shows that the Corps' statement that Rueter-Hess would require infrastructure development was incorrect. PAA0975. The district court issued its order affirming the agency action, PAA0499, and Denver Audubon initiated this appeal on January 2, 2018. PAA0542.

Summary of Argument

The primary purpose of the CWA, its regulations and guidelines, and the associated guidance documents created by the Corps and EPA is to eliminate discharges into the waters of the United States. In order to

accomplish this goal, both the Corps' regulations and guidance documents mandate that the when the Corps is considering alternatives to a proposed action which requires a discharge, it must prioritize alternatives that avoid discharges. If there are no alternatives that completely avoid discharges, then the Corps must attempt to minimize any unavoidable discharges. Only after the Corps has taken those steps can it consider mitigating the impacts of discharges.

In this case, the Corps' approval of the Project was arbitrary and capricious and a violation of the CWA because the Corps did not even analyze, yet alone prioritize, alternatives to the Project that would avoid discharges. When the Corps performed its 404(b)(1) analysis, it analyzed alternatives to a segmented portion of an alternative to the overall Project that it had already committed to. By committing to this alternative to the overall Project before performing its 404(b)(1) analysis, the Corps precluded itself from analyzing alternatives that would accomplish the purpose of the Project without any discharges.

Because the type of segmented analysis performed by the Corps in this case frustrates the purpose of the CWA, it should not be allowed. When performing a NEPA analysis, an agency may not segment out connected portions of a project and perform multiple NEPA analyses

that make the environmental consequences of the overall project look minor. This frustrates the purpose of NEPA because it fails to accomplish the objective of informing the public and decisionmakers about the environmental consequences of a proposed action. When performing a CWA analysis, segmentation causes the same problem. It precludes the evaluation of the environmental consequences of the larger connected action and prevents the Corps from accomplishing the goal of prioritizing the avoidance of discharges. For this reason, the CWA guidelines contemplate a single and complete project and mandate that when performing a 404(b)(1) analysis, the Corps should look for practicable alternatives in light of the overall project purpose.

Lastly, if this Project was being carried out by a private party, rather than the Corps, the private party would have to apply for a 404(b)(1) permit from the Corps Regulatory Program, and the Regulatory Program would have analyzed environmental impacts of the entire project. When a private party applies for a 404(b)(1) permit, it may not constrict the Corps' alternatives analysis by only seeking a permit for a small, but integral, portion of the project. In those cases, the CWA guidelines direct the Corps to expand its jurisdiction and analyze the environmental consequences of the entire project not just the

portion which requires a discharge. The Corps Civil Works Program, which lacks the expertise and experience of the Regulatory Program, should not be allowed to get away with a course of action that a private party could not get away with.

The Corps' decision to eliminate enhanced water conservation measures, upstream gravel pits, and Rueter-Hess Reservoir from its NEPA analysis without detailed consideration was also arbitrary and capricious. NEPA requires an agency to rigorously explore all reasonable alternatives to a proposed major federal action. Rueter-Hess Reservoir, enhanced water conservation, and upstream gravel pits are all reasonable alternatives to this Project because they would all accomplish at least a portion of the Project's purpose and need. The Corps relied on improper reasons to dismiss these alternatives, including arguments that they would only partially meet the need of the Project, and that they required action by third parties. The Corps also made conclusory statements that were not supported by the record, and in some cases contradicted by the record. For example, the Corps said that conservation could not make sufficient water available, yet it never even attempted to analyze how much water could be saved by going beyond baseline conservation measures, and it dismissed upstream

gravel pits because they require infrastructure even though it considered downstream gravel pits that require the same. As a result, all three dismissed alternatives would be no more impracticable to implement than any of the other alternatives the Corps chose for detailed analysis. Therefore, the Corps' dismissal of each of these alternatives was arbitrary and capricious.

The administrative record should be supplemented with extra-record evidence that demonstrates the procedural deficiencies of the Corps' NEPA analysis of these alternatives under the NEPA exception to the ban on extra-record evidence in APA cases. The information Denver Audubon seeks to add to the administrative record is necessary for the court to determine if the Corps complied with the procedural requirements of NEPA. For example, documents related to Project WISE indicate that a key assumption the Corps relied on when analyzing Rueter-Hess reservoir as an alternative was incorrect. Furthermore, the evidence related to enhanced water conservation shows that Colorado could do more to conserve its water, highlighting the insufficiency of the Corps' evaluation of water conservation which only looked at measures already being implemented. These materials thus fit within the NEPA

exception and should have been used to supplement the administrative record in this case.

Argument

The district court erred in upholding the Corps' ROD approving the Project because the Corps violated the CWA and NEPA. Further, the district court abused its discretion in denying Denver Audubon's Motion to Supplement the Record.

I. The Corps violated the CWA by failing to prioritize avoidance of discharges, which is the primary purpose of the statute, and by segmenting the Project, the Corps improperly defined the scope of its 404(b)(1) analysis.

The Corps violated the CWA when: (A) it did not attempt to avoid discharges into waters of the United States as a first priority, which is the primary purpose of the CWA, its regulations and guidelines, and the Corps' own guidance documents; (B) it contradicted the policy reasons behind the CWA guidelines and the NEPA anti-segmentation rule which are intended to ensure the accomplishment of the objectives of their respective statutes; and (C) it avoided comparing Alternative Three to other practicable alternatives, including NEPA alternatives, that could meet the underlying purpose of increasing water availability in the region.

A. The Corps failed to prioritize avoiding discharges in its 404(b)(1) analysis, which is the primary objective of the CWA, regulations and guidelines, as well as the Corps' own guidance documents.

The primary purpose of the CWA, its regulations and guidelines, and the Corps' own guidance documents is to avoid discharges into waters of the United States. When these are applied to this case they support the conclusion that the Corps should have never segmented the Project in its CWA analysis. The Corps' decision to depart from these laws, regulations, and guidance documents, and its failure to prioritize the alternatives that would avoid discharges was arbitrary and capricious because its explanation for doing so is illogical.

1. <u>The primary purpose of the CWA and its regulations and guidelines is to eliminate discharges of dredged material into the waters of the United States.</u>

The Corps violated the primary purpose of the CWA, which is to eliminate discharges into navigable waters of the United States. *See* 33 U.S.C. § 1251(a)(1). Although the CWA had a set target date of eliminating all discharges to the waters of the United States by 1985, which did not get fulfilled, its primary purpose: to eliminate discharges, remains. *See, e.g.*, *Rapanos*, 547 U.S. at 722–23. Thus, the first step in a 404(b)(1) analysis is to attempt to avoid discharges wherever possible.

The CWA regulations echo the CWA's goal of eliminating discharges by stating that dredged or fill material should not be discharged into the aquatic ecosystem. 40 C.F.R. § 230.10(c). When the Corps is the party carrying out the discharge, it does not issue itself a permit, but it must nevertheless abide by these regulations. 33 C.F.R. § 335.2. The regulations state that it is in the public interest to discourage the "unnecessary alteration or destruction" of wetlands. 33 C.F.R. § 320.4(b)(1). They also prohibit any discharge of dredged or fill material if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). Unless clearly demonstrated otherwise, practicable alternatives are (1) "presumed to be available" and (2) "presumed to have a less adverse impact on the aquatic ecosystem." *Bersani v. U.S. Envtl. Prot. Agency.*, 850 F.2d 36, 39 (2d Cir. 1988) (citing 40 C.F.R. § 230.10(a)(3)). Therefore, when performing a 404(b)(1) analysis, the Corps should consider practicable alternatives that avoid any discharge of dredged or fill material before considering any other alternatives that would have a more adverse impact on the environment.

2. The Corps' guidance documents require the Corps to first avoid, then minimize discharges, and then mitigate impacts of unavoidable discharges.

The Corps' guidance documents prioritize the avoidance of discharges. The guidance documents state that the Corps must comply with the 404(b)(1) guidelines to incorporate water quality policies embodied in Sections 102, 401, and 404 of the Federal Water Pollution Control Act. U.S. Army Corps of Eng'rs, Dep't of the Army, *Planning Guidance Notebook*, Appendix C, Page C-41. Also, the documents state that the ROD must state whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why. *Id.* at Appendix H, Page H-38.

Furthermore, EPA and the Corps Regulatory Program have reiterated the standard order of analysis. *See MOA Between Department of the Army and the EPA* (Feb. 6, 1990), https://www.epa.gov/cwa-404/memorandum-agreement. The MOA makes it clear that, in situations similar to this Project, the primary emphasis is on avoidance of discharges, and it permits compensatory mitigation only when those discharges are unavoidable. *Id.* The MOA provides a three-step sequence for obtaining a Section 404(b)(1) permit: (1) avoidance, (2) minimization, and (3) compensatory mitigation. *Id.* The applicant must

first attempt to avoid any impact on protected wetlands, for example, by developing around the wetlands or using an alternative site for development whether or not it is owned by the applicant. *Id*. Therefore, by failing to first avoid discharges, the Corps violated its own guidance documents.[2]

3. Committing to Alternative Three and then breaking it into segments prior to its 404(b)(1) analysis precluded the Corps from avoiding discharges by forcing it to ignore alternatives that avoid discharges.

When the Corps committed to Alternative Three prior to performing its 404(b)(1) analysis, it failed to avoid discharges into waters of the United States. Although the Corps evaluated alternatives in its 404(b)(1) analysis, these alternatives were designed to mitigate the impacts of the recreational modifications portion of Alternative Three, which could have never been implemented without discharges. Because Alternative Three raises the water level of the reservoir above

[2] Although the MOA between the Corps and the EPA only applies to the Corps' Regulatory Program, it simply explains in more detail what the CWA guidelines were intended to accomplish; specifically, the MOA emphasizes that the first priority is to avoid discharges. Therefore, although the MOA does not apply to the Civil Works Program the principle stated in the MOA does. The Corps has not pointed to any contrary authority allowing the Civil Works Program not to prioritize avoidance even though the Regulatory Program is required to do so under the 404(b)(1) guidelines because no such authority exists.

where some recreational facilities are currently located, an integral aspect of Alternative Three is relocating those facilities. Therefore, Alternative Three required reconstructing some of the recreational facilities. *See* PAA1135. As a result, the Corps stated that the goal of the 404(b)(1) analysis was to avoid and minimize discharges to the maximum extent practicable "while still meeting the objectives of providing recreation facilities that maintain the existing recreational experience." PAA1140. However, applicable federal regulations require the Corps to consider practicable alternatives in a 404(b)(1) analysis in light of "overall project purposes." 40 C.F.R. § 230.10(a)(3). Furthermore, the Corps' internal guidelines support the idea of a single, complete project being carried through all phases of analysis.[3] U.S. Army Corps of Eng'rs, Dep't of the Army, *Planning Guidance Notebook* at 2-5. The overall purpose of this Project is to increase water availability by 8,539 AF. PAA0628. Therefore, the Corps should have attempted to avoid or minimize discharges while still meeting the objective of increasing water availability by 8,539 AF.

[3] Project planners must "focus on the larger, complete plan(s) even when carrying out specific, individual tasks."

The difficulty of replacing the recreational facilities is that their location proximal to the shoreline makes them convenient. Therefore, it would be impracticable to move the facilities back to where the shoreline will be when the water is at its highest because the water level will rarely be at that point. PAA0648. Instead, to provide in-kind facilities, they would have to be moved to a higher elevation that will be similarly proximal to the new shoreline. PAA1134-35. This is the activity that requires discharges: bringing in fill to raise the elevation of the existing plots. Thus, it would be impossible to avoid discharges while still accomplishing the goal of providing in-kind recreational facilities. Therefore, it would be impossible to accomplish Alternative Three while avoiding discharges. If, instead of choosing a preferred alternative, the Corps analyzed alternatives to the entire Project, it could have accomplished the purpose and need of the entire Project without any discharge or at the very least, less.

EPA also voiced this concern in its communication with the Corps. PAA0601-03. When the Corps drafted its initial Preliminary Draft EIS (PDEIS), EPA sent a letter to the Corps stating that the 404(b)(1) analysis was "inappropriately constrained" because it only focused on alternatives to aspects of the Project requiring dredge and fill, rather

than alternatives to the Project as a whole. PAA0601-02. The letter further stated EPA's concern that the analysis should not have "considered the raising of water levels separately from the other associated actions, including the relocation of infrastructure." PAA0602. In a response letter, the Corps asserted that the PDEIS was merely preliminary and that, when it did issue an EIS for public comment, it would demonstrate compliance. PAA1060-62. However, the Corps failed to correct the identified flaws. PAA1112-42. To this date, neither the Corps nor the EPA have adequately explained why EPA's expressed concerns no longer apply.

Furthermore, the Corps Regulatory Program also noticed the flaws in the Corps' CWA analysis and stated that it believed the analysis "should [have been] done for the entire Reallocation Project. PAA1160. The Regulatory Program came to this conclusion because "the reallocation of water storage and relocation of recreation facilities/roads are inextricably linked." PAA1160. The Corps never adequately explained why the integral components of the Project should be broken into distinct segments.

B. Because of the similarity between the policy reasons behind the NEPA anti-segmentation rule and those of the CWA guidelines, an anti-segmentation rule should apply in the CWA context.

Just as the policy reasons for the CWA guidelines are to ensure the Corps' actions do not preclude it from accomplishing the objectives of the CWA, the policy reasons behind the NEPA anti-segmentation rule are to ensure agency action accomplishes the purpose of NEPA. The CWA regulations and the NEPA anti-segmentation rule both prevent the segmentation of a project that makes it appear to be less environmentally damaging than it actually is. For that reason, an anti-segmentation rule should apply in the CWA context.

In pursuing the objective of avoiding discharges, the CWA regulations prevent an applicant from circumventing that objective by narrowly defining the purpose of a project. 33 C.F.R. pt. 325, App. B, § 7(b)(2). The guidelines and case law indicate that an applicant may not submit an application for discharge for only a minor portion of the project if that portion of the project is key to its overall implementation. *See Ohio Valley*, 556 F.3d at 194; *Save our Sonoran,* 408 F.3d at 1121; *Fla. Wildlife Fed'n,* 401 F. Supp. 2d at 1313-23. In those situations, the Corps is required to expand its jurisdiction and evaluate the impacts of the entire project rather than the selected portion. *Ohio Valley*, 556 F.3d at

194. If the Corps only looks at alternatives to the narrow portion of a project, the environmental impacts of the project will look minor. If the portions of the Project that require discharges are integral to the overall project, the environmental impacts of the overall project are essentially products of the Corps action. Therefore, requiring the Corps to expand its jurisdiction and perform a 404(b)(1) analysis on the entire project will better accomplish the objectives of the CWA because the Corps may recognize practicable alternatives to the project that avoid discharges.

The NEPA anti-segmentation rule is designed to prevent the same outcome that would result from the Corps analysis of only an integral portion of a project: a failure to consider the impacts of the larger action. This is unacceptable in the NEPA context because it would fail to accomplish an objective of NEPA, which is to provide the public with information relating to the environmental consequences of a major federal action. Segmenting a project into smaller portions makes the environmental consequences of a project look less drastic and would permit the agency to perform multiple EA's rather than one EIS. Similarly, only analyzing alternatives in a 404(b)(1) analysis to a segmented portion of a project will make the entire project appear to less damaging.

These two statutes are inherently linked. When the issuance of a 404(b)(1) permit constitutes a major federal action, the Corps is required to comply with the procedural requirements of NEPA. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1063 (10th Cir. 2015)(McHugh, J., concurring). Furthermore, "courts have consistently held that the Corps' NEPA obligations when issuing a 404(b)(1) permit, which constitutes a major federal action, extend beyond consideration of the effects of the discharge of dredged or fill material in jurisdictional waters." *Id.* Applying an anti-segmentation rule in the CWA context would better ensure the accomplishment of the objectives of both the CWA and NEPA by preventing the Corps from segmenting a project in order to make the project seem less environmentally damaging and less deserving of a thorough attempt to avoid all unnecessary discharges.

C. Applying the CWA requirements would have meant comparing Alternative Three to the other practicable alternatives of the entire Project, including the NEPA alternatives, that could meet the underlying purpose of increasing water availability by 8,539 AF..

The Corps would have considered other alternatives to the entire Project in its 404(b)(1) analysis if it followed CWA guidelines and guidance documents. By preselecting Alternative Three, the Corps ignored the underlying purpose of the Project which was to increase

water availability by 8,539 AF. If this was a typical permitting process, the Corps would have been forced to analyze alternatives to the entire Project designed to accomplish this purpose, and if it had done so, it is unlikely that it would have chosen Alternative Three as the LEDPA.

1. By only looking at alternatives to recreational modifications necessary under Alternative Three in its 404(b)(1) analysis, the Corps violated the CWA by failing to look at the underlying purpose of the Project.

The Corps chose Alternative Three prior to its 404(b)(1) analysis. However, the Corps was required to evaluate and compare all practicable alternatives that met the purpose of the Project in selecting the LEDPA. 40 C.F.R. § 230.10(a)(2). An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of "overall project purposes." 40 C.F.R. § 230.10(a)(2). Here, there were other alternatives, including the NEPA alternatives, that the Corps identified as practicable alternatives to satisfy the purpose of the overall Project. However, the Corps chose Alternative Three as its preferred alternative prior to its 404(b)(1) analysis. By doing so, the Corps ignored other alternatives to the Project. The Corps has the burden to show that no other practicable alternative could avoid discharges while satisfying the purpose of the

project (to increase availability of water by providing an additional average year yield of up to approximately 8,539 AF). PAA0628. The Corps is required to make a persuasive showing concerning the lack of practicable alternatives. *Utahns*, 305 F.3d at 1163. Here, the Corps identified at least three practicable alternatives to the Project in its NEPA analysis, yet it ignored those alternatives completely in its 404(b)(1) analysis.

The Corps claims that it is only required to analyze alternatives to the portions of this Project that require discharges in its 404(b)(1) analysis, and that is why it restricted the analysis to alternatives to the recreational modification. PAA0416. However, the applicable guidelines state that a practicable alternative should be viewed in light of the "overall project purposes." 40 C.F.R. § 230.10(a)(2). Furthermore, in its letter to the Corps, EPA stated that the guidelines contemplate a single and complete project, and that the Corps must consider the scope and impacts of the entire reallocation Project. PAA0602. Despite this, the Corps ignored the underlying purpose of the overall Project which is to increase water availability. The Corps' inadequate explanation for ignoring the underlying project purpose in its 404(b)(1) analysis runs

counter to the CWA guidelines, Corps guidance documents, and case law, which makes its LEDPA analysis arbitrary and capricious.

2. If this were a typical permitting process, the Corps would have analyzed alternatives to the entire Project rather than alternatives to a small, but integral, piece of the Project.

Although the Corps does not issue itself a 404(b)(1) permit for its own activities, regulations co-developed by EPA and the Corps mandate that the Corps abide by the same steps and analysis as if it were. 33 C.F.R. § 335.2. In a typical 404(b)(1) permitting process, the Corps Regulatory Program issues a permit for discharges to a private party. During that process, the Corps does not permit developers to artificially constrain the alternatives analysis by defining the project's purpose in an overly narrow manner. *Greater Yellowstone*, 359 F.3d at 1270 (citing *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1346 (8th Cir.1994)). In this case, the Corps defined the purpose of its 404(b)(1) analysis in a narrow manner even though in a typical situation that would not be permitted.

If the party carrying out this action was a private party applying for a 404(b)(1) permit from the Corps' Regulatory Program, the Corps would have taken control of and responsibility for the entire project and analyzed its associated environmental impacts. According to *Ohio Valley*

and *Save our Sonoran*, in typical permitting processes, the Corps must analyze the environmental impacts of a project as a whole, rather than just the portion of a project that requires a discharge, if the project hinges on the grant of a 404(b)(1) permit. Essentially, if the action requiring a discharge that the private party submits an application for has no independent purpose or utility and is a necessary component of the larger action, then the Corps should expand its jurisdiction and consider the impacts of the whole project in its analysis.

The recreational modification and compensatory mitigation portions of the Project have no independent purpose or utility. Neither of these actions would be necessary if not for the broader action of the entire Project. The reason for relocating the recreational facilities is because after the water reallocation, the facilities would be submerged when the reservoir is full. PAA1047. Similarly, the reason for the compensatory mitigation plan is "to offset the adverse impacts to the target environmental resources associated with Alternative Three." PAA1045.

Not only do the recreational modifications and compensatory mitigation have no independent purpose, they are necessary components of the Project. One of the objectives for the design of the

Project was to "ensure provision of in-kind recreational facilities and experiences" at the Park. PAA0631. This objective was so critical to the Project that throughout the entire EIS, the Corps continuously refers to the recreational modifications and compensatory mitigation as "integral" components of the overall Project. *See, e.g.,* PAA0625, PAA0640, PAA0822, PAA0825, PAA0828, PAA0848. The only time in the EIS that the Corps even hints that the recreational modifications and compensatory mitigation may not be necessary is in its 404(b)(1) analysis. PAA1117.

Interestingly enough, two factors from the CWA guidelines for determining the scope of the Corps' jurisdiction in instances such as this illustrate the unusual nature of this case. Had a private party been applying for a permit, the court would look to the extent to which the entire project is within the Corps' jurisdiction and the extent of cumulative federal control and responsibility. In this case, the answer to both of those questions is 100%. This indicates that, in this instance, it would be even more reasonable for the Corps to analyze the environmental impacts of the larger project because the Corps already has jurisdiction over that project.

Because the recreational modifications and compensatory mitigation portions are integral to the Project, as the Corps states prior to its 404(b)(1) analysis, it is clear that the Project would not move forward without their completion. Furthermore, neither the recreational modifications nor the compensatory mitigation have independent utility because they would be completely unnecessary if not for the reallocation. Therefore, if an applicant sought a permit for the dredge or fill associated with these aspects of the Project, the Corps' Regulatory Program would have had to take control of and responsibility for the entire project because its environmental consequences would essentially be the product of the Corps' permitting process. It would then perform a NEPA alternatives analysis and then use various alternatives to determine the LEDPA.

3. Had the Corps performed its 404(b)(1) analysis in the proper scope, it would have analyzed alternatives to the entire Project and would not have been able to choose Alternative Three as the LEDPA.

Had the Corps performed its 404(b)(1) analysis on alternatives to the entire Project, it would have had to eliminate the other NEPA alternatives as impracticable in order to choose Alternative Three as the LEDPA because Alternative Three is the most environmentally

damaging of those alternatives. However, that seems like a difficult proposition given that the Corps analyzed these alternatives as reasonable alternatives under NEPA. This may suggest one of the reasons the Corps narrowly defined the scope of its 404(b)(1) analysis.

In a 404(b)(1) analysis, the Corps must determine the practicability of the alternatives to the action that requires a permit. Here, instead of analyzing the practicability of the alternatives to the entire Project, the Corps analyzed alternatives to the recreational modification plan. Had the Corps performed the impracticability analysis on the NEPA alternatives, it would have been very difficult for it to dismiss them as impracticable because the Corps found them to be reasonable alternatives deserving of detailed analysis in the EIS under NEPA.

The next step after compiling practicable alternatives to an activity that requires discharges is to choose the least environmentally damaging one of those alternatives. 40 C.F.R. § 230.10(a). In this case, compared to the other NEPA alternatives, Alternative Three is the most environmentally damaging rather than the least. Alternative Three inundates 586 acres of wildlife habitat, destroys a minimum of 42.5 acres of mature cottonwoods, and floods 157.2 acres of wetlands.

PAA0721-31. The other three alternatives combined would flood 150.06 acres of wetlands (the majority of which comes from one alternative), and inundate 514 acres of wildlife habitat (again, the majority of which comes from one alternative). PAA0721-31.

This analysis could have been performed on alternatives to the entire Project other than the NEPA alternatives, but the NEPA alternatives demonstrate that the Corps had at least three other less environmentally damaging practicable alternatives to this Project. Furthermore, 40 C.F.R. § 230.10(a)(4) states that for actions subject to NEPA, the analysis of alternatives required for NEPA will in most cases provide the information for the evaluation of alternatives in determining the LEDPA. Although the regulation does state that occasionally NEPA documents may address a broader range of alternatives than required to be considered under the CWA, this contemplates projects that are large and have portions with independent purposes that require a discharge. *See Hoosier* WL 3028014, at *11. If the Corps thought that the NEPA alternatives were not practicable alternatives, the Corps had the burden to show why they were not. Because the NEPA alternatives are practicable, and the Corps never demonstrated otherwise, the Corps should have used the NEPA

alternatives in addition to other practicable alternatives in its LEDPA analysis.

This case is even more egregious than the other cases which involved a CWA analysis that was artificially constrained. Here, the Corps already performed a NEPA analysis for the entire Project, yet narrowed the scope of the CWA analysis. This is what makes the issue presented by this case unique. The NEPA analysis shows exactly why the Corps wanted to segment Alternative Three in its LEDPA analysis: because Alternative Three is the most environmentally damaging of the NEPA alternatives. Thus, the Corps' novel interpretation of the 404(b)(1) guidelines is a blatant attempt by the Corps to approve a government project that would never be approved if proposed by a private party. This court should reject this segmentation approach and hold the Corps to the same standard that it would hold any private party. The segmentation does not comply with the purpose of the CWA to avoid discharges, and if the Corps performed its analysis at the proper scope, it would have been unlikely that it would have chosen Alternative Three as the LEDPA. Therefore, the Corps' ROD was arbitrary and capricious and should be vacated by this court.

II. The Corps' NEPA analysis was arbitrary and capricious and not in accordance with the law because it failed to adequately evaluate several reasonable alternatives.

The Corps failed to comply with the procedural requirements of NEPA and made arbitrary and capricious decisions in its alternatives analysis. The Corps' NEPA analysis was flawed because it wrongfully dismissed three reasonable alternatives to the Project without detailed analysis: (A) enhanced water conservation measures, (B) the use of upstream gravel pits, and (C) the use of Rueter-Hess Reservoir.

The Corps improperly dismissed enhanced water conservation measures as an alternative without any examination at all. Although the Corps did analyze what it called "increased water conservation measures," a hard look at the EIS reveals that the Corps did not actually discuss what it claimed to. PAA0945-61 (discussing baseline conservation measures). The Corps dismissed the use of "increased water conservation measures" because it determined that, standing alone, water conservation could not meet the entire purpose and need of the Project, and further that water conservation measures do not increase water supply, and thus cannot achieve the goals of the Project. PAA0679.

The Corps dismissed the use of upstream gravel pits because it determined that, standing alone, they could not meet the entire purpose and need of the Project. The Corps further claimed that because they would require additional infrastructure connecting them to the South Platte River, upstream gravel pits were impracticable as an alternative.

The Corps dismissed storage at Rueter-Hess Reservoir without detailed consideration because it claimed storing water in the reservoir would require action by a third party. Therefore, the Corps dismissal of these alternatives without detailed analysis was arbitrary and capricious and a violation of NEPA because it was based on unlawful reasoning.

A. The Corps dismissed enhanced water conservation measures without adequate exploration of them as an alternative.

Enhanced water conservation measures should have been considered in detail as an alternative or partial alternative to this Project because it is a reasonable alternative that would accomplish at least a portion of the purpose and need of this Project. Furthermore, the Corps' failure to analyze enhanced water conservation measures at all prior to dismissing them as an unreasonable alternative was arbitrary and capricious.

Enhanced conservation measures are a reasonable alternative to this Project because they would accomplish at least a portion of its purpose, which is to increase water availability. Enhanced water conservation measures are programs that go beyond the standard methods already being used by water providers. These measures would effectively increase water supply because they make water previously unavailable to consumers available for use. Whether this is accomplished through a decrease in demand or through methods intended to reduce losses in supply is irrelevant. Either way, enhanced measures would allow water providers to spread out the finite water resources in Colorado to more consumers. By making supplies last longer, conservation effectively increases the water availability. Therefore, even if enhanced water conservation measures could not accomplish the entire purpose and need, they should have been evaluated as a reasonable alternative.

Dismissing this alternative as only a partial alternative was not in accordance with NEPA as it was interpreted in *Davis*. According to *Davis*, alternatives are reasonable even if, standing alone, they do not accomplish the entire purpose and need of a project. Here, the Corps dismissed increased water conservation measures without considering

combining them with other partial alternatives, only stating that "increased water conservation alone is not adequate to address the purpose and need of the proposed action." PAA0679. The Corps cites to no evidence as to why it would be ineffective to combine increased water conservation measures with other alternatives to meet the Project's goal of increasing water availability.

The Corps' dismissal of enhanced water conservation measures without detailed consideration was arbitrary and capricious because it failed to base this decision on the consideration of relevant factors. In its alternatives analysis, the Corps did not truly consider enhanced water conservation measures at all. The Corps only looked at a baseline of current conservation measures, and did not evaluate the possibility of going beyond that baseline. PAA0673. In doing so, the Corps never analyzed the extent to which enhancing conservation could meet the Project's purpose and need. Rather than evaluating an enhancement of water conservation measures, the Corps only discussed water conservation measures already in use by the water providers, such as rebates for use of low-flow or high-efficiency appliances, irrigation improvements and xeriscaping in the EIS. PAA0678-79. Instead, the Corps should have analyzed enhanced or new types of measures that

could be implemented to increase water availability because that information is critical to the evaluation of water conservation as an alternative.

The Corps' determination that water conservation could not accomplish the purpose and need of the Project because it does not increase water availability was arbitrary and capricious because it is a clear error of judgment. The EIS states that water conservation was dismissed from detailed consideration because it would not solidify water supply, and therefore, could not meet the Project's purpose and need. PAA0673. The Corps reached this conclusion partially based on the fact that it claimed "conservation helps to stretch existing resources, but does not solidify additional water supplies." PAA0673. Even if conservation measures did only decrease demand, less demand placed on extant water supplies vis-à-vis water conservation measures that decrease usage, means there is not a need for supplies to be as large. Therefore, employing enhanced water conservation measures to decrease the demand for water in the Denver Metro Area would lower the amount of water supply needed to be provided by this Project. Because enhanced conservation would increase water availability, it addresses the purpose and need of the Project. Thus, enhanced water

conservation measures should have been considered a reasonable alternative.

The Corps' determination that water conservation would not do enough to address the shortages of sustainable water supplies faced by the water providers was not in accordance with the law because it failed to meet the procedural requirements of NEPA. NEPA requires an agency to look at all reasonable alternatives to a major federal action. In its analysis of water conservation, the Corps states that water conservation will not solve the problem of supply shortages faced by the water providers. PAA0674. However, the purpose of this Project is to increase water availability by 8,539 AF, not to address a general shortage in supply. PAA0628. Comparing water conservation to the overall issue of water shortages in Colorado rather than to the specific purpose and need of the Project dismisses this alternative for the wrong reason. If this Project sought to address the entirety of the region's water needs, then its purpose and need should have been defined as such. Dismissing an alternative to a project because it cannot meet a broader need than the project seeks to address is arbitrary.

Like the situation in *Davis*, the Corps dismissed this alternative because it would not accomplish the purpose and need of the Project

even though the true extent of how much conservation measures could increase water supply is unknown. Had the Corps actually evaluated enhanced conservation, rather than just the baseline of what is currently being done, the Corps could have made a definitive judgment as to its viability as an alternative. However, in its current state, the Corps' evaluation of this alternative fails to answer the question of whether it could meet the Project's need. Therefore, the dismissal of this reasonable alternative on the grounds that it would not meet the entire need of the Project was unlawful.

B. The Corps' dismissal of the use of upstream gravel pits from detailed analysis because it would only be a partial alternative, and its claim that it would be impracticable was improper and not supported by the record.

The use of upstream gravel pits should have been considered in detail as an alternative by itself or as a combined alternative with other actions. The Corps failed to indicate why upstream gravel pits would be less practicable than the use of the downstream gravel pits included in Alternative Two. Furthermore, even if the use of upstream gravel pits may not be able to accomplish the entire purpose and need of the Project, this is not a valid reason to exclude their use from detailed analysis. When combined with other alternatives, the use of upstream

gravel pits, specifically the Titan ARS gravel pit, could accomplish the purpose and need of this Project.

The use of upstream gravel pits should have been considered in more detail because it could accomplish a portion of the purpose and need of the Project just as downstream pits could. There is evidence in the record that upstream gravel pits could potentially store as much as 11,000 AF of storage, which is more than half of the 20,600 AF of storage identified as the objective of the Project, and more than the threshold of 7,700 AF the Corps instituted for alternatives to reach detailed consideration. PAA1105. Further, the issues the Corps cited as to why upstream gravel pits were impracticable exist to a similar extent with downstream gravel pit storage, and yet downstream pits were carried forward for detailed analysis. In its discussion of the preliminary concepts for this Project the Corps states one issue for both upstream and downstream gravel pits; "[they] would require diversions to/from the South Platte River to the Reservoir." PAA0669. However, in its summary of the results of the screening of these concepts, the Corps carries forward the use of downstream pits as a portion of Alternative Two and dismisses upstream gravel pits because of "the logistics of combining other small reservoirs in the area." PAA0687. The Corps

never explains how, despite having the same flaw, the use of downstream gravel pits is reasonable and the use of upstream pits is not. PAA0714-15.

The Corps' determination that upstream gravel pits could only hold an amount of water insufficient for it to be fully evaluated with detailed analysis was arbitrary and capricious. The EIS states that the Titan ARS gravel pit, the largest of the upstream pits, could only hold 4,500 AF of water, and that the total storage capacity of all upstream gravel pits is 5,490 AF. PAA0669. However, the owner of Titan ARS informed the Corps that a survey conducted on Titan ARS revealed that its storage capacity was actually 11,000 AF. PAA1105. The EIS is devoid of any explanation for how the Corps reached the conclusion that Titan ARS could only hold 4,500 AF, and does not acknowledge the possibility of it holding more water at all. The Corps thus made its determination on facts that were contrary to the evidence in the record, making this determination arbitrary and capricious.

The Corps relied on insufficient justifications for excluding upstream gravel pits from consideration. Tenth Circuit precedent shows that the Corps' elimination of upstream gravel pits from detailed study because it is a partial alternative was unlawful. In addition, the use of

upstream gravel pits cannot be differentiated from the use of downstream gravel pits, and the information relied upon to determine the capacity of upstream gravel pits is contrary to evidence in the record. Thus, the Corps' overall determination regarding this alternative was arbitrary and capricious, and this court should vacate the ROD.

C. The Corps' dismissal of Rueter-Hess Reservoir from detailed consideration because it required action by a third party was unlawful because it was contrary to the procedural requirements of NEPA.

Rueter-Hess Reservoir is a reasonable alternative for this Project because it will have the capacity needed to accomplish the entire purpose and need of this Project, and it would not be impracticable to implement. The Colorado Public Works Journal indicated that an expansion project carried out by Parker Water and Sanitation District (PWSD) would make 45,200 AF of additional storage space available for sale at Rueter-Hess by the time this Project is to be completed. PAA0976. This additional storage space is vastly more than the increase in storage capacity the Chatfield reallocation would provide. Furthermore, the use of this alternative would mean buying storage capacity already existing at Rueter-Hess, rather than expanding a reservoir's capacity as is required for this Project. Thus, not only does

this alternative satisfy the purposes of the Project, it also serves one of the objectives of NEPA, which is to avoid or minimize adverse effects on the human environment.

The Corps dismissed Rueter-Hess from detailed analysis based on incorrect assumptions that are contradicted by evidence in the record. First, the Corps claimed a third party, PWSD, would need to make more storage space available than it was able or willing to. PAA0684. The Corps asserted that the storage commitments at Rueter-Hess meant there was insufficient space to meet the needs of the water providers in this Project. PAA0684; PAA0688. However, there is no evidence in the record that indicates this. Rather, there is evidence to the contrary which states that there would be additional storage available by the time the Project is completed. PAA0976.

Even if it were true that third party action was required to make Rueter-Hess a viable alternative, this was not a valid reason to dismiss it. According to *Morton*, the Corps may not dismiss alternatives from detailed consideration, because it would require action by a third party. In its response brief, to distinguish *Morton,* the Corps contends that *City of Alexandria* "clarified that the 'broad articulation of reasonable alternatives' [in *Morton*] was compelled by the national scope of the

problem being addressed." PAA0440 (discussing *City of Alexandria, Va. v. Slater,* 198 F.3d 862, 868 (D.C. Cir. 1999)). The Corps also claimed addressing the water needs of the Denver metropolitan area is "primarily a nonfederal responsibility," and further categorized this as a discrete, regional problem. PAA0440 (citing PAA0628). However, as the Corps should be well-aware, a shortage of water storage is a problem faced in virtually the entire Western United States, with Denver being one of many areas currently trying to address this issue. As such, it is a mischaracterization to claim that addressing water storage solutions is a "discrete, regional problem." The Corps' rationale for dismissing Rueter-Hess from detailed consideration as an alternative was thus contrary to evidence in the record and was unlawful. Therefore, it was arbitrary and capricious.

III. The district court abused its discretion in denying Denver Audubon's Motion to Supplement the Record because information regarding enhanced water conservation and Project WISE is necessary for the court to make a substantial inquiry into the Corps' NEPA alternatives analysis.

The district court abused its discretion when it denied Denver Audubon's motion to supplement the record for two reasons: (A) the Tenth Circuit recognizes the NEPA exception to the general rule that appellate review pursuant to the APA should be restricted to the

administrative record; and (B) the reasons for applying the NEPA exception are all present in this case.

A. There is a NEPA exception to the ban on extra-record evidence in APA cases because when evaluating whether an EIS contains an adequate discussion of alternatives to a proposed action, it is occasionally necessary to look outside the administrative record.

The NEPA exception to the ban on extra-record evidence in APA cases is based on the distinction between judicial review of substantive agency decisions and judicial review of an agency's compliance with the procedural requirements of NEPA. *Vilsack*, 713 F. Supp.2d at 1240. It exists because exceptions to the ban on extra-record evidence are more appropriate when contesting the procedural validity of agency decisions. *Id*. (citing *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 667 F. Supp.2d 111, 115 (D.D.C. 2009). Exceptions are appropriate in these cases because when agency action is challenged on procedural grounds it is often necessary to look to extra-record evidence to enable judicial review to become effective. *Cape Hatteras*, 667 F. Supp.2d at 115.

In NEPA cases, when an agency is challenged on procedural grounds, extra-record evidence may be needed to ensure that the EIS adequately discusses reasonable alternatives. *Vilsack*, 713 F. Supp.2d at

1240. Often this requires the court to look outside the administrative record to see what the agency may have ignored. *Id.* (citing *Suffolk v. Sec. of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977)). The Tenth Circuit has recognized the relevance of extra-record evidence in NEPA cases where there are gaps or inadequacies in the NEPA process. *Lee*, 354 F.3d at 1242. In *Lee*, this court stated that in the context of NEPA, extra-record evidence can be helpful to determine whether the agency failed to consider relevant factors in its decisionmaking process. *Id*. However, in *Lee*, the petitioners sought to introduce an expert opinion which may not be admitted under the guise of the NEPA exception. *Id.* Distinguishably, Denver Audubon seeks to add evidence that is necessary for the court to conduct a substantial inquiry into the Corps' alternatives analysis.

B. The NEPA exception should apply in this case because the Corps improperly dismissed alternatives that extra-record evidence confirms are reasonable.

In this case, the record is not sufficient for the court to make a determination whether the Corps' action was the product of informed decisionmaking. Specifically, the record lacks documentation required to determine if the Corps' dismissal of Rueter-Hess Reservoir and enhanced water conservation measures as unreasonable was justified.

Because the NEPA exception is designed to allow courts to review this type of evidence in order to engage in effective judicial review, the district court abused its discretion by failing to consider this extra-record evidence.

The document related to enhanced water conservation was necessary for the Corps to make an informed decision regarding the reasonableness of these measures as an alternative. This document is a study conducted by the Alliance for Water Efficiency and Environmental Law Institute on water conservation law and policies across the states. PAA0201. The study shows that the water conservation measures utilized in Colorado could be improved. While the study cannot necessarily prove that enhanced water conservation measures would have been a viable alternative to this Project, it shows that the Corps relied on insufficient information to make that determination. The study shows that the measures the Corps analyzed, which are currently being practiced in Colorado are insufficient. This in-depth evaluation of enhanced water conservation, rather than measures currently being used, should have been considered by the Corps and may have led it to determine that enhanced water conservation would be a reasonable alternative to this Project. By failing to consider necessary information

in its analysis of water conservation, the Corps failed to ensure that it and the public were fully-informed about the feasibility of enhanced water conservation as an alternative.

The district court abused its discretion when it refused to add this document to the record because it provides information necessary to evaluate the Corps' analysis of enhanced water conservation. Without this study, the existing record lacks any real discussion of how enhanced conservation could meet the purpose and need because the record only shows what the baseline of conservation measures can achieve in terms of increasing water supply. As such, it is impossible to fully analyze the adequacy of the Corps' analysis of this alternative without this document, and so the district court cannot claim to have done so.

Like the documents related to water conservation, the documents related to Project WISE were necessary for the Corps to thoroughly evaluate Rueter-Hess Reservoir as a potential reasonable alternative. These documents refute the Corps' claim, which is conclusory and unsupported by any evidence in the record, that a new pipeline is needed to connect Chatfield and Rueter-Hess Reservoir. PAA0975. The documents show that Project WISE would provide the pipeline infrastructure that could make Rueter-Hess a viable alternative. The

Project WISE summary provides details about the project, including information regarding the existing and planned infrastructure that could transport water downstream from Chatfield Reservoir to Rueter-Hess Reservoir. PAA0226. The public notice relating to the Section 404 permit for Rueter-Hess Reservoir describes how water from Project WISE would be stored in Rueter-Hess Reservoir using a diversion from the South Platte River, connecting through Aurora Water's Prairie Waters Project, with the water ultimately ending up in Rueter-Hess. PAA0236. The letter from Denver Audubon to the Corps supports both of the aforementioned facts, in that it details the viability of Rueter-Hess as an alternative. PAA0240-41. Further, because it was received by the Corps, the Corps should have known about Rueter-Hess' viability. These documents all contain critical information regarding this potential alternative and demonstrate that the Corps was not fully-informed when it dismissed this alternative without detailed analysis.

The district court abused its discretion by denying Denver Audubon's Motion to Supplement the Record with information that was necessary to contradict the Corps' assertion that Rueter-Hess was not a reasonable alternative. The district court stated in its order on the merits that there was nothing in the record contradicting the Corps'

assertion that additional infrastructure would be needed to connect Chatfield Reservoir directly to Rueter-Hess Reservoir. PAA0527-29. However, this is more reflective of the deficiency of the record, specifically its lack of information showing that infrastructure from Project WISE would connect Rueter-Hess to the South Platte, than of the actual status of said infrastructure. The deficiency in the record only emphasizes that the district court should have supplemented the record. Just as there was no evidence in the record contradicting the Corps' assertion, there was also nothing in the record that supported the Corps' assertion regarding needed infrastructure – instead it was merely a bare conclusory assertion utterly lacking in evidence. The documents Denver Audubon attempted to supplement the record with demonstrate that water from Chatfield could flow through the South Platte and to the Project WISE infrastructure. Thus, no additional infrastructure would be needed to make Rueter-Hess a viable alternative. Therefore, the district court denied Denver Audubon the ability to show that there is evidence that contradicts the Corps' assertion when it denied Denver Audubon the ability to supplement the record. For this reason, refusing to supplement the record with this evidence was an abuse of discretion.

The petitioners in *Lee* sought to introduce an expert opinion that contradicted the expert opinion the agency relied on, and thus the court refused to apply the NEPA exception and supplement the record. *Lee*, 354 F.3d at 1242. *Lee* is distinguishable from this case because the documents Denver Audubon seeks to introduce contain information not contained in the record at all. Because the Corps failed to include evidence in the record showing that additional infrastructure would not be necessary, there was no potential for an improper battle of the experts in this case. Instead, it is simply a matter of comparing the Corps' conclusory and unsupported response to comments with reliable information regarding Project WISE which contradict the Corps.

These documents reveal that the record was insufficient for the court to conduct a substantial and thorough review of the Corps' decision. Moreover, these documents show that the Corps violated NEPA's requirement to evaluate all reasonable alternatives in its dismissal of Rueter-Hess and enhanced water conservation. The documents related to Project WISE show that one of the principal reasons for dismissing Rueter-Hess, a lack of sufficient infrastructure, was erroneous, and the water conservation study shows that the scope of the Corps' evaluation of enhanced water conservation measures was

limited to an extent that made it insufficient. As such, these documents are necessary for the court to conduct a substantial inquiry into the adequacy of the Corps' NEPA analysis. Therefore, unlike the documents in *Lee*, they contain information the NEPA exception was designed to admit and should be added to the record.

Conclusion

For the foregoing reasons, Denver Audubon respectfully requests this court to vacate the Record of Decision and remand the EIS to the Corps for additional investigation or explanation.

Oral Argument Statement

Denver Audubon believes that oral argument is necessary in this case because it regards complex statutory interpretation and is a matter of first impression.

Certificate of Service

I certify that on February 27, 2018, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send notification of such filing to all Counsel of Record.

Certificate of Digital Submission

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender, and according to the program are free of viruses.

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Date: February 27, 2018 /s/ Kevin J. Lynch

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