No. 18-1004

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AUDUBON SOCIETY OF GREATER DENVER,
Petitioner-Appellant,

v.

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

and

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

On Appeal from the U.S. District Court for the District of Colorado,
No. 1:14-CV-02749-PAB (Hon. Philip A. Brimmer)

FEDERAL RESPONDENT-APPELLEE'S ANSWERING BRIEF

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Oral argument is not requested.

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There are no prior or related appeals under Tenth Circuit Rule 28.2(C)(1).

GLOSSARY

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

INTRODUCTION

This case concerns the analysis and approval by the U.S. Army Corps of Engineers (the Corps) of the Chatfield Reservoir Storage Reallocation Project (Reallocation Project), which the Corps (consistent with congressional authorization) developed to help suppliers in the Denver, Colorado metropolitan area meet growing demands for water. In 2012, those suppliers requested additional storage space in the Reservoir, and the Corps completed a detailed analysis of the request under the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA). The Corps selected the alternative designed to provide additional storage at the lowest cost while preserving environmental resources. The Audubon Society of Greater Denver (Audubon) petitioned for review in the district court, claiming that the Corps' analysis and approval of the Reallocation Project did not comply with NEPA or the CWA.

The court denied Audubon's petition and entered judgment for the Corps. That judgment should be affirmed because the Corps complied with both NEPA and the CWA. The agency satisfied its obligations under NEPA when it analyzed a range of alternatives and provided reasonable explanations for its decision not to evaluate particular concepts in greater detail. The agency also complied with the CWA because its analysis was properly limited to the activities that were subject to the Corps' narrow authority under that statute.

JURISDICTIONAL STATEMENT

Audubon asserted claims under NEPA, 42 U.S.C. §§ 4321-4370h; the CWA, 33 U.S.C. § 1344; and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. Accordingly, the district court had jurisdiction under 28 U.S.C. § 1331.

On December 15, 2017, the district court entered final judgment in favor of the Corps. PAA540-41. On January 2, 2018, Audubon filed a timely notice of appeal. PAA543; Fed. R. App. P. 4(a)(1)(B)(ii). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Corps satisfied NEPA by considering a variety of project concepts and providing reasonable brief explanations for eliminating particular concepts from detailed analysis.

2. Whether the Corps acted reasonably by tailoring the scope of its analysis under Section 404 of the CWA to reflect the limits of its authority under that statute.

3. Whether the district court properly declined to admit certain pieces of extra-record evidence after determining that the narrow exceptions to the rule against considering that evidence were not satisfied.

STATEMENT OF THE CASE

I. Legal Background

A. National Environmental Policy Act

NEPA seeks to ensure that federal agencies consider the environmental impacts of proposed major federal actions. 42 U.S.C. § 4332(C); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 15-16 (2008). The statute does not mandate any specific substantive results, "but simply prescribes the necessary process." *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 690 (10th Cir. 2015) (internal quotation marks omitted). In the end, NEPA "merely prohibits uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

NEPA requires agencies to take a "hard look" at the environmental consequences of a proposed federal action. *Id.* at 350. When an agency determines that a particular action will have significant environmental impacts, it must prepare an Environmental Impact Statement (EIS). 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.1. The content of an EIS is dictated in part by the "underlying purpose and need to which the agency is responding." 40 C.F.R. § 1502.13. An agency must analyze a range of alternatives—along with a no-action alternative—that are consistent with the nature and scope of the proposed action. *Id.* § 1502.14; *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002).

B. Clean Water Act

The CWA establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA prohibits the discharge of pollutants, including dredged or fill material, into "waters of the United States" unless authorized by a CWA permit. *Id.* §§ 1311(a), 1344(a), 1362(7).

Section 404 of the CWA authorizes the Corps to issue permits for discharges of dredged and fill material into waters of the United States. *Id.* § 1344. The agency's jurisdiction under Section 404 "is limited to the narrow issue of the filling of jurisdictional waters." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.* (*OVEC*), 556 F.3d 177, 195 (4th Cir. 2009); *see also Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2004). The Corps will grant a permit to discharge dredged or fill material into waters of the United States unless it "determines that [the permit] would be contrary to the public interest." 33 C.F.R. § 320.4(a)(1). The Corps evaluates permit applications under the "Section 404(b)(1) Guidelines," which are regulations developed jointly by the Corps and the Environmental Protection Agency. 40 C.F.R. Part 230.

The Section 404(b)(1) Guidelines provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."

40 C.F.R. § 230.10(a). The Corps must analyze a variety of alternatives consistent with the "overall project purpose" for which a Section 404 permit is sought in order to identify the practicable alternative likely to cause the least environmental damage. *Id.* That alternative is called the least environmentally damaging practicable alternative, or "LEDPA." *Id.* A "practicable" alternative is one that is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2).

Where, as here, the Corps itself—as opposed to a private party—undertakes a project that results in the discharge of dredge or fill material, the Corps does not issue itself a permit. The Corps nevertheless "appl[ies] all applicable substantive legal requirements, including . . . the section 404(b)(1) guidelines." 33 C.F.R. § 336.1(a).

II. Factual Background

A. Project Background

Chatfield Reservoir is a federally-owned and operated water storage facility located within the South Platte River Basin southwest of Denver. PAA629. The Reservoir was constructed in 1973 as part of the Chatfield Dam and Lake Project, which Congress authorized for flood control and other purposes. *See* PAA627; Flood Control Act of 1950, Pub. L. No. 81-516, § 204, 64 Stat. 163, 175.

Consistent with congressional authorization to provide recreation at the facility, *see* Pub. L. No. 93-251, § 88, 88 Stat. 12, 38 (1974), the Corps leased the area surrounding the Reservoir to the State of Colorado in 1974 to form Chatfield State

Park. PAA644. The Park is a popular recreation site with trails, picnic areas, and boating facilities. PAA628-29. It also provides habitat for various animals and plants. PAA649.

In 1986, Congress authorized the Corps, "upon request of and in coordination with the Colorado Department of Natural Resources [CDNR]," and following the Corps' "finding of feasibility and economic justification," to reallocate some of the storage space in Chatfield Reservoir to "joint flood control-conservation purposes, including storage for municipal and industrial water supply, agriculture, and recreation and fishery habitat protection and enhancement." Water Resources Development Act of 1986, Pub. L. No. 99-662, § 808, 100 Stat. 4082, 4168. Congress conditioned the reallocation of storage space within the Reservoir upon agreement from non-federal project sponsors (here, the water providers) to pay any costs associated with reallocation. *Id.*; PAA627.

In 2009, Congress authorized CDNR to perform modifications of the Chatfield Reservoir necessary for reassignment or reallocation of storage space, as well as any required mitigation that might result from implementing the reallocation. Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 116, 123 Stat. 524, 608. Congress directed the Corps to collaborate with the CDNR and other local interests to determine the costs to be paid by non-federal parties for storing water in Chatfield Reservoir. *Id.*; PAA627-28.

In 2012, CDNR asked the Corps to consider reallocating space in the Reservoir to permit a consortium of municipal and industrial water providers to store additional water. PAA820. Colorado's population is projected to nearly double by 2050, and the water providers are already turning to nonrenewable groundwater sources to meet municipal water needs. PAA629-30. Although groundwater can help meet demand in the short term, it is not a reliable source in the long term due to increasing costs and the fact that groundwater availability is already reduced. PAA630. Reallocating water storage within Chatfield Reservoir would help the water providers meet demand with a more reliable surface water supply. PAA648-49, 658.

B. The Corps' analyses under NEPA and the CWA.

Because Chatfield Reservoir is federally owned, Congress specifically authorized the reallocation of water for storage at Chatfield, and the reallocation will be carried out, at least in part, by the Corps, the Reallocation Project is a "major federal action" requiring analysis under NEPA. 42 U.S.C. § 4332(C); *see Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1480 (10th Cir. 1990). That analysis resulted in an EIS.

The Corps also prepared an analysis under the CWA. The Reallocation Project would provide additional water storage space by raising the level of Chatfield Reservoir, thereby inundating some lands that are currently dry. Raising the Reservoir's water level does not require the Corps to deposit any fill material into waters of the United States (quite the opposite), but the Corps decided to require on

and off-site mitigation to compensate for resources affected by the increased reservoir pool. Because those ancillary actions result in the deposit of some fill material, the Corps analyzed the impacts of the fill undertaken in mitigation of the Project under CWA Section 404. The agency's Section 404 analysis was attached to the EIS as Appendix W. *See* PAA1072-1102.

1. The Corps' NEPA analysis.

The Corps and the CDNR conducted a joint NEPA study of the proposed reallocation, which culminated in a Final Feasibility Report and an Environmental Impact Statement (together, EIS).

The Corps determined that "purpose and need" of the Project is

> to increase availability of water, providing an additional average year yield of up to approximately 8,539 acre-feet of municipal and industrial [ ] water, sustainable over the 50-year period of analysis, in the greater Denver Metro area so that a larger proportion of existing and future water needs can be met.

PAA628. The Corps explained that the water providers seeking additional storage space within Chatfield Reservoir "each have immediate and future water needs which will extend beyond current supplies," and which cannot be met through continued groundwater use. PAA629-30. Expanding the use of an existing facility like Chatfield Reservoir, the Corps explained, would enable water providers to capture water during high-flow years and seasons for use during low-flow periods. Capturing water is

"critical to providing reliable water supplies in a semiarid climate" like Colorado's, where "hydrologic events are highly variable." PAA630.

The Corps began its alternatives analysis by exploring and screening no fewer than 38 potential project concepts. Concepts included "Increased Water Conservation," PAA667; the use of "Upstream Local Gravel Pit Reservoirs," PA668-69; and storing water in other reservoirs in the Denver area, PAA668-70. All initial concepts were evaluated based on four factors: (1) the concept's ability to meet the Project's purpose and need; (2) cost; (3) logistics and technology (including water rights and availability, land availability, permitting and mitigation feasibility, design and construction feasibility, and operational feasibility); and (4) environmental impacts. PAA633-34.

The screening process led to the development of four primary alternatives for more detailed consideration. PAA689. Alternative 1 was the "no action" alternative, in which no reallocation would occur within Chatfield Reservoir. PAA634, 693-714. Alternative 2 was a combination of increased use of non-tributary groundwater and downstream gravel pit storage. PAA634, 714-15. Alternative 3—the Chatfield Reallocation—would reallocate water supply storage within Chatfield Reservoir from the flood control pool to the conservation pool. PAA634-35, 715-16. Reallocated storage would be used for municipal and industrial purposes, as well as agriculture, recreation, and fishery habitats. PAA634. Finally, Alternative 4 would reallocate some

storage within Chatfield Reservoir but also include non-tributary groundwater use and downstream gravel pit storage. PAA635, 716-17.

The Corps carefully evaluated the environmental impacts of the four alternatives. The agency considered each alternative's effects on geology and soils, hydrology, water quality, aquatic life and fisheries, vegetation, wildlife, and land use. PAA721-31. The Corps also evaluated each alternative's contribution to cultural and socioeconomic resources, noise, and air quality. *Id.* In addition to evaluating environmental impacts, the Corps also evaluated how each alternative would achieve project goals and respond to planning constraints. PAA811-12.

The Corps ultimately selected Alternative 3 as the preferred alternative after determining that it would fully meet the purpose and need for the Project, provide the requested water at the lowest cost, and preserve environmental resources. PAA819-20, 638. The Corps also explained that Chatfield Reservoir is "well placed" to meet project goals, because it "provides a relatively immediate opportunity to increase water supply storage" without significant infrastructural development, "provides an opportunity to gain additional use of an existing federal resource," and would permit the efficient capture of water runoff. PAA628. Although storing additional water in Chatfield Reservoir in accord with Alternative 3 would raise the Reservoir's water level by twelve feet and inundate surrounding areas, PAA827, the Corps further concluded that "[t]he adverse impacts to recreation and the environment [from

Alternative 3] are mitigable and would be mitigated to the most sustainable alternative to below a level of significance." PAA638.

Consequently, the Corps required the non-federal project sponsors to undertake a variety of measures to mitigate adverse effects resulting from inundation. PAA830-31. Trees and large plants in areas to be inundated would be removed to ensure that they would not endanger boats. PAA761, 787. A Recreation Facilities Modification Plan (Recreation Plan) was developed to remove recreation facilities in areas to be inundated and to rebuild similar facilities at higher elevations. PAA828-30. The Recreation Plan will be implemented within Chatfield State Park and requires construction of new boat ramps; construction of new parking, picnic, and utility facilities; and creation of new trails. PAA828-29.

A separate "Compensatory Mitigation Plan" was developed to "creat[e], enhance[], and protect[] wetlands, riparian habitat, [and wildlife] habitat" in order to compensate for changes to the landscape and wildlife habitats caused by inundation. PAA1097. Implementation would occur both on-site and off-site. PAA830. On-site mitigation would include expanding wetlands and existing habitats in the Park not affected by reallocation. PAA829-30. Off-site mitigation would include habitat conversion and enhancement activities, protection of existing off-site habitat, and sediment control and riparian habitat extension on nearby streams and forest land. PAA830.

2. The Corps' CWA Section 404 analysis.

The Corps' NEPA analysis revealed that the water reallocation itself would *not* require the discharge of fill into jurisdictional waters of the United States. PAA1051, 1074. Accordingly, no Section 404 authorization or analysis was required for such reallocation. *Id.* But because both the Recreation Plan and the Compensatory Mitigation Plan described above would require discharges into jurisdictional waters, PAA1074, the Corps focused its Section 404 analysis on those two plans, *id.* The Corps therefore defined the "overall project purposes" for its Section 404 analysis, 40 C.F.R. § 230.10(a)(2), as the purposes of the Recreation Plan and the Compensatory Mitigation Plan. *See* PAA1094-95, 1097 (defining purposes of mitigation plans).

The Corps evaluated both plans and determined that they would "avoid[] and minimize[] the discharge of fill material into waters of the U.S. to the maximum extent practicable while still meeting" mitigation objectives. PAA1097 (Recreation Plan); PAA1098 (Comprehensive Mitigation Plan). The Corps explained that that there were no "practicable alternative[s] to the proposed discharge[s]" in the final Recreation Plan and Compensatory Mitigation Plan that "would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). Thus, each plan was the least environmentally damaging practicable alternative under Section 404. PAA1100.

C. Project Approval

The Corps ultimately determined that the Project would comply with all relevant environmental laws, PAA1050-52, and it issued a Record of Decision in May

of 2014. PAA1144-45. The decision explained that the proposed Reallocation Project was "technically feasible, economically justified, environmentally acceptable, and in the public interest." PAA1144. It further explained that the Project "incorporates all practicable means to avoid or minimize adverse environmental effects, and the unavoidable impacts are mitigated." PAA1145.

III. Proceedings Below

Audubon petitioned the district court for review of the Corps' approval of the Project in October of 2014. PAA13. During the proceedings, Audubon also moved to supplement the administrative record. PAA131-54. The district court denied the motion to supplement the record, PAA277-88, and affirmed the Corps' decision, PAA500-38. The court also denied Audubon's motion for an injunction pending appeal. PAA540. Audubon appealed, PAA543, and moved for a stay pending appeal in this Court, which this Court denied on February 1, 2018.

SUMMARY OF THE ARGUMENT

The district court correctly ruled that the Corps satisfied its obligations under both NEPA and the CWA, and this Court should affirm that ruling.

1. NEPA requires that agencies analyze "reasonable" alternatives to the proposed action. Thus, an agency like the Corps is not required to analyze every possible alternative, but rather may "briefly discuss the reasons" why it excluded particular alternatives from detailed analysis. Audubon challenges the agency's exclusion of three alternatives in particular, but the record shows that the Corps

considered those alternatives to the extent necessary before providing a sufficient reason for not evaluating them further.

2. The Corps' CWA Section 404 analysis was adequate. Because the Corps' jurisdiction under Section 404 is limited to discharges into waters of the United States—and the reallocation of storage at Chatfield would *not* result in any such discharges—the Corps properly tailored its analysis to the activities that did require discharges, namely, the Recreation Plan and the Compensatory Plan. Audubon contends the Corps should have been required to analyze NEPA alternatives in the CWA analysis, but it misapplies the law in so contending.

3. The district court did not abuse its discretion when it denied Audubon's motion to supplement the record. The court properly held that supplementation of the record is permissible in only "extremely limited circumstances," and that this case did not implicate any of those circumstances.

The judgment of the district court should be affirmed.

STANDARD OF REVIEW

The APA supplies the standard for judicial review of NEPA and CWA claims. *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1268 (10th Cir. 2004). The APA provides that agency action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This Court reviews the district court's application of that standard de novo. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1244-45 (10th Cir. 2011).

Agency actions are entitled to a "presumption of validity." *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008). The party challenging agency action bears the burden to show that the agency "entirely failed to consider an important aspect of the problem, 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." *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983); *Biodiversity Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1264, 1271 (10th Cir. 2014). Arbitrary and capricious review is "narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. Deference is particularly great when an agency's challenged decision is within its expertise. *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1057 (10th Cir. 2011). Indeed, a reviewing court's "job is not to second-guess the experts." *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1445 (10th Cir. 1992) (internal quotation marks omitted).

ARGUMENT

The Corps conducted a thorough and reasonable analysis of the Reallocation Project that fulfilled its responsibilities under both NEPA and the CWA. Audubon's arguments to the contrary lack merit.

I. The Corps' NEPA analysis was not arbitrary or capricious.

The Corps engaged in a thorough alternatives analysis. The agency briefly explained why it did not select particular alternatives for detailed consideration, and

the district court correctly rejected Audubon's arguments that the Corps' explanations were insufficient.

A. The Corps considered a range of project concepts before identifying four for detailed evaluation.

NEPA's implementing regulations require federal agencies to explore and evaluate all reasonable alternatives for proposed major federal actions. 40 C.F.R. § 1502.14; *Citizens' Comm. to Save Our Canyons*, 297 F.3d at 1030.

An agency's selection of alternatives—as well as the degree to which it must analyze each alternative—is governed by the "rule of reason." *Save Our Canyons*, 297 F.3d at 1031. An agency need not analyze in detail alternatives that are not "significantly distinguishable" from other alternatives already analyzed, *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708-09 (10th Cir. 2009); alternatives "it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective," *All Indian Pueblo Council*, 975 F.2d at 1444 (internal quotation marks omitted); or alternatives that do not accomplish a project's purpose, *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001).

Instead, an agency's EIS must contain "sufficient discussion of the relevant issues and opposing viewpoints to enable the [agency] to take a hard look at the environmental impacts of the proposed [action] and its alternatives." *Save Our Canyons*, 297 F.3d at 1031 (internal quotation marks omitted). And when an agency decides to

eliminate alternatives from detailed consideration, it need only "briefly discuss the reasons" for doing so. 40 C.F.R. § 1502.14(a); *Save Our Canyons*, 297 F.3d at 1030.

Here, the Corps explained that the Project was designed to address the inadequate water supply in the Denver metropolitan area and to lessen reliance on groundwater resources. PAA648-49. With those goals in mind, the Corps initially identified and evaluated nearly 40 project concepts. *See supra* at pp.8-10. That rigorous screening process resulted in the selection of four alternatives for detailed consideration, PAA689-739, and the Corps explained its decision to eliminate each of the remaining concepts, PAA686-88. In general, concepts involving large costs, insufficient storage capacity, prohibitive logistics, or the inability to obtain water rights or legal agreements for water transfers were eliminated in favor of local, more cost-effective concepts. *Id.*

B. The Corps' explanations for eliminating particular alternatives from detailed consideration were reasonable.

Audubon contends that the Corps violated NEPA by failing to consider in detail "enhanced" water conservation and the use of either upstream gravel pits or the Rueter-Hess Reservoir for water storage. Br. at 44-55. But the record shows that the Corps considered those concepts and adequately explained its decision not to evaluate them in greater detail.

1. Increased Water Conservation.

The Corps considered and eliminated from further analysis a category of project concepts falling under the umbrella of "Increased Water Conservation." Audubon contends the Corps "fail[ed] to analyze enhanced water conservation measures at all," Br. at 45-46, and that that the Corps improperly eliminated increased water conservation because it would only partially address the purpose and need of the Project. *Id.* at 46-50.[1] The record shows otherwise.

There can be no reasonable dispute that the Corps evaluated increased water conservation during its initial screening process. The Corps discussed additional water conservation in the concepts screening section of the EIS, PAA673-79, and it explained that the water providers will "need to reduce their demands and stretch their supplies" to meet future demands, PAA673. The EIS also acknowledged that the water providers "recognize the importance of incorporating aggressive and meaningful water conservation efforts in their operations." *Id.* To that end, the EIS included a separate appendix dedicated exclusively to the discussion of water conservation programs adopted by the water providers. PAA944-61. These included implementing pricing structures designed to decrease demand, creating conservation

[1] Audubon does not define "enhanced" conservation measures, *see* Br. at 46, but the Corps assumes that Audubon challenges the Corps' decision to eliminate "increased" water conservation from further consideration.

incentive programs, and developing comprehensive education and outreach programs. PAA673.

Even though the Corps acknowledged the importance of conserving water, it decided not to evaluate increased conservation as a standalone alternative because conservation alone would not meet the Project's purpose—to generate additional surface water supplies and decrease dependence on groundwater. PAA673, 686; *see also* PAA970-71. Conservation efforts, the Corps explained, "can reduce demand and give more time to find surface water supplies," but they will not eliminate the need for surface water storage in the long run—especially because continuing population growth drives at least part of the increased demand. PAA673; *see also* PAA674 (explaining that the "shortages of sustainable water supplies faced by the water providers will not be resolved by water conservation measures alone").

That decision was not arbitrary or capricious. An agency need not evaluate in detail project concepts that will not meet the project's purpose and need. *See, e.g., Garvey*, 256 F.3d at 1041; *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999) (agreeing with the Forest Service that when "the purpose is to add terrain in order to respond to specific qualitative needs at the ski area, it is appropriate to dismiss from consideration ski trail development opportunities that would not advance those objectives"). After all, NEPA requires agencies to consider only "reasonable alternatives," and "[a]lternatives that do not accomplish the purpose of an action are not reasonable." *Garvey*, 256 F.3d at 1041. The Corps considered increased

conservation as a project concept and satisfied its obligation to "briefly explain" why the concept did not deserve detailed review. NEPA requires nothing more.

Audubon takes issue with the Corps' rationale for dismissing increased conservation as a standalone alternative, asserting that the agency should have evaluated whether increased conservation could have at least made current supplies last longer. Br. at 46-49. The district court properly dismissed this argument as a "non-sequitur." PAA523. The goal of the Reallocation Project was to increase current water supplies, and the Corps explained why additional conservation would not achieve that goal. PAA673.

Furthermore, the record shows that the Corps did not ignore the importance of increased conservation even though such conservation would not, by itself, meet the Project's goals. Indeed, the Corps explained that increased conservation remains a "major tool" for reducing future water demands and an important "independent parallel action" that the water providers would need to undertake, no matter the project alternative selected. PAA679. The agency explained that water conservation goals were taken into account when the Corps and its project partners assessed the water amounts needed for future use, such that "[o]ne could view each alternative evaluated as also including the various conservation programs as components." PAA971. Thus, the Corps did not dismiss water conservation "as only a partial alternative," Br. at 46; it determined only that conservation alone would not achieve the Project's purpose.

2. Upstream Gravel Pits.

Audubon next challenges the Corps' dismissal of upstream gravel pits from detailed consideration. Br. at 50-53. The Corps dismissed such pits because of their "limited storage capacity" and because use of the pits would be logistically difficult. PAA669, 683, 687, 689. Using those pits, the Corps explained, would require combining them with other small-capacity reservoirs in the area to meet the Project's storage capacity goals. PAA687; *see also* PAA666-67 (discussing feasibility as a screening alternative). Although the Corps decided not to evaluate the use of upstream gravel pits in more detail, it did not eliminate the consideration of gravel pits altogether. Indeed, Alternative 2 contemplated the use of a second group of downstream gravel pits (with much greater total capacity) because "they represented a cost-effective off-channel storage option with minimal environmental impacts." PAA683, 668-69, 687.

Audubon contends that the Corps' rejection of the upstream gravel pits was arbitrary and capricious. Br. at 50-53. Observing that the Corps considered Alternative 2 in detail, Audubon asserts that the logistical difficulties facing use of the upstream pits must not have been impracticable because the agency considered the use of gravel pits under another alterative. *Id.* at 51. It also claims that the upstream pits' insufficient capacity should not have barred further evaluation, since they could be combined to provide sufficient capacity. *Id.* at 50-53.

This Court should decline Audubon's invitation to second-guess the Corps' reasoned decisionmaking. *All Indian Pueblo Council*, 975 F.2d at 1445; *San Juan Citizens All.*, 654 F.3d at 1057. An agency need not consider alternatives that "it has in good faith rejected as . . . impractical." *Wyoming*, 661 F.3d at 1244. Here, the Corps reasonably determined that it would not be practical to rely on upstream pits because doing so would require combining reservoirs to meet capacity demands—a logistically complicated endeavor. PAA683. The fact that the Corps carried Alternative 2 forward for detailed evaluation does not render its conclusion as to the separate, upstream pits arbitrary or capricious.

Even if use of the upstream pits were reasonable, the Corps was not required to evaluate their use in detail. An agency is "excused from analyzing alternatives that are not significantly distinguishable" from other alternatives under consideration. *New Mexico ex rel. Richardson*, 565 F.3d at 708-09 (internal quotation marks omitted). Here, the Corps considered use of gravel pits under Alternative 2, and Audubon does not explain how considering the use of the upstream pits as well would have contributed to the Corps' hard look at project impacts. *See Save Our Canyons*, 297 F.3d at 1031.

In a further effort to call the Corps' determination into question, Audubon refers to a letter allegedly showing that the upstream gravel pits had more storage capacity than the Corps believed. Br. at 51. The letter is from the owner of one upstream gravel pit, explaining that he has "a preliminary geotechnical investigation" stating that the pit could have a larger capacity "when expanded." PAA1105. That

letter does not show that the Corps' reasons for dismissing the upstream gravel pits were arbitrary or capricious. Indeed, the fact that one pit might have more capacity if expanded in the future does not rebut the Corps' determination (at the time its analysis was completed) that use of the upstream pits was not feasible. In the end, a reviewing court's role "is not to second-guess the experts in policy matters," *All Indian Pueblo Council*, 975 F.2d at 1445 (internal quotation marks omitted), and the district court properly held that the Corps' explanation for its decision to eliminate the upstream gravel pits from detailed consideration was reasonable.

3. The Rueter-Hess Reservoir.

The Rueter-Hess Reservoir is located approximately 9.5 miles south of Chatfield Reservoir. PAA670. It is owned and operated by the Parker Water and Sanitation District, and several towns and metropolitan districts store water there. *Id.* The Corps dismissed use of the Rueter-Hess Reservoir from detailed consideration because, despite a previous expansion completed the year before the EIS was finalized, (1) the total storage capacity at that reservoir was fully spoken-for; and (2) and no additional storage was available for sale. PAA684.

An agency need not evaluate in detail alternatives it has rejected as impractical. *Wyoming*, 661 F.3d at 1244. Here, the Corps determined that Rueter-Hess would not be available to meet the needs of the Denver water providers, and so it did not spend resources examining that reservoir in further detail. That decision was reasonable and is entitled to deference.

Audubon contends that the Corps rejected further review of Rueter-Hess simply because it required action by a third party, and it asserts that the Corps' analysis ran afoul of the D.C. Circuit's decision in *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1972). Br. at 53-55. But Audubon attacks a straw man: the Corps eliminated Rueter-Hess because the reservoir's capacity was already allocated and no more was available for sale, not because it required action by a third party. PAA684.

Even if the Corps eliminated use of Rueter-Hess because it required action by a third party, that would not necessarily make its analysis arbitrary or capricious. *Morton* would not require a different result. First of all, the D.C. Circuit itself "doubt[s] the continuing vitality of the rather expansive view of NEPA" it articulated in *Morton*, "since subsequent Supreme Court cases have directly criticized [the court] for overreading [NEPA's] mandate." *City of Alexandria v. Slater*, 198 F.3d 862, 869 n.4 (D.C. Cir. 1999).

Even if *Morton* were still good law, it is inapposite. In that case, the D.C. Circuit considered a challenge to the Interior Department's proposed sale of oil and gas leases in the Gulf of Mexico. The sale was intended to increase American energy supplies during the 1970s energy crisis and was part of a multi-agency directive initiated by the President. 458 F.2d at 829-31. The D.C. Circuit found Interior's alternatives analysis inadequate because the agency did not consider whether the elimination of oil import quotas would achieve the directive's goals. The court

rejected Interior's assertion that, because elimination of oil import quotas was "entirely outside its cognizance," *id.* at 834, it was not required to evaluate it as an alternative, reasoning that "[w]hen the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened," *id.* at 835. The court explained that the project at issue was "far broader" than many other projects (such as the building of a "single canal or dam") and so Interior's NEPA analysis necessarily required a broader consideration of alternatives. *Id.*

Here, despite Audubon's protestations that "a shortage of water storage is a problem faced in virtually the entire Western United States," Br. at 55, the Project at issue is much more akin to the construction of a "single canal or dam," *Morton*, 458 F.2d at 835. This project affects a single metropolitan area within the jurisdiction of one federal agency, *i.e.*, the Corps. Nothing in *Morton* supports an argument that the Corps' dismissal of the Rueter-Hess Reservoir was arbitrary or capricious. As the district court held, even if the water providers could have acquired existing storage capacity in Rueter-Hess, that would have "done nothing to accomplish the Project's goal of increasing water availability" because it would only allow the transfer of storage capacity among water providers. PAA528-29.

* * *

Thus, the Corps' alternatives analysis was neither arbitrary nor capricious. The agency evaluated a spectrum of project concepts and provided sufficient explanation

for its decision to eliminate particular concepts from detailed consideration. In short, the Corps took a hard look at project impacts and its analysis was consistent with the rule of reason.

II. The Corps' CWA analysis was not arbitrary or capricious.

Audubon argues that the Corps' CWA analysis was flawed in a number of respects. But as explained below, Audubon's arguments ignore the limits of the Corps' CWA jurisdiction, conflate NEPA with the CWA, and invite this Court to fashion new legal requirements out of whole cloth. Audubon has not established that the Corps' CWA analysis was arbitrary or capricious, and this Court should affirm the district court's decision so holding.

A. The scope of the Corps' Section 404 Analysis was consistent with its Section 404 authority.

Audubon asserts that the Corps' Section 404 analysis was unduly narrow and that if the scope of the analysis were broader, the Corps would not have selected Alternative 3. *See* Br. at 28-31, 35-37, 39-43. But the Corps appropriately tailored its Section 404 analysis to match the agency's limited jurisdiction, and its decision was not arbitrary or capricious.

As explained above (p.4), the Corps may not permit the discharge of "dredged or fill material [into waters of the United States] if there is a practicable alternative *to the proposed discharge* which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a) (emphasis added). The Corps, therefore, may approve

discharges under Section 404 only if they are the least environmentally damaging practicable alternative. *Id.*

The Corps assesses whether a project is the least environmentally damaging practicable alternative in light of "overall project purposes." *Id.* § 230.10(a)(2). Here, the Corps determined that the Reallocation Project itself would not result in discharges into waters of the United States, but that the Recreation Plan and Compensatory Mitigation Plans would result in such discharges. PAA1051, 1094. For its Section 404 analysis, therefore, the Corps defined the relevant project purposes to match the purpose of the mitigation plans and evaluated whether there were practicable alternatives to discharges anticipated under those plans. PAA1094.

The Corps' analysis of the two mitigation plans was thorough and careful. The agency was involved in creation of the Recreation Plan from the beginning. It reviewed a preliminary plan and made suggestions to minimize discharges, which were incorporated into the Recreation Plan. PAA1095. Suggestions included relocating a proposed trail, extending boat ramps, and modifying road designs to both minimize dredge and fill and avoid impacts to wetlands. *Id.* The Corps also assessed whether each proposed recreation facility "could be located or constructed in a way to avoid or minimize the discharge or fill material into wetlands." *Id.* The agency also considered a plan that would avoid all discharge of fill materials, but it determined that such a plan would "result in a greater area of net disturbance and environmental impact" relative to the proposed plan and was therefore not the least environmentally damaging

practicable alternative. *Id.* The Corps ultimately concluded that the proposed Recreation Plan "avoids and minimizes the discharge of fill material into waters of the [United States] to the maximum extent practicable while still meeting" mitigation objectives. PAA1097.

The Corps completed a similarly thorough analysis when it considered the Compensatory Mitigation Plan. PAA1097-98. Although it acknowledged that the proposed mitigation could be implemented with no discharges, it determined that avoiding discharges altogether would present other difficulties that would make that plan impracticable. PAA1098. Avoiding all fill, the Corps explained, would "result in a greater area of net disturbance and environmental impact[] and would complicate the construction, maintenance, and reliability of the mitigation." *Id.* Thus, the Corps determined that the proposed Compensatory Mitigation Plan, like the Recreation Plan, would avoid and minimize the discharge of dredge and fill material into waters of the United States and was the least environmentally damaging practicable alternative. *Id.*

In addition to assessing whether the two proposed mitigation plans were the least environmentally damaging practicable alternatives, the Corps also considered the environmental impacts of dredge and fill activities, as well as how to mitigate those impacts. PAA1089-94, *see also* PAA840-42. Because dredge and fill activities would be limited, the Corps anticipated that their effects on water quality, turbidity, and

circulation would be both minor and or temporary. PAA1089-90. Effects on wildlife habitat and the human environment would also be minor. PAA1090-94.

The Corps' decision to limit its Section 404 analysis to discharges under the mitigation plan was not arbitrary or capricious or contrary to law. Instead, it was consistent with the language of 40 C.F.R. § 230.10(a), which requires the agency to consider "alternative[s] to the proposed discharge." Here, the Corps reasonably interpreted "alternative[s] to the proposed discharge" to refer to the projects that would, in fact, require discharges—implementation of the Recreation Plan and Compensatory Mitigation Plan. PAA1051, 1094, 1097. The Chatfield Reallocation by itself required no discharges into waters of the United States, and so the Corps determined that its jurisdiction under Section 404 did not extend to the entire Project. PAA1074. After all, the discharges contemplated under the mitigation plans were secondary elements of the Reallocation Project (the EIS called their implementation "incidental to this alternative"). PAA1051; *see also* PAA841.[2] Thus, the Corps reasonably decided to consider them separately. *See National Wildlife Fed'n v. Whistler*,

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[2]Audubon notes that the mitigation plans are called "integral" throughout the EIS. *See* Br. 17, 21, 29, 31, 33, 37, 39-40. That term was used to signal that non-federal project partners were authorized to carry out mitigation activities at their own expense, in accordance with Section 116 of the Omnibus Appropriations Act of 2009. *See* PAA827, 625. Use of that term did not necessarily make the details of the mitigation plans determining factors for selection of Alternative 3. In other words, the criteria for selecting the mitigation plans were different from, and necessarily of lesser import than, the criteria for selecting the preferred alternative for the entire Reallocation Project.

27 F.3d 1341, 1345-46 (8th Cir. 1994) (holding that because a larger housing development project did not require a Section 404 permit, the Corps' decision to limit its analysis to a separate plan to build boat-access for that development was not arbitrary or capricious).

Moreover, to the extent the phrase "alternative to the proposed discharge" is ambiguous, the Corps' interpretation is entitled to deference. An agency's interpretation of its own regulations is entitled to deference unless "plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *see also Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1062 (10th Cir. 2014). Because the Chatfield Reallocation was not a "proposed discharge," the Corps determined that it did not need to compare it to Alternatives 1, 2, and 4. That interpretation was not plainly erroneous or inconsistent with the regulation's text, and Audubon has identified no reason grounded in the relevant law to call it into question. The Corps' decision should therefore stand.[3]

[3] The fact that EPA expressed concern about the scope of the Corps' Section 404 analysis, *see* Br. at 30-31, 36, does not indicate that the analysis was arbitrary and capricious, because only the Corps' final decision is under review. *National Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007). And even though EPA initially disagreed with the Corps' analysis, EPA subsequently changed its views. PAA1066, *see also* PAA974 ("The Corps and EPA . . . have consulted on this issue and determined that reallocation is not subject to the 404(b)(1) Guidelines.").

B. This Court should reject Audubon's attempt to read NEPA requirements into the CWA.

In the alternative, Audubon asserts that even if the CWA and the Corps' regulations do not mandate the result it seeks, then this Court should interpret the law so that they do. Audubon points to NEPA's anti-segmentation regulation and insists that it should apply to the Corps' Section 404(b)(1) analysis as well. Br. at 10, 32-34 (citing 40 C.F.R. § 1508.25). This Court should reject Audubon's attempt to create new regulations.

NEPA's anti-segmentation regulation requires agencies to evaluate connected or "closely related" alternatives in the same environmental impact statement. 40 C.F.R. § 1508.25(a)(1); *see also Save Our Canyons*, 297 F.3d at 1028. That rule is intended to "prevent agencies from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting NEPA review) by segmenting or isolating an individual action that, by itself, may not have a significant environmental impact." *Save Our Canyons*, 297 F.3d at 1028.

But NEPA's anti-segmentation regulation applies only to the Corps' *NEPA* analysis, and not to its separate *Section 404(b)(1)* analysis. *See, e.g.*, 40 C.F.R. Part 1501 (NEPA and Agency Planning). Thus, the district court correctly held that "there is no legal basis for applying the NEPA anti-segmentation rule to analysis under the CWA." PAA536. To counsel's knowledge, no court has ever agreed with Audubon's argument. Indeed, Audubon itself proffers no authority in support.

The Recreation Plan and the Compensatory Mitigation Plan are the actions requiring Section 404 analysis and authorization, and the Corps has properly limited the application of its authority to only those activities. Plaintiffs would have this Court apply NEPA's anti-segmentation requirement and require the Corps to expand its Section 404 authority to encompass the proposed reallocation. But doing so would ignore the fact that the Corps' Section 404 jurisdiction is limited. Indeed, Audubon acknowledges as much, noting that for the Corps to consider the entire Reallocation Project, the agency would have to "expand its jurisdiction." Br. at 32, 33, 38. But neither this Court nor the Corps can change the scope of the Corps' jurisdiction; that scope is grounded in the Clean Water Act.

Audubon's argues that the policy underlying the CWA warrants applying NEPA's anti-segmentation rule. *See, e.g.*, Br. at 20 (the Corps' approach "frustrates the purpose of the CWA"), 24 (arguing that Corps "contradicted the policy reasons" behind the Section 404(b)(1) Guidelines), 32 (invoking the "policy reasons" for the Section 404(b)(1) Guidelines and NEPA's anti-segmentation regulation). But the district court correctly observed that the "policy underlying the anti-segmentation rule is not implicated" by the Corps' decision, because the Corps did not break apart the elements of the Recreation Plan or the Compensatory Mitigation Plan to minimize their impacts. PAA535-36. Instead, the Corps properly considered the discharges under both plans and acknowledged the cumulative impacts of those actions. *See id.*; PAA1089-94. Because "consideration of the cumulative impact of connected actions

is what the anti-segmentation rule is intended to require," PAA536, Audubon's policy arguments provide no traction.

Audubon further contends that the fact that the Corps evaluated discharges from a Corps project makes this project unique, and that if the Corps were issuing a permit to a private party, it would necessarily have analyzed the broader project in the course of its CWA analysis. Br. at 37-40. But even if the Corps were issuing a Section 404 permit to a private party, its CWA and NEPA analyses would remain distinct. When the Corps reviews a project as a regulator, it must "address the impacts of the specific activity requiring a [Section 404] permit and those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant federal review." 33 C.F.R. Part 325, Appx. B, § 7.b.1. The Corps may consider "portions of the project beyond the limits of [its regulatory] jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action." *Id.* § 7.b(2). Here, the Corps already completed a thorough NEPA analysis of the entire project, and its narrower but no less thorough CWA analysis was properly limited to the activities directly implicating the CWA. Indeed, expanding the Corps' CWA analysis to the entire Project would have accomplished nothing, as there were

no additional impacts to waters associated with the Project that the Corps did not already consider.[4]

Finally, Audubon claims that the Corps' CWA analysis was inconsistent with its own guidance documents, Br. at 29, but even if those documents can be the basis for a claim, they do not help Audubon. For example, Audubon asserts that the Corps' *Planning Guidance Notebook* dictates the substance of the Corps' CWA review, but Audubon identifies nothing in that guidance substantively addressing the appropriate scope of a Section 404(b)(1) analysis.

Indeed, the Planning Guidance Notebook includes no such requirements. Instead, it "provides the overall direction by which Corps of Engineers Civil Works projects are formulated, evaluated and selected for implementation." *Planning Guidance Notebook* at 1-1.[5] "Its fundamental purpose is to describe the planning process in a straightforward, plain-language manner." *Id.* It simply states that the Corps should "complete the investigations and analyses required by the Section 404(b)(1) Guidelines," and provides a "suggested format for the Section 404(b)(1) evaluation," which the Corps used here. *Id.* at C-41. *Compare Planning Guidance Notebook* Ex. C-1

[4] The cases cited by Audubon do not demand a different result. *See* Br. at 32-33 (citing *OVEC*, 556 F.3d at 194; *Save Our Sonoran*, 408 F.3d at 1121). Those cases addressed whether the Corps properly decided not to expand the scope of its NEPA review when it evaluated requests for Section 404 permits from third parties. Here, the Corps completed an entire NEPA analysis because the Reallocation Project itself was a federal action. Those cases have no bearing here.

[5] http://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1105-2-100.pdf (April 22, 2000).

(Recommended Outline for Section 404(b)(l) Evaluation) *with* PAA1072-1102 (App. W, CWA Section 404(b)(1) Analysis). Thus, the notebook creates no requirements above and beyond the CWA and applicable regulations, and it is of no help to Audubon.[6]

III. The District Court's denial of Audubon's motion to supplement the record was not an abuse of discretion.

Judicial review of an agency decision is generally limited to review of the record before the agency at the time it made its decision. *See Federal Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976). Indeed, the "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Consequently, courts may consider extra-record evidence in only "extremely limited circumstances." *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (internal quotation marks omitted). In this Circuit, for example, supplementation may be allowed to show that an agency "has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism under the rug." *Citizens for Alternatives to*

[6] Audubon's reliance on the February 1990 Memorandum of Agreement between the Corps and the EPA, Br. at 27, fails for the same reason. Audubon relies on that Agreement for the proposition that the Civil Works Program may not consider mitigation before identifying the least environmentally damaging practicable alternative. As Audubon concedes, however (*id.* at 28 n.2), the Agreement is "specifically limited to the Section 404 Regulatory Program." MOA at 1.

Radioactive Dumping v. U.S. Dep't of Energy (*CARD*), 485 F.3d 1091, 1096 (10th Cir. 2007) (internal citation and alteration omitted). A court's decision to consider or exclude extra-record evidence in an APA case is reviewed for abuse of discretion. *Id.*

Audubon moved in the district court to supplement the Corps' record with a variety of documents, claiming that they were admissible under a "NEPA exception" to the rule against extra-record evidence. *See* PAA142-43; *see also* Br. at 55-57 (citing *Colorado Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1240 (D. Colo. 2010)). The NEPA exception Audubon references purports to differentiate between review of the substance of an agency decision and review of an agency's compliance with NEPA's procedural requirements. *Vilsack*, 713 F. Supp. 2d at 1240-41.

The district court denied Audubon's supplementation request across-the-board. PAA288. Citing *CARD*, 485 F.3d at 1096, the district court accepted Audubon's argument that the Tenth Circuit had at least tacitly adopted a NEPA exception, but it held that any exception did not apply in this case. PAA281. The court explained that Audubon "has not shown any gaps or inadequacies in the NEPA process that require supplementation of the record . . . , and has not shown that the[] documents are essential" for the court's review of the Corps' NEPA compliance. PAA285.

Audubon challenges the district court's exclusion of only a subset of the documents it initially proffered. The documents now at issue are a "Water Efficiency and Conservation State Scorecard," which evaluates water conservation laws and policies nationwide, PAA157-224; and documents discussing a separate water

management project called the Water Infrastructure and Supply Efficiency Partnership (Project Wise), PAA225-41. *See* Br. at 58-59.[7] Audubon asserts that those documents show that the Corps' reasons for dismissing increased water conservation were inadequate and that the Corps should have considered use of the Rueter-Hess Reservoir in more detail. Br. at 59-63.

As an initial matter, Audubon is incorrect that this Court recognizes a distinct NEPA exception. *Cf.* Br. 56-57. The case cited by Audubon is one in which the district court "note[d] the confusion . . . governing the admission of extra-record evidence" and expressed hope that the "10th Circuit will grasp the nettle" and articulate more clearly when supplementation is allowed. *Vilsack*, 713 F. Supp. at 1240.

This Court should not adopt a NEPA exception. Judicial review of NEPA claims is subject to the APA standard of review and, as the First Circuit has observed, "APA review . . . involves neither discovery nor trial." *Atieh v. Riordan*, 727 F.3d 73, 76 (1st Cir. 2013). Adopting a separate NEPA exception would run afoul of the rule that the "focal point for judicial review should be the administrative record already in

[7] Project WISE is regional project undertaken by several metropolitan water supply authorities. PAA688, 975. When the Corps completed its NEPA analysis, Project WISE was "in the planning stages, and its configuration and completion date [were] unknown." PAA688. The Corps eliminated it "based on unknown cost, logistics and timing." PAA685. Audubon offers the Project WISE documents now to show that use of the Rueter-Hess Reservoir would have been technologically feasible. Br. at 59-62.

existence," *Camp*, 411 U.S. at 142, and Audubon identifies no compelling reason to abandon that rule here.

But even if this Court does recognize a separate NEPA exception, the documents Audubon has identified would not fall within the exception as it is discussed in *Vilsack*. *See supra* p.36. As for the Rueter-Hess and Project WISE documents, the district court properly explained that "[c]ontrary to [Audubon's] assertion that the Corps did not consider [those] alternatives, the record specifically considers both of those projects and evaluates them . . . as alternatives or supplements to the Project." PAA284. It held that nothing in the documents Audubon offered suggested that the Corps had ignored relevant information, nor did they "show[] any gaps or inadequacies in the NEPA process that require supplementation of the record." PAA285.

That determination was reasonable. As discussed above (pp.23-25), the Corps considered use of the Rueter-Hess Reservoir but determined that the reservoir's capacity was fully spoken-for and that no additional capacity would be available for sale. PAA684. Audubon argues on appeal that documents related to Project WISE show that use of Rueter-Hess might have been logistically feasible, but in the process it takes issue with the *substance* of the Corps' decision, not the procedure underlying it. Moreover, the Corps dismissed Rueter-Hess largely because no additional storage capacity was available for sale when it completed its NEPA analysis; the documents

Audubon offers do not show that the Corps ignored relevant information in that regard. *See CARD,* 485 F.3d at 1096.

As for the Water Efficiency and Conservation State Scorecard, the district court noted that the EIS included a discussion dedicated exclusively to discussion of current water conservation measures, as well as an appendix summarizing both current water conservation efforts and future conservation plans. PAA286. Because Audubon identified was no gaps in the Corps' analysis or process, the court explained, it had not established that supplementation was warranted. PAA287.

That decision was not an abuse of discretion. As discussed above (pp.18-20), the Corps discussed increased water conservation in detail and explained why it did not merit analysis as a standalone alternative. Audubon might wish that the agency had considered different sources within its increased conservation analysis. *See* Br. at 58-59. But Audubon has not shown that the Corps' analysis was procedurally inadequate or that the agency otherwise ignored a serious environmental consequence, did not address a reasonable alternative, or ignored a problem or criticism. *CARD,* 485 F.3d at 1096. Therefore, no exception applies.

The court's decision to deny supplementation thus found ample support in the record, and Audubon's arguments on appeal do not show otherwise. The district court justifiably held that the existing record supported the Corps' decision, and it acted well within its discretion in rejecting Audubon's invitation to second-guess the Corps.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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May 3, 2018

ORAL ARGUMENT STATEMENT

The United States does not believe oral argument is necessary but would be pleased to appear should the Court so order. If the Court orders argument, the United States suggests 10 minutes per side.

CERTIFICATES OF COMPLIANCE, SERVICE, DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that this response complies with the type-volume and type-face requirements of Fed. R. App. P. 32(a)(5), (7) because it contains 9,245 words in 14-point type (Garamond).

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

I also certify that I have scanned for viruses the PDF version of the attached document using our current version of Endpoint Protection (May 3, 2018) (v.1.261.39.0) and this document is free of viruses. I further certify that the electronic submission is an exact copy of the hard copies submitted to the court in accordance with Fed. R. App. P. 32, and 10th Cir. R. 31.5.

I further certify that I have not made any privacy redactions in the attached document.

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