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,
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,
Intervenors–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)

INTERVENORS–APPELLEES' JOINT RESPONSE BRIEF

Oral argument is not requested.

TROUT RALEY
Bennett W. Raley, CO #13429
Deborah L. Freeman, CO #12278
William Davis Wert, CO #48722
1120 Lincoln Street, Suite 1600
Denver, CO 80203
Telephone: (303) 861-1963
Facsimile: (303) 832-4465
braley@troutlaw.com
dfreeman@troutlaw.com
dwert@troutlaw.com

Attorneys for the Water Providers:
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

CYNTHIA H. COFFMAN
Attorney General
Scott Steinbrecher, CO #36957
Assistant Solicitor General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203
Telephone: 720-508-6287
scott.steinbrecher@coag.gov

Attorneys for Colorado Department of Natural Resources

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

APA	– Administrative Procedure Act
CPW	– Colorado Parks and Wildlife
CWA	– Clean Water Act
CWCB	– Colorado Water Conservation Board
DNR	– Department of Natural Resources
EIS	– Environmental Impact Statement
EPA	– Environmental Protection Agency
FR/EIS	– Final Integrated Feasibility Report/Environmental Impact Statement
IAA	– Intervenors' Appellate Appendix
LEDPA	– Least Environmentally Damaging Practicable Alternative
NEPA	– National Environmental Policy Act
PAA	– Petitioner–Appellant's Corrected Appendix
Project	– Chatfield Reservoir Reallocation Project
WRDA	– Water Resources Development Act of 1986

STATEMENT OF RELATED CASES

There are no prior or related appeals to this case.

STATEMENT OF ISSUES PRESENTED

1. Whether the Corps complied with CWA Section 404 and the CWA Section 404(b)(1) Guidelines by analyzing practicable alternatives to the proposed discharges into navigable waters.

2. Whether the Corps selected a reasonable range of alternatives and reasonably screened three concepts out of further detailed consideration pursuant to NEPA's procedural requirements.

3. Whether the District Court acted within its broad discretion by denying Denver Audubon's motion to supplement the administrative record with unnecessary extra-record documents.

I. INTRODUCTION

Intervenors–Appellees, Colorado Department of Natural Resources (Colorado DNR) and Castle Pines Metropolitan District, Castle Pines North Metropolitan District, Centennial Water and Sanitation District, Center of Colorado Water Conservancy District, Central Colorado Water Conservancy District, and Town of Castle Rock (Water Providers) (collectively, Intervenors), hereby submit this Joint Response Brief. For the reasons set forth below and in the briefing by the Corps, this Court should affirm the district court's judgment affirming the Corps' decision to approve the Chatfield Reservoir Reallocation Project (Project).

In the interest of efficiency and avoiding duplication, this Joint Response Brief supplements arguments made by the Response Brief of Respondent–Appellee United States Army Corps of Engineers (Corps) or adds additional detail and record citations. The Intervenors concur with the Corps' arguments regarding, and recitation of the legal standards applicable to, Denver Audubon's Clean Water Act (CWA) Section 404(b)(1) and National Environmental Policy Act (NEPA) claims. To provide context for this brief, Intervenors first distill the core legal points that are applicable in this case.

A. Under CWA Section 404(b)(1), the Corps considers practicable alternatives to the proposed discharges into navigable waters.

- The scope of CWA Section 404 is explicitly defined by the statute, which regulates the "discharge of dredged or fill material" into navigable waters. 33 U.S.C. § 1344(a).
- The criteria set out by the Environmental Protection Agency (EPA) in the Section 404(b)(1) Guidelines require the Corps to evaluate "practicable alternative[s] *to the proposed discharge*," and to withhold authorization if there is a less environmentally damaging "practicable alternative *to the proposed discharge*" under the LEDPA test. 40 C.F.R. § 230.10(a) (emphasis added).

Consequently, the LEDPA test is only relevant to practicable alternatives *to the proposed discharge* and is not applied beyond the scope of the activity regulated by CWA Section 404. NEPA is a separate procedural statute and does not expand the regulatory scope of the CWA.

- In this case, the activities involving regulated discharges consist of proposed work on the recreational facilities and environmental mitigation at Chatfield Reservoir State Park. The Corps properly analyzed practicable alternatives to those proposed discharges and ultimately authorized the discharges. This Court should reject Denver Audubon's attempts to import NEPA concepts into CWA Section 404.

B. Under NEPA, a Court applies a rule of reason to an agency's decision to eliminate a concept or alternative from further detailed analysis in an environmental impact statement (EIS).

- In contrast to CWA Section 404(b)(1)'s explicit focus on regulated discharges, NEPA imposes procedural disclosure requirements on the Corps to take a "hard look" at the environmental consequences of, and reasonable alternatives to, a proposed major federal action.

- A court facing a claim that an agency should have considered a certain concept or alternative in an EIS applies a "rule of reason" to determine whether the agency's decision not to do so was arbitrary and capricious.
- The major federal action necessitating NEPA compliance here is the Corps' decision to reallocate storage space in Chatfield Reservoir under its Civil Works Program pursuant to the Water Resources Development Act of 1986 (WRDA).
- The Corps evaluated dozens of potential concepts and alternatives to the proposed reallocation of storage space in Chatfield Reservoir and articulated its reasons for screening out concepts in carrying forward a reasonable range of alternatives for further detailed analysis in the FR/EIS.

II. STATEMENT OF CASE

A. Project Background

The Corps constructed Chatfield Reservoir on the South Platte River near Denver, Colorado, for flood control purposes in 1973. PAA0643, PAA0664 (FR/EIS). Soon thereafter, local water providers began studying and planning for the possible use of Chatfield Reservoir storage space for municipal and other uses. *Id.* In 1986 Congress

enacted Section 808 of WRDA. Section 808 authorized the Secretary of the Army to reallocate storage space in Chatfield Reservoir for municipal, industrial, agricultural, recreation, and fishery uses, provided that Colorado DNR requested the reallocation and the Corps found it to be feasible and economically justified. Pub. L. 99-662, § 808, 100 Stat. 4082, 4168; *see also* Water Resources Development Act of 2007, Pub. L. 110-114, § 3042, 121 Stat. 1041, 1116.

In a 2004 Statewide Water Supply Initiative report, the Colorado Water Conservation Board (CWCB), a division of Colorado DNR, found that a deficit or "gap" between present water supplies and present and future water demands exists in many areas of Colorado, including in the Denver metropolitan area. *See* IAA7 tbl. 6-2 (SWSI 2004); PAA0653–PAA0655 (FR/EIS). Notably, this water supply shortfall exists even after accounting for aggressive water conservation and new and anticipated water projects. IAA3–IAA4 (SWSI 2004). The CWCB also examined a range of options to close this water-supply gap and identified the Chatfield Reservoir Reallocation Project as one of the projects that could help to do so. PAA0629 (FR/EIS).

B. Intervenors' Interests in this Case

The Intervenors are the proponents for the Project and have requested that the Corps approve the Project to supplement existing water supplies and help satisfy rapidly growing water demand in the greater Denver metropolitan area and South Platte River basin with a new source of sustainable water yield. The Intervenors have agreed to repay all costs of the Project as required by Section 808 of WRDA, including the costs of modifying and providing in-kind recreation facilities and implementing on- and off-site environmental mitigation. *See* IAA20; Omnibus Appropriations Act of 2009, Pub. L. 111-8, § 116, 123 Stat. 524, 608.

1. Colorado Department of Natural Resources

Colorado DNR is a department of the State of Colorado that has as its mission "to encourage, by every appropriate means, the full development of the state's natural resources to the benefit of all of the citizens of Colorado." Colo. Rev. Stat. § 24-33-103 (2017). Colorado DNR is comprised of several statewide natural resources agencies, including the Colorado Division of Water Resources, the CWCB, and Colorado Parks and Wildlife (CPW), that assist in fulfilling the State's mission to protect and develop the State's waters for the benefit of the State's

present and future inhabitants.[1] *See* Colo. Rev. Stat. § 24-33-104 (2017); Colo. Rev. Stat. §§ 37-60-102, -106 (2017) (CWCB mission and duties).

Colorado DNR is the official sponsor of the Project and has requested the reallocation of storage space in accordance with Section 808 of WRDA. Colorado DNR is primarily responsible for the funding of the entire Project and has entered into agreements with and provided loans to the Water Providers to secure their interests in the Project. *See* PAA0647 (FR/EIS); Colorado House Bill 14-1333, § 14, 2014 Colo. Sess. Laws, ch. 365, p. 1655. The Project is a central component to Colorado DNR's efforts to meet particularly rapid increases in demand in the Denver metropolitan area. *See* PAA0648 (FR/EIS).

2. The Water Providers

The six Water Providers are political subdivisions of the State of Colorado located in the greater Denver metropolitan area and South Platte River basin that have similar responsibilities to provide adequate water supplies to their local residents and users as Colorado DNR has statewide. As of 2010, they served users with a combined water demand

[1] Colorado DNR and CPW also lease land and water at Chatfield Reservoir, where they operate Chatfield Reservoir State Park and the Chatfield Fish Planting Base. PAA0644 (FR/EIS).

of over 120,000 acre-feet, over 70,000 acre-feet of which was unmet by the Water Providers' then-existing surface water and nontributary groundwater supplies. *See* IAA21–IAA23. The Water Providers face significant increases in this demand over the next few decades. *See id.*

For many of the Water Providers, this water-supply problem is compounded by their present heavy reliance on nontributary groundwater, a nonrenewable source that raises "serious reliability and sustainability concerns" when used as part of a permanent water supply. PAA0648; *see also* PAA0630. For others, particularly agricultural water providers, the problem is complicated by their reliance on alluvial wells that are generally junior to numerous senior surface water rights and subject to a risk of curtailment under Colorado water law. PAA0630. Given these problems, the Water Providers need to develop new and reliable water supplies to meet demands over the next fifty years, a need that is persistent in spite of the Water Providers' ongoing water conservation efforts, which the Corps has recognized as innovative and increasingly stringent. PAA0630–PAA0631, PAA0674, PAA0679. The Water Providers have worked with the CWCB to investigate and pursue the Project and have acquired

water rights to store water in Chatfield Reservoir. *See* PAA0644–PAA0645, PAA0648.

C. The Final Feasibility Report/Environmental Impact Statement

After a decade of information-gathering and collaboration, in 2004 the CWCB formally requested reallocated storage capacity in Chatfield Reservoir for a group of water providers in the Denver metropolitan area. Agreements between the CWCB and the Water Providers for their respective interests to storage space in Chatfield Reservoir were formally completed in March 2005. *See* PAA0647 (FR/EIS). The Corps began the feasibility study and environmental review processes under WRDA and NEPA, respectively, in 2004. Notice of Intent to Prepare FR/EIS, 69 Fed. Reg. 58412 (Sept. 30, 2004). This process produced the Corps' Final Integrated Feasibility Report/Environmental Impact Statement (FR/EIS) in 2013.

As the FR/EIS states, "[t]he purpose and need [of the Project] is to increase availability of water, providing for an additional average year yield[2] of up to approximately 8,539 acre-feet of municipal and

[2] Although Denver Audubon made an argument below regarding the Corps' use of the term "average year yield," it expressly has not appealed the district court's rejection of that argument. Appellant's Opening Brief at 16 n.1; *see also* PAA0513.

industrial (M&I) 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." PAA0628. After performing an extensive screening process on 38 concepts and an exhaustive NEPA analysis of the environmental and other impacts of a no-action alternative and three action alternatives, the Corps selected the Reallocation Project as the Selected Plan and found that the Project is feasible and economically justified. PAA0685–PAA0689, PAA0819–PAA0820.

The Project would reallocate 20,600 acre-feet in Chatfield Reservoir and result in the raising of the reservoir's water level up to 12 feet above the existing maximum water level, inundating up to 587 acres of land when full. PAA0765–PAA0766. As the Corps observed, the Project is well-positioned to serve the purpose and need because it "provides a relatively immediate opportunity to increase water supply storage without the development of significant amounts of new infrastructure," since the reallocation would be accomplished by changes to operations and would not require physical enlargement of the dam. PAA0628. The Corps also found that the Project includes

appropriate measures to preserve the recreation experience at Chatfield Reservoir State Park and mitigation measures that would fully compensate its environmental impacts. PAA0827.

D. CWA Section 404(b)(1) Analysis

As part of its review process, and critical to the correct analysis of Denver Audubon's claims in this case, the Corps concluded that the reallocation of storage space and increase in Chatfield Reservoir's pool elevation would not discharge fill material into navigable waters and therefore did not itself require authorization under CWA Section 404. PAA1074 (FR/EIS Appendix W, CWA Section 404(b)(1) Analysis). However, it did conduct a Section 404(b)(1) analysis for the two activities related to the Project that would involve discharges of dredged or fill material into navigable waters: the relocation of recreation facilities pursuant to the Recreation Facilities Modification Plan and implementation of certain environmental mitigation measures identified in the Compensatory Mitigation Plan. PAA1077.

The Corps analyzed alternatives to these specific activities that would reduce or avoid discharges. PAA1095, PAA1098. However, the Corps found that those alternatives would result in greater areas of net

disturbance, would have other significant adverse environmental impacts, and would not adequately meet the objectives of the respective Plans. *See* PAA1095–PAA1098. As a result, the Corps concluded that the Recreation Facilities Modification and Compensatory Mitigation Plans were the least damaging practicable alternatives—the "LEDPAs."[3] *See* PAA1097–PAA1098; 40 C.F.R. § 230.10(a).

The Corps issued its Record of Decision approving the Project on May 29, 2014. PAA1144–PAA1145.

E. Procedural Background

Denver Audubon filed its Petition for Review in the district court on October 8, 2014. PAA0013. The court granted the Water Providers' and State's motions to intervene on January 22, 2015, and February 6, 2015, respectively. PAA0006–PAA0007. After the Corps filed the Administrative Record, Denver Audubon filed a Motion to Complete and Supplement the Administrative Record, PAA0131–PAA0154, which the court denied on March 2, 2016, PAA0277–PAA0288. After full briefing, the district court issued a 39-page order affirming the Corps' decision on December 12, 2017. PAA0500–PAA0538.

[3] As part of this analysis, some of the recreation-facility relocations were revised to minimize discharges of dredge or fill material. PAA1095, PAA1097.

III. SUMMARY OF ARGUMENT

A. The CWA and the Section 404(b)(1) Guidelines charge the Corps with analyzing practicable alternatives "to the proposed discharge[s]." The Corps correctly (1) limited its CWA analysis to the recreation facilities modifications and environmental mitigation measures that involved discharges regulated by CWA Section 404, and (2) did not import NEPA concepts to expand the scope of CWA Section 404 by applying it to the reallocation of storage space, which did not involve or require a discharge regulated by Section 404.

B. The Corps complied with the procedural requirements of NEPA because it disclosed and considered a reasonable range of alternatives and adequately explained its reasons for dismissing the three concepts that Denver Audubon asserts should have been subjected to further detailed analysis.

C. The Intervenors join and adopt the Corps' argument in its Response Brief that the district court did not abuse its discretion in denying Denver Audubon's motion to supplement the administrative record with unnecessary extra-record documents.

IV. ARGUMENT

A. The Corps Complied with the CWA and the Section 404(b)(1) Guidelines in Approving Discharges into Navigable Waters.

Applicable Standard of Review

Denver Audubon's challenge of the district court's decision to affirm the Corps' analysis and approval of discharges into navigable waters under CWA Section 404(b)(1) is reviewed de novo. *See WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1182 (10th Cir. 2013). But the Court's review of the agency's actions is much more deferential and conducted under the standard set forth in the Administrative Procedure Act (APA), which allows the Court to hold unlawful and set aside only agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id.*; 5 U.S.C. § 706(2)(a); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1268 (10th Cir. 2004). "[T]he Corps' determinations 'may be set aside only for substantial procedural or substantive reasons.'" *Greater Yellowstone Coalition*, 359 F.3d at 1268 (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002), *modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003)).

1. The Corps properly analyzed practicable alternatives to the Recreation Facilities Modification and Compensatory Mitigation Plans.

By basing its Section 404(b)(1) analysis upon the two actions involving discharges of fill material into navigable waters and examining practicable alternatives to those actions, the Corps complied with the requirements and jurisdictional limits of the CWA and the related Section 404(b)(1) Guidelines. The CWA and the Section 404(b)(1) Guidelines explicitly focus on the specific activity that involves a discharge of dredge or fill material into navigable waters and direct the Corps to examine practicable alternatives "to the proposed discharge." 40 C.F.R. § 230.10(a); *see also* 33 C.F.R. § 336.1(a) (Guidelines apply to Corps' authorization of its own discharges); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005) ("[I]t is the development's impact on jurisdictional waters that determines the scope of the Corps' [Section 404] permitting authority"); Appellant's Opening Brief[4] at 41 ("In a [Section] 404(b)(1) analysis, the Corps must determine the practicability of the alternatives *to the action that requires a permit*." (Emphasis added)).

[4] Citations to "Appellant's Opening Brief" refer to Appellant's Corrected Opening Brief, Document No. 01019952478 (filed Mar. 1, 2018).

Denver Audubon does not dispute the Corps' factual finding that there are no regulated discharges associated with the reallocation of storage space in Chatfield Reservoir under the Civil Works Program. Given that fact, the CWA did not require that the Corps undertake a Section 404(b)(1) LEDPA analysis for the proposed reallocation of storage space.[5]

Instead, the proposed activities that involve regulated discharges here consist of work on recreational facilities under the Recreation Facilities Modification Plan and environmental mitigation under the Compensatory Mitigation Plan. The Corps appropriately identified and explored practicable alternatives *to those discharges* that would involve less or no discharges into navigable waters. 40 C.F.R. § 230.10(a); *see also Save Our Sonoran*, 408 F.3d at 1122.

For example, the Corps considered an alternative that would avoid "cuts and fills" below the current ordinary high water mark by

[5] In fulfilment of NEPA's separate procedural requirements, however, the Corps did consider a reasonable range of water supply alternatives to the reallocation, the environmental impacts of each identified alternative, and mitigation measures that could avoid or minimize those impacts. *See, e.g.*, PAA0634–PAA0635, PAA0782–PAA0785, IAA24–IAA33. *Contra* Appellant's Opening Brief at 21 (claiming that "segmentation" under the CWA "precludes the evaluation of the environmental consequences of the larger connected action. . . .").

moving recreation facilities farther from the reservoir's shoreline, but the Corps observed that the alternative would reduce the amount of desired in-kind replacement of existing facilities, prevent the partial salvage of certain facilities, and potentially impact additional recreational facilities. PAA1095. It also examined environmental mitigation that could be implemented without discharges that would involve the relocation of certain features and excavation of other areas. PAA1098. In authorizing the proposed discharges, the Corps concluded that the Recreation Facilities Modification and Compensatory Mitigation Plans were the LEDPAs because while these other alternatives were available, they were more environmentally damaging or would not adequately meet the goals of maintaining the existing recreational experience and providing reliable mitigation.[6] PAA1096–PAA1098.

The EPA concurred with the Corps and stated that it was "comfortable with the approach taken by the Corps" in its Section 404(b)(1) analysis. PAA1066 (October 6, 2010, EPA letter); *see also*

[6] Denver Audubon's claim that, under Alternative Three, "it would be impossible to avoid discharges," Appellant's Opening Brief at 30; *see also id.* at 28, is contradicted by the Corps' consideration of these practicable alternatives to the recreational modifications and environmental mitigation that would avoid such discharges.

PAA0974 (Corps response to public comments). Thus, the two federal agencies to which Congress conferred shared jurisdiction over CWA Section 404 agreed on the approach used in the Corps' analysis. *See* Respondent–Appellee's Response Brief at 30 n.3 (disposing of Denver Audubon's argument that EPA's initial disagreement contributes to a finding that the Corps' analysis was arbitrary and capricious).

2. The CWA, related regulations, and caselaw do not support Denver Audubon's "segmentation" theory.

Denver Audubon cites three NEPA cases in its "Legal Background" section discussing the CWA, either because it misunderstands the distinctions between the regulatory provisions of the CWA and the procedural requirements of NEPA, or in an attempt to persuade this Court to, for the first time in CWA jurisprudence, apply the anti-segmentation rule of NEPA to a CWA Section 404(b)(1) analysis. Appellant's Opening Brief at 4–6 (citing *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 193–94 (4th Cir. 2009); *Save Our Sonoran*, 408 F.3d at 1121, *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1313–23 (S.D. Fla. 2005)). In Denver Audubon's view, it was not enough for the Corps to conduct a NEPA analysis of the proposed reallocation of storage space and

alternatives to that proposal in support of its Civil Works decision whether to reallocate storage capacity in Chatfield Reservoir; rather, Denver Audubon argues that the Corps should have also applied the substantive requirements of CWA Section 404 to the reassignment of storage space, Appellant's Opening Brief at 24, 35, an action which did not involve a discharge that is within the scope of CWA Section 404.

Denver Audubon's novel attempt to graft an "anti-segmentation" rule onto CWA Section 404(b)(1) jurisprudence conflates NEPA's disclosure requirements applicable to the reallocation decision with the Corps' separate Section 404(b)(1) analysis that is expressly limited to regulated discharges. The NEPA cases Denver Audubon cites do not support its CWA argument, and in fact cut against it by reaffirming the longstanding principle that a CWA Section 404(b)(1) analysis focuses on—and does not expand beyond—practicable alternatives "to the proposed discharge." 40 C.F.R. § 230.10(a); *see also Ohio Valley Envtl. Coalition*, 556 F.3d at 195 ("The Corps' jurisdiction under CWA § 404 is limited to the narrow issue of the [dredging or] filling of jurisdictional waters."); *Save our Sonoran*, 408 F.3d at 1122 ("[I]t is the development's impact on jurisdictional waters that determines the scope of the Corps'

[Section 404] permitting authority."); *cf. City of Shoreacres v. Waterworth*, 420 F.3d 440, 449 (5th Cir. 2005). Even under circumstances in which "NEPA requires a significantly broader scope of analysis," the Corps' analysis under CWA Section 404(b)(1) is "properly limited to the aquatic impacts associated with the discharge of dredge and fill material." *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1063 (10th Cir. 2015) (McHugh, J., concurring); *see also White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1039–40 (9th Cir. 2009) (discussing the differences between NEPA and CWA jurisdiction).

Thus, in this case, Section 404(b)(1) required only that the Corps consider practicable alternatives to the recreational facilities relocations and the environmental mitigation involving discharges. Denver Audubon is effectively asking this Court to amend the jurisdictional scope of CWA Section 404 by importing NEPA concepts. Congress has not done so, and neither should this Court.

Denver Audubon's reliance on the Corps' NEPA Implementation Procedures for the Regulatory Program,[7] 33 C.F.R. pt. 325, App. B § 7.b, again confuses the Corps' role under NEPA with its jurisdiction over

[7] As opposed to the Civil Works Program, which had approval authority over the Project here.

discharges into navigable waters under CWA Section 404(b)(1). *See* Appellant's Opening Brief at 32 (erroneously referring to the NEPA Implementation Procedures as "the CWA regulations"). The NEPA Implementation Procedures state that, when a non-federal applicant seeks a CWA Section 404(b)(1) permit for a component of a project that involves a discharge, the Corps, acting through its Regulatory Program, "should establish the scope of the *NEPA document* (e.g., EA or EIS) to address the impacts of the specific activity requiring a [CWA Section 404(b)(1)] permit and those portions of the entire 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(1) (emphasis added).

While the Corps' duties under NEPA's procedural requirements may expand under the circumstances described in the NEPA Implementation Procedures to a consideration of the environmental impacts of the broader project, its jurisdiction under CWA Section 404(b)(1) remains tied to "practicable alternatives *to the proposed discharge*." 40 C.F.R. § 230.10(a) (emphasis added); *see also* 33 C.F.R. pt. 325, App. B § 7.b(3) (referring only to extension of "the NEPA review"); *White Tanks Concerned Citizens*, 563 F.3d at 1039–40; *Ohio*

Valley Envtl. Coalition, 556 F.3d at 194; *Save our Sonoran*, 408 F.3d at 1121–21. The FR/EIS here in fact did address the environmental impacts of the reallocation of storage space pursuant to NEPA. But the NEPA Implementation Procedures, as their name suggests, have no effect on the scope of the Regulatory Program's CWA Section 404(b)(1) responsibilities. In a similar fashion, the Civil Works Program's CWA Section 404(b)(1) responsibilities here remained tied to the recreational modifications and environmental mitigation involving regulated discharges.

In short, Denver Audubon's attempt to extend the scope of the Corps' Section 404(b)(1) LEDPA test to the Civil Works decision on whether to reallocate storage space reflects a misunderstanding of applicable caselaw. As the two federal agencies with regulatory jurisdiction over this issue and the district court already concluded, NEPA anti-segmentation policies do not apply to analyses under CWA Section 404(b)(1). Accordingly, the scope of the Corps' Section 404(b)(1) analysis complied with the CWA and the applicable regulations and was not arbitrary and capricious.

B. The Corps' FR/EIS Analyzed a Reasonable Range of Alternatives for the Proposed Reallocation Project in Compliance With NEPA.

Denver Audubon next challenges the Corps' FR/EIS under NEPA by arguing that its decisions to screen out three concepts from further detailed analysis were arbitrary and capricious. However, as discussed below, the Corps considered and gave valid reasons for eliminating each of these (and dozens of other) concepts from further analysis in the FR/EIS, and its decision to do so easily satisfies the rule of reason courts apply to alleged NEPA deficiencies.

Applicable Standard of Review

Like the Section 404(b)(1) issue above, this Court reviews Denver Audubon's challenge of the district court's decision to affirm the Corps' NEPA analysis de novo. However, the Court reviews the agency's action under the APA's arbitrary and capricious standard. *See supra* Section IV.A; *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d at 1182; *Greater Yellowstone Coalition*, 359 F.3d at 1268.

NEPA imposes procedural disclosure requirements on the Corps and requires it to take a "hard look" at the environmental consequences of, and reasonable alternatives to, a proposed major federal action before taking it. 42 U.S.C. § 4332(C); *WildEarth Guardians v. U.S.*

Bureau of Land Mgmt., 870 F.3d 1222, 1233 (10th Cir. 2017). "Reasonable alternatives are those which are 'bounded by some notion of feasibility,' and, thus, need not include alternatives which are remote, speculative, impractical, or ineffective." *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1236–37 (D. Colo. 2011) (quoting *Utahns*, 305 F.3d at 1172) (citing *Custer Cty. Action Assoc. v. Garvey*, 256 F.3d 1024, 1039–40 (10th Cir. 2001)).

Accordingly, a court facing a claim that an agency should have considered this or that alternative examines only "whether [the] agency's decisions regarding which alternatives to discuss and how extensively to discuss them were arbitrary, keeping in mind that such decisions are 'necessarily bound by a rule of reason and practicality.'" *Greater Yellowstone Coalition*, 359 F.3d at 1277 (quoting *Airport Neighbors All., Inc. v. United States*, 90 F.3d 426, 432 (10th Cir. 1996)); *see also* 40 C.F.R. § 1502.14(a).

1. The Corps considered and reasonably eliminated enhanced water conservation.

Contrary to Denver Audubon's claim that enhanced water conservation was dismissed "without any examination at all," Appellant's Opening Brief at 44, the Corps fully considered increased

conservation and articulated its reasons for not carrying that concept forward in the FR/EIS. As the Corps stated, "[a]lthough water conservation for each water provider will be relied upon as a major tool for reducing their future water demands, further conservation measures alone will not be adequate to make up for the shortfall in water needed by the water providers to meet current and future water needs over the next 50-year period." PAA0679 (FR/EIS).

The Corps analyzed the Water Providers' existing water conservation efforts, *see* PAA0944–PAA0961 (Appendix AA to FR/EIS), and observed that "[m]ost of the water providers will, of necessity and with or without the Chatfield Reservoir storage reallocation project, develop even more stringent water conservation measures in the future to reduce their future water demands." PAA0674 (FR/EIS). The record established that increased conservation was anticipated in part because of state laws that require large water suppliers to submit water conservation plans to the CWCB, which in turn uses those plans to promote increased statewide conservation. *See id.*; Colo. Rev. Stat. §§ 37-60-124(2), -126(2) (2017). The Corps recognized certain of the Water Providers as innovators in the realm of conservation. PAA0674,

PAA0678–PAA0679 (FR/EIS). But while the Water Providers have committed to aggressive water conservation to extend the use of their water supplies, conservation does not meet the purpose of the Project or the Water Providers' need to increase their water supplies to make them more reliable and able to meet growing demands. *See* PAA0673, PAA0679, PAA0648–PAA0649.

Notably, the Corps also stated in response to public comments that it considered assembling concepts into combined alternatives where individually they would not meet the purpose and need. *See* PAA0969–PAA0971. Indeed, two of the three action alternatives in the Corps' FR/EIS involved concept combinations. PAA0689. But with respect to combinations that included enhanced conservation or upstream gravel pits, the Corps explained that it eliminated those combinations because of their complex logistical requirements, cost, and limited storage capacity. *See* PAA0970–PAA0971. This case is thus distinguishable from the cases Denver Audubon relies upon, in which the courts faulted the agencies for wholly failing to analyze combinations of alternatives. Appellant's Opening Brief at 8–9; *Utahns*, 305 F.3d at 1170–71; *Davis v. Mineta*, 302 F.3d 1104, 1121 (10th Cir.

2002), *abrogated on other grounds as recognized in Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016).

Hence, the record supports the district court's conclusion that it was not arbitrary and capricious for the Corps to eliminate enhanced water conservation from detailed analysis in the FR/EIS.

2. The Corps considered and reasonably eliminated upstream gravel pit storage.

The Corps also considered three gravel pits upstream of Chatfield Reservoir that could store a total of 5,490 acre-feet of water. PAA0669 tbl2-2; PAA0683 (FR/EIS). The Corps did not carry these upstream gravel pits forward for further consideration in the FR/EIS in part for the stated reason that they involved unique logistical problems for combining the reservoirs that downstream gravel pits did not have. PAA0683, PAA0687 tbl. 2-4. The Corps also eliminated them because their collective 5,490 acre-foot capacity was too small of a benefit to justify the project's cost to the Water Providers, in contrast to the downstream gravel pits (which could store 7,835 acre-feet) or the Project (which can store 20,600 acre-feet). PAA0765–PAA0766; PAA0687; *see also* PAA0662 ("Reallocation of storage less than 7,700

acre-feet was considered by the water providers to provide too little water supply benefits for the costs involved.").

Denver Audubon asserts that this second rationale is arbitrary because a document in the record—a letter sent by the purported owner of the "Titan ARS" upstream gravel pit to the Corps after publication of the final FR/EIS—suggests that the Titan ARS pit could actually store 11,000 acre-feet of water, not 4,500 acre-feet as the FR/EIS stated. Appellant's Opening Brief at 51–52 (citing PAA1105). However, the post-FR/EIS letter to which Denver Audubon points is inconclusive at best. The letter claims that a preliminary investigation (that is not itself in the administrative record) suggested that the gravel pit could have "the capacity for 11,000 acre-feet of storage *when expanded*." PAA1105 (emphasis added). The one-page letter provides no details on when, how, or even whether the gravel pit will be expanded; nor does it contradict the Corps' conclusion that the gravel pit's *current* capacity is 4,500 acre-feet. This post-FR/EIS speculation as to the Titan ARS gravel pit's possible future enlargement does not make the Corps' dismissal of the upstream gravel pits from further analysis in the FR/EIS unreasonable or arbitrary.

The Corps considered combining upstream gravel pit storage with other concepts that could, together, contain enough storage capacity to satisfy the project's objectives. However, it ultimately did not include that alternative because of cost and because a combination project would not remove the logistical problems posed by the upstream gravel pits. *See* PAA0971. Thus, as discussed above, Denver Audubon's argument under *Davis* and *Utahns* that the Corps unreasonably dismissed upstream gravel pit storage without considering it in tandem with other concepts is refuted by the administrative record.

Accordingly, the Corps' decision to dismiss the upstream gravel pits from detailed analysis is supported by the administrative record and not arbitrary or capricious.

3. The Corps considered and reasonably eliminated Rueter-Hess Reservoir as an alternative to the Reallocation.

Finally, the Corps gave Rueter-Hess Reservoir considerable attention but ultimately screened it out from further consideration in the FR/EIS for a number of reasons. As the Corps explained, Rueter-Hess Reservoir is owned by Parker Water and Sanitation District (Parker Water), which has allocated the reservoir's expanded storage capacity of 72,000 acre-feet to various water providers in

accordance with a separate planning action. PAA0684 (FR/EIS). Parker Water has not, since the expansion's completion in 2012, "made any additional [storage] capacity available for sale." *Id.* In addition, further physical expansion of the reservoir cannot occur because the total possible storage capacity at the Rueter-Hess Reservoir site, based on topography, is 72,000 acre-feet. PAA0796. In light of this unavailability of storage capacity, the Corps eliminated Rueter-Hess Reservoir from further analysis. PAA0684.

The administrative record thus contradicts Denver Audubon's claim that, when Rueter-Hess Reservoir's expansion to 72,000 acre-feet would be completed, Parker Water would make "additional storage space available for sale." Appellant's Opening Brief at 53–54 (citing PAA0976 (public comment)). Denver Audubon's citation of a 2010 projection does not contradict the Corps' later statement in 2012—after Parker Water's completion of the Rueter-Hess expansion—that Parker Water actually had not made any storage capacity available for sale. PAA0684.

In short, as a factual matter, the Corps eliminated Rueter-Hess Reservoir as an alternative not because it required third-party action,

but because that third-party action was speculative. *See WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d at 1236–37 ("Reasonable alternatives are those which are 'bounded by some notion of feasibility,' and, thus, need not include alternatives which are remote, speculative, impractical, or ineffective." (quoting *Utahns*, 305 F.3d at 1172) (citing *Custer Cty. Action Assoc.*, 256 F.3d at 1039–40); *see also* Respondent–Appellee's Response Brief, Section I.B.3 (explaining why Denver Audubon's reliance on *Natural Resources Defense Council, Inc. v. Morton*, 458 F.3d 827, 836 (D.C. Cir. 1972), is misplaced). The Corps weighed the realities of the Water Providers acquiring the necessary storage capacity in Rueter-Hess Reservoir cognizant of the fact that, since its expansion in 2012, its owner had not put any capacity up for sale. PAA0684. It was reasonable for the Corps to conclude that the possibility of Parker Water offering storage capacity in the future was too remote.

In sum, the Corps' decisions to eliminate enhanced water conservation, upstream gravel pits, and Rueter-Hess Reservoir from further detailed analysis in the FR/EIS easily satisfy the rule of reason

that this Court applies when reviewing alleged NEPA deficiencies. This Court therefore should affirm those decisions.

C. The District Court Reasonably Exercised its Discretion in Denying Denver Audubon's Motion to Supplement the Record With Extra-Record Documents.

On Denver Audubon's third and final appealed issue, this Court reviews the district court's denial of Denver Audubon's motion to supplement the record with extra-record documents under an abuse-of-discretion standard. *Citizens For Alternatives To Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007); *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008).

The Intervenors join and incorporate herein by reference the Corps' arguments defending the district court's decision to deny Denver Audubon's motion to supplement the administrative record with a handful of documents that were not necessary to conduct a substantial inquiry into Denver Audubon's claims. Respondent–Appellee's Response Brief, Section III. The district court did not abuse its discretion by acting in this manner.

V. CONCLUSION

For the foregoing reasons, the Intervenors respectfully request that the Court affirm the Corps' decision under NEPA and the CWA

and affirm the district court's denial of Denver Audubon's motion to supplement the administrative record.

Respectfully submitted this 3rd day of May, 2018.

TROUT RALEY

s/ Bennett W. Raley
Bennett W. Raley, CO #13429
Deborah L. Freeman, CO #12278
William Davis Wert, CO #48722
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, CO 80203
Telephone: (303) 861-1963
Facsimile: (303) 832-4465
braley@troutlaw.com
dfreeman@troutlaw.com
dwert@troutlaw.com
Attorneys for the Water Providers:
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

CYNTHIA H. COFFMAN
Attorney General

s/ Scott Steinbrecher
Scott Steinbrecher, CO #36957
Assistant Solicitor General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203
Telephone: 720-508-6287
scott.steinbrecher@coag.gov

Attorneys for Colorado Department of Natural Resources

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on May 3, 2018, I electronically filed the foregoing Intervenors–Appellees' Response Brief with the Clerk of the Court using the appellate CM/ECF system, which will send notification of such filing to all Counsel of Record.

I certify that no privacy redactions were or were required to be made in accordance with 10th Cir. R. 25.5, that the electronic submission is an exact copy of the hard copies submitted to the Court in accordance with Fed. R. App. P. 32, 10th Cir. R. 31.5, and 10th Cir. R. 32, and that the digital submission has been scanned for, and found free from, viruses by the most recent version of SentinelOne.

I certify pursuant to Fed. R. App. P. 32(g) that this document complies with the type-volume limitation and word limit of Fed. R. App. P. 32(a)(7)(B)(i) & Fed. R. App. P. 32(f) because this document contains 6,016 words. Furthermore, the document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a 14-point proportionally spaced typeface (Century) using the 2016 version of Microsoft Word.

s/ William Davis Wert
William Davis Wert, CO #48722
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, CO 80203
Telephone: (303) 861-1963
dwert@troutlaw.com