UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-1004

AUDUBON SOCIETY OF GREATER DENVER,
Petitioner – Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent – Appellee,

and

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

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

APPELLANT'S REPLY BRIEF

May 14, 2018

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Glossary

CWA: Clean Water Act

EIS: Environmental Impact Statement

LEDPA: Least Environmentally Damaging Practicable Alternative

NEPA: National Environmental Policy Act

WISE: Water Infrastructure and Supply Efficiency

AF: Acre-Feet

Introduction

When performing the CWA analysis for this Project, the Corps segmented it into portions and violated the CWA by ignoring alternatives, which would have avoided or minimized discharges, and thus did not fulfill the main objective of the CWA. Furthermore, the Corps violated NEPA by dismissing reasonable alternatives as impracticable without providing any evidence as to why and without fulfilling its duty to investigate those reasonable alternatives. Rather than responding to these concerns, the Corps and Intervenors seem to either ignore the majority of Denver Audubon's argument or talk past Denver Audubon in their briefs. They point the court to sections of the EIS that are misleading and conclusory, and fail to properly address the following portions of Denver Audubon's claims:

- the CWA and its guidelines require the avoidance and minimization of discharges whenever possible,
- the portions of the Project that the Corps segmented out for its 404(b)(1) analysis are integral to the entire Project,
- an analysis of enhanced water conservation would differ substantially from the section of the EIS titled "increased water conservation,"
- the Corps and Intervenors inconsistently define the Project purpose and need throughout the EIS and in their briefs,

- there is no evidence in the record to support the Corps' claims that Rueter-Hess Reservoir and upstream gravel pits are impracticable alternatives, and
- the information Denver Audubon wants to add to the Administrative Record demonstrates the procedural deficiencies of the Corps' NEPA analysis.

Instead of addressing these deficiencies in their briefs, the Corps and Intervenors instead engage in an extended discussion of the CWA analysis performed on the recreational modifications and compensatory mitigation. Denver Audubon respectfully requests that the court focus on the key issues identified above, which demonstrate that the Corps did not comply with the requirements of the CWA to avoid discharges, and that its inadequate dismissal of viable NEPA alternatives was arbitrary and capricious.

Argument

The Corps' 404(b)(1) analysis was not in accordance with the CWA because the CWA and its guidelines require the avoidance and minimization of discharges whenever possible. The Corps' interpretation of the 404(b)(1) guidelines in this case precluded the Corps from considering alternatives that would avoid discharges entirely. The Corps has not, and cannot, explain how limiting its CWA analysis to small portions of a larger project that require a

discharge would ever allow the agency to consider alternatives to the Project as a whole that would entirely avoid discharges. Furthermore, the Corps' NEPA analysis was arbitrary and not in accordance with the law because it failed to analyze enhanced water conservation and eliminated Rueter-Hess Reservoir and upstream gravel pits from detailed analysis without adequate evidence or explanation. Lastly, this court should reverse the district court's denial of its motion to supplement the record and take note of the Water Efficiency and Conservation State Scorecard and documents discussing Project WISE, which are essential for the court to review the Corps' NEPA analysis.

I. The Corps failed to address that the CWA and its guidelines require the Corps to avoid and minimize discharges whenever possible.

The Corps violated the CWA when it performed its 404(b)(1) analysis on the recreational modifications and the compensatory mitigation rather than the Project as a whole. The CWA and its guidelines require the Corps to avoid and minimize discharges whenever possible. However, the Corps' narrowly defined purpose for its 404(b)(1) analysis in this case precluded it from fulfilling that requirement. The defined purpose constrained the Corps' analysis to an evaluation of portions of one alternative, namely, Alternative 3 that required the most discharges of all identified alternatives to the Project.

The Corps never addresses this point in its brief and instead attempts to justify its process by clinging to the phrase "to the proposed discharge:" Appellee's Br. at 26, a single clause in one of many regulations that should not be looked upon in isolation from the rest of the CWA that requires the avoidance of discharges. Furthermore, because segmenting a project in this way implicates the policy reasons for an anti-segmentation rule, the court should adopt something similar to NEPA's anti-segmentation rule for the CWA.

a. The CWA and its guidelines unambiguously require the Corps to avoid and minimize discharges whenever possible.

The Corps' and Intervenors' assertions that the Corps' CWA analysis should be limited to segments of a project that require a discharge, Appellee's Br. at 29; Intervenors' Br. at 19, directly conflict with the language of the CWA and the 404(b)(1) regulations. Instead of addressing this conflict, the Corps sidesteps Denver Audubon's argument by focusing on an interpretation of the phrase "to the proposed discharge." Appellee's Br. at 19; 40 C.F.R. § 230.10(a). In its brief, the Corps only uses the words avoid or avoidance in its explanation of the improper 404(b)(1) analysis it performed. Appellee's Br. at 12, 13, 27-28. The Corps never addresses how the scoping itself precluded avoidance. Instead, throughout their briefs, the Corps and Intervenors claim

that the Corps was only required to analyze alternatives to portions of a project that require a discharge. Appellee's Br. at 29; Intervenors' Br. at 19. Not only does this frustrate the objective of the CWA, but it is also contrary to all available guidance interpreting these regulations.

The CWA and its regulations require the avoidance and minimization of discharges whenever possible. *See* 33 U.S.C. § 1251(a)(1) ("it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985"); 40 C.F.R. § 230.1(a) ("the purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material"); 40 C.F.R. § 230.10(a) ("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.").[1]

The Corps' guidance documents demonstrate the requirement to avoid and minimize discharges whenever possible. The Memorandum of Agreement between the Corps and EPA provides an explanation of the requirement to avoid and minimize discharges. It is true that, as the Corps states, this is not binding on the Corps Civil Works Program. Appellee's Br. at 35. However,

[1] For a more detailed analysis of the CWA's requirements, see Pet'r Br. at 24-31.

Denver Audubon simply would like the court to take note of the fact that the two agencies that are experts in 404(b)(1) analysis (EPA and the Corps Regulatory Program) have drafted a document that very clearly explains that when granting a 404(b)(1) permit, the 404(b)(1) guidelines, which do bind the Corps Civil Works Program, require the avoidance of discharges. *MOA Between Department of the Army and the EPA* (Feb. 6, 1990), https://www.epa.gov/cwa-404/memorandum-agreement ("Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative. The thrust of this section on alternatives is avoidance of impacts.") Although the Corps claims that Denver Audubon cites nothing in the Planning Guidance Notebook that indicates what the substance of the Corps' CWA analysis should be, this is untrue. Appellee's Br. at 34. The Corps' Planning Guidance Notebook demonstrates that when the Corps performs any alternatives analysis, it should evaluate alternatives to the complete project. U.S. Army Corps of Eng'rs, Dep't of the Army, *Planning Guidance Notebook* at 2-5. The Notebook states that "planners must maintain focus on the larger, complete plan(s) even while carrying out specific, individual tasks." *Id.* In fact, EPA, which co-drafted the 404(b)(1) regulations, noted that the Planning Guidance Notebook requires the Corps to follow the 404(b)(1) guidelines, PAA1054, and goes on to say that the Planning Guidance Notebook requires

the "consideration of a single and complete project as well as compliance with the 404(b)(1) Guidelines." *Id.*

The Corps' and Intervenors' interpretation runs contrary to the CWA and the 404(b)(1) requirements to avoid and minimize discharges. If the Corps were only required to analyze a segment of a chosen alternative for the project, where discharges would be inevitable, it would never be able to avoid discharges. If alternatives to that small segment which avoided a discharge while still accomplishing the purpose of the Project existed, the applicant would choose that alternative rather than dealing with bureaucratic red tape. An applicant seeking a permit indicates that there are no alternatives to that small segment which could avoid discharges. Therefore, if the Corps limits its alternatives analysis to only alternatives to that segment it eliminates the ability to avoid discharges. Whereas if it expanded its analysis to alternatives to the project as a whole, it may identify ways to accomplish the purpose of the project without implementing the segment which requires a discharge.[2] For example, in this case, Alternative 2, as well as other alternatives, to the

[2] In this case, although the Intervenors claim that the Corps analyzed alternatives to the recreational modifications that would not require a discharge, Intervenors' Br. at 17, those alternatives were superficial attempts to comply with the CWA because the goal of providing in kind recreation would always require a discharge.

Project would accomplish the Project's purpose while avoiding or minimizing discharges to a much greater extent. PAA0721-31 (demonstrating that Alternative 3 requires the most discharges and is the most environmentally damaging alternative).

Because the Corps' interpretation of the 404(b)(1) regulations is contrary to the plain language of those regulations, it warrants no deference. When an agency is interpreting its own regulations, its interpretation warrants deference if the regulations are ambiguous, and the interpretations are not plainly erroneous or inconsistent with the regulations. *Christopher v. Smithkline Beecham*, 567 U.S. 142, 155 (2012) In this case, the regulations are not ambiguous, and the Corps' interpretation of the 404(b)(1) guidelines is inconsistent with the regulations (and the CWA) because it precludes the avoidance of discharges. EPA and the Corps Regulatory Program which co-drafted these regulations, expressed the same concerns with this interpretation that Denver Audubon does. PAA0601-03; PAA1160. The Corps points out that EPA eventually changed their mind (the Regulatory Program did not) and went along with the Civil Works Program's interpretation. Appellee's Br. at 30. However, there is nothing in the record to explain why EPA caved to the Civil Works Program's interpretation that is inconsistent with the regulations. PAA1066 (The EPA only states that "upon review of the

specific facts… EPA is comfortable with the approach taken by the Corps.") Although an agency is allowed to change its mind when making a legal interpretation, it is typically required to show good reasons for doing so. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); *see also Homemakers N. Shore, Inc. v. Bowen,* 832 F.2d 408, 412 (7th Cir. 1987) ("when an agency waffles without explanation … this may show the absence of a real decision. Courts are correspondingly less willing to accept the agency's latest word.")

Furthermore, this interpretation does not warrant respect under *Skidmore*. When a court applies *Skidmore* deference, the weight of the judgment will depend upon the thoroughness evident in the agency's consideration, the validity of the agency's reasoning, the consistency with earlier and later pronouncements, and all those factors which give the agency interpretation power to persuade. *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). In this case, the interpretation's power to persuade is significantly reduced because it is inconsistent with EPA's and the Regulatory Program's interpretation, it is inconsistent with the purpose of the CWA and its regulations, the Corps never addresses how its interpretation would ever allow for the avoidance of discharges, and the interpretation was not made until after a preferred alternative was chosen.

Because the CWA and the 404(b)(1) guidelines require the Corps to avoid and minimize discharges whenever possible, and the Corps' interpretation of the term "to the proposed discharge" directly contradicts that requirement, it warrants no deference and is impermissible.

b. The Corps' decision to ignore alternatives which would avoid or minimize discharges was not in accordance with the law and its assertion that the recreational modifications and compensatory mitigation were not integral was arbitrary.

The Corps failed to comply with the CWA by narrowly defining the scope of its 404(b)(1) analysis and ignoring alternatives to the Project that would avoid or minimize discharges. The Corps should have analyzed the alternatives from its NEPA analysis in its 404(b)(1) analysis. The Intervenors claim that Denver Audubon misunderstands the distinctions between NEPA and the CWA. Intervenors' Br. at 18. They claim that Denver Audubon cites to NEPA cases in its argument about the Corps' CWA analysis. Intervenors' Br. at 18. However, Denver Audubon is pointing to the most analogous cases in which both NEPA and the CWA are involved, just as they are in this case. In those analogous cases, the Corps Regulatory Program was issuing a 404(b)(1) permit to a private party, and in many of those cases, the court required the Corps to expand its jurisdiction and perform a NEPA analysis on the whole project. *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir.

2009); *Save our Sonoran, Inc. v. Flower*s, 408 F.3d 1113 (9th Circ. 2005); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298 (S.D. Fla. 2005). The Corps and Intervenors claim that when the Corps is required to perform a NEPA analysis on a whole project as it was in those cases, it has no effect on the scope of the CWA analysis. Intervenors' Br. at 18-19; Appellee's Br. at 32. However, this is not true. In most cases, when the Corps performs a NEPA analysis, the information contained in the EIS informs the 404(b)(1) analysis. 40 C.F.R. § 230.10(a)(4). By citing those "NEPA cases," Denver Audubon is pointing out the nonstandard approach in the Corps' 404(b)(1) analysis in the Chatfield case which led to an unlawful result. Unlike in those cases, here the Corps has jurisdiction over the whole Project and already performed a NEPA analysis which identified alternatives to the Project that avoided or minimized discharges that it ignored when performing its 404(b)(1) analysis.

The results of this NEPA analysis provide a rational explanation for the Corps' novel interpretation of the CWA regulations. The Corps wished to approve this Project due to the support from the water providers. However, the NEPA analysis demonstrated that the chosen alternative, Alternative 3, was the most environmentally damaging of the four. PAA0721-31. This motivated the Corps to define the purpose of its 404(b)(1) analysis narrowly

in order not to be required to compare the four NEPA alternatives. This is similar to the behavior of the applicant in *Florida Wildlife*, which the court found concerning. In that case, the court stated, "just as a project may not be unlawfully segmented to avoid significance, the concept of independent utility should not be manipulated to avoid significance or troublesome environmental issues, in order to expedite the permitting process." *Fla. Wildlife,* 401 F. Supp. 2d at 1315. This similar attempt to avoid problems associated with 404(b)(1) analysis should not be sanctioned either.

The Corps' decision to ignore its NEPA findings and define the scope of its 404(b)(1) analysis narrowly was not in accordance with the law because it precluded the Corps from avoiding discharges. In its NEPA analysis, the Corps identified three other alternatives to this Project which would avoid or minimize discharges to a greater extent than Alternative 3. PAA0721-31. However, the Corps ignored these alternatives in its 404(b)(1) analysis. PAA1112-42. Instead, the Corps only analyzed alternatives to the relocation of recreational facilities and compensatory mitigation plan. *Id.* In doing so, the Corps limited its LEDPA analysis to actions that would require a discharge. *Id.* Although the Corps states that it analyzed the possibility of rebuilding the recreational facilities in a manner that would avoid discharges, this was a superficial way for the Corps to feign compliance with the CWA. Alternative 3

could never have been implemented without a discharge. It raises the water level in the reservoir which will inundate the recreational facilities, and because providing in-kind recreational facilities is an integral component of the overall project, the Corps would never have chosen the alternatives that avoided discharges but did not accomplish that goal.[3]

Even if the Corps' interpretation of "to the proposed discharge" is permissible, its segmentation of the Project was arbitrary. The recreational modifications and compensatory mitigation both require discharges and are integral components of the reallocation, even though the Corps claims that they are incidental. Appellee's Br. at 29. In its brief, the Corps contends that the term integral was used in the EIS "to signal that non-federal project partners were authorized to carry out mitigation activities at their own expense." *Id.* However, this definition does not appear anywhere in the EIS. The dictionary definition of integral is "essential to completeness", whereas the dictionary definition of incidental is "occurring merely by chance or without intention or calculation." *Integral*, Merriam – Webster, (11th ed. 2016); *Incidental*, Merriam – Webster (11th ed. 2016). The recreational modifications and compensatory mitigation would not be necessary if not for

[3] For a more in-depth analysis of why Alternative 3 could never have been implemented without discharges, see Pet'r Br. at 28-30.

the reallocation, and the reallocation would not be carried out without those portions. Therefore, the modifications and mitigation are essential to the Project's completeness and are not occurring merely by chance, and the Corps never indicated otherwise until its 404(b)(1) analysis.[4] Because these components of the Reallocation Project are integral to its completion, the reallocation involves discharges.[5] Therefore, if the regulations require the Corps to perform its 404(b)(1) analysis on projects that require a discharge, the Corps should have performed its analysis on the entire project.

c. The policy reasons behind the NEPA anti-segmentation rule apply because the Corps broke apart elements of a complete project which precluded it from accomplishing the objective of the CWA.

The NEPA anti-segmentation rule is designed to prevent an agency from breaking apart a single project to minimize the apparent environmental impacts of that project, and to ensure compliance with NEPA's goal of a fully informed public. *See Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1028 (10th Cir. 2002). The rule forbids the segmentation of a

[4] For a list of places in the EIS where the Corps refers to Recreational Modifications as "integral", see Pet'r Br. at 39.

[5] The Intervenors claim that Denver Audubon does not dispute the Corps' factual finding that there are no regulated discharges associated with the reallocation of storage space at Chatfield Reservoir, but this is untrue. Intervenors' Br. at 16. Denver Audubon has continuously contended that both the recreational modifications and compensatory mitigation are integral components of the larger Project. Therefore, the Project as a whole requires discharges.

project into smaller portions that appear to have smaller environmental impacts, which forces the agency to fully explore the environmental impacts of a project. *Id.* The rule prohibits the agency from performing multiple smaller EAs on the segmented portions, rather than one combined EIS that truly shows the environmental impact of the project. *Id.* Thus, the objective of the anti-segmentation rule in the NEPA context is to accomplish the objectives of the statute.

When the Corps broke apart the Project into the reallocation, recreational modifications, and compensatory mitigation for its 404(b)(1) analysis, it failed to accomplish the CWA's objective to avoid discharges. In this case, through segmentation, the Corps was able to ignore less environmentally damaging alternatives to this Project because it narrowed the scope of its 404(b)(1) analysis. The segmentation led the Corps to perform an improper LEDPA analysis and led to the Corps choosing the most environmentally damaging alternative to this Project, PAA0721-31 (discussing the impacts of Alternative 3), which is antithetical to the objective of the CWA. Therefore, because an anti-segmentation rule would ensure

agencies' adherence to the objectives of the CWA, just like it does in the NEPA context, it should apply in the CWA context.[6]

The Corps' reliance on the district court's order to demonstrate that the policy reasons for the NEPA anti-segmentation rule are not implicated, Appellee's Br. at 31, is misguided for two reasons: (1) this is an interpretation of a legal issue to which the district court gets no deference; and (2) the district court applied its analysis to the improperly narrow 404(b)(1) analysis as opposed to analyzing whether the 404(b)(1) analysis was improperly narrowed. The Corps relies on the district court's statement that, because it did not break apart the elements of the Recreation Plan or the Compensatory Mitigation Plan to minimize their impacts, no segmentation had occurred. Appellee's Br. at 32 (citing PAA0535-36). However, the district court is entitled to no deference with regard to legal issues because the Tenth Circuit reviews all legal issues de novo. *E.E.O.C. v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 946 (10th Cir. 1992). And, even if the Corps could rely on the district court's statement, the segmentation Denver Audubon is concerned

[6] It is not uncommon for courts to import concepts related to enforcement from one act to other related acts when policy reasons exist to do so. *See United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991)(importing the expansion of liability for a criminal act to corporate officers under the FDCA to the CWA).

with is the segmentation of the whole Project into reallocation, recreational modification, and compensatory mitigation portions: not segmentation of the recreational modifications or compensatory mitigation. However, the district court did not analyze this segmentation. PAA0535-36

II. The Corps' NEPA analysis was arbitrary, capricious, and not in accordance with the law because it eliminated reasonable alternatives and supported those eliminations with conclusory claims unsupported by any evidence.

The Corps violated NEPA by failing to analyze enhanced water conservation at all and by dismissing Rueter-Hess reservoir and upstream gravel pits without detailed analysis. NEPA requires agencies to take a hard look at the environmental impacts of any major federal action. 42 U.S.C. § 4332(C). To do so, the agency is required to perform an EIS in which it rigorously explores and objectively evaluates all reasonable alternatives to a proposed action. 40 C.F.R. § 1502.14(a). This alternatives analysis is characterized as "the heart of the environmental impact statement." *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999). An agency's alternatives analysis is governed by a rule of reason, which occasionally excuses it from the general requirement to evaluate all reasonable alternatives to a project. *Wyoming v. U.S. Dep't of Agriculture*, 661 F.3d 1209, 1243-44 (10th Cir. 2011). Under the rule of reason, agencies are not required

to analyze alternatives that are too remote, speculative, or impracticable. *Id.* The agency must only briefly discuss the reasons for the elimination of those remote, speculative, or impracticable alternatives. *Id.* However, the agency is always required to provide information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned. *Dombeck*, 185 F.3d at 1174. In this case, the Corps' NEPA alternatives analysis was arbitrary and not in accordance with the law because it failed to discuss enhanced water conservation at all and it eliminated upstream gravel pits and Rueter-Hess Reservoir without supplying sufficient information to permit a reasoned choice of alternatives.

a. The Corps failed to comply with the procedural requirements of NEPA because it failed to discuss enhanced water conservation.

The Corps never analyzed enhanced water conservation, a reasonable alternative to the Project, and therefore, it was not in accordance with the procedural requirements of NEPA. The Corps points the court to a section of the EIS titled "increased water conservation" in an effort to distract the court. Appellee's Br. at 20. However, the title of that section is misleading and inaccurate. At first glance, the title may seem to indicate that the section is indistinguishable from an analysis of enhanced water conservation, but when the court looks to the substance it will become clear it is not. PAA0673-79.

That section of the EIS is simply a discussion of water conservation measures that the water providers are already implementing. PAA0674 ("The specific conservation measures *now being implemented* by the municipal and agricultural water providers" (Emphasis added)); PAA0674-79 (describing only specific programs in use such as current block rate structures, incentives, and the use of reclaimed wastewater). There is no discussion of new or different measures that other states and water providers are implementing, and it lacks any indication of specific goals for future conservation. PAA0673-79. In fact, there is no discussion anywhere in the EIS regarding enhanced water conservation.[7] Appendix AA is the only other portion of the EIS that discusses water conservation, and it is more appropriately titled "Summaries of Water Provider's Water Conservation Programs" because it is a discussion of *current* conservation programs. PAA0944.

Enhanced water conservation should have been analyzed because it is reasonable to assume that it fits the purpose of this Project. The purpose of

[7] The Corps claims that Denver Audubon does not define enhanced water conservation measures, and that it assumes Denver Audubon is discussing the elimination of increased water conservation measures. Appellee's Br. at 18. However, there is no need to make this assumption because Denver Audubon clearly defines enhanced water conservation measures as "programs that go beyond the standard methods already being used by water providers." Pet'r Br. at 46.

this 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." PAA0628. The purpose is not to increase water storage, Appellee's Br. At 10 (citing PAA0628), nor resolve the shortages of sustainable water supplies faced by the water providers, despite the Corps' assertions to the contrary. *See* PAA0674 (implying that the purpose of the Project is to resolve the shortage of sustainable water supplies); Appellee's Br. at 10, 17. Increasing water availability implies a broader spectrum of possibilities and alternatives than increasing water storage, which could only be accomplished by certain means.[8] There are comments in the EIS, PAA0970-71; PAA0990-91, and Denver Audubon attempted to supplement the record with information, PAA0157-224, which provide reason to believe that enhanced water conservation could increase the availability of water so that a

[8] Consider the following analogy: A student needs more money for her next semester. Her parents can send her additional money, she can decrease her spending, work more, or some combination of the above. It would make no sense for the student to limit the solutions to only the parents sending a check, wiring money, or directly depositing the money. Similarly here, the Corps only focused on one method of increasing availability: increasing storage. Instead, it should have considered other options such as enhanced water conservation.

larger proportion of existing and future water needs can be met. In its response to these comments about enhanced water conservation measures, the Corps misstates the purpose of the Project, and points to its summary of current water conservation programs. PAA0970-71(implying that the problem being addressed by the Project is the inadequacy of water supplies in the region). Furthermore, the Corps admits that "increased water conservation" could stretch existing supply and reduce demand. PAA0673. This makes water *available* to consumers that would have been unavailable prior to the enhancement of water conservation. Therefore, implementing new conservation measures would likely increase the water providers' ability to increase water availability by stretching existing supply and reducing demand to a greater extent.

The Corps' analysis of "increased water conservation" was also deficient because it weighed the ability of conservation to accomplish the purpose of the Project against a misstated purpose. The Corps stated that increased water conservation measures will not "result in the elimination or lessening of the dependence on groundwater supplies," "[will] not solidify additional needed water supplies," and "[will not resolve] the water shortages of sustainable water supplies faced by the water providers." PAA0673-74.

However, none of these claims address whether conservation could meet the purpose of this Project, which is to increase water availability.

Even if the Corps' analysis of water conservation was satisfactory otherwise, it cannot dismiss this alternative simply because it alone would not satisfy the entire purpose of the Project. *See* Pet'r Br. at 46-47 (citing *Davis v. Mineta*, 302 F. 3d 1104, 1122 (10th Cir. 2002)); *Utahns for Better Transportation v. U. S. Dept. of Transportation*, 305 F.3d 1152, 1166 (10th Cir. 2002). The Intervenors claim that this case is distinguishable from *Utahns* and *Davis* because the Corps evaluated combined alternatives to the Project that included enhanced water conservation and upstream gravel pits but rejected them as too complex, costly, or due to limited storage capacity. Intervenors' Br. at 26. However, there is no evidence in the record that indicates any such combinations were ever considered. The Corps never analyzed enhanced water conservation at all and eliminated upstream gravel pits as a stand-alone alternative because of unsubstantiated claims regarding their limited storage capacity. PAA0687.

b. The Corps' dismissal of upstream gravel pits and Rueter-Hess Reservoir without detailed analysis is not excused by the rule of reason because it was based on insufficient information to permit a reasoned choice.

There is no evidence in the record to support the Corps' estimation of the storage capacity of the upstream gravel pits that led to its rejection. In its

opening brief, Denver Audubon cited to the only clear indication of the potential storage capacity of upstream gravel pits: a letter from the owner of the Titan ARS gravel pit to the Corps that explains a geotechnical investigation which revealed that the pit could hold as much as 11,000 AF when expanded. Pet'r Br. at 51; PAA1105. In its response brief, the Corps dismissed the relevance of this letter by claiming that it could not rely on a potential expansion of the pit when performing its alternatives analysis. Appellee's Br. at 22-23. Also, the Intervenors claim that Titan ARS is only capable of storing 4,500 AF, Intervenors' Br. at 28 (citing PAA0669), but cites to no evidence and provides no explanation of how that figure was determined, which makes that figure more speculative than Denver Audubon's estimation. Because the Corps dismissed upstream gravel pits from detailed consideration, in part due to their supposed insufficient storage capacity, the Corps should have explained how it calculated that capacity. And, although the court is deferential to agency fact-finding, the finding of fact must sufficiently be supported by available evidence. *Davtyan v. Holder*, 2011 WL 754843 *2 (10th Cir. 2011). Here, the Corps' determination that Titan ARS could only store 4,500 AF was not based on any evidence at all, and therefore, deserves no deference. Furthermore, the Corps should have fulfilled its independent duty to investigate the challenges to its determination that upstream gravel pits have

insufficient storage capacity to satisfy the purpose of the Project. *See Coal. of Concerned Citizens to MakeARTSmart v. Fed. Transit Admin. of U.S. Dep't of Transportation*, 843 F.3d 886, 904 (10th Cir. 2016). Instead, the Corps responded with a conclusory statement underestimating the storage capacity of upstream gravel pits without demonstrating that it had sufficient information to make a reasoned decision.

The Corps also attempts to justify its dismissal of upstream gravel pits by claiming that upstream gravel pits are indistinguishable from the downstream pits; Appellee's Br. at 22, but this is a post hoc rationalization that was not made in the record. PAA0687 (upstream pits were eliminated "due to limited storage capacity and the logistics of combining with other small capacity reservoirs in the area," not because they are indistinguishable from other alternatives). Now, for the first time – during litigation – the Corps asserts that the upstream pits are indistinguishable from the downstream pits and it did not have to analyze them separately. Appellee's Br. at 22. The Court should not give any weight to this post hoc rationalization. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419-20 (1971) (agencies may not justify their decisions with post hoc rationalizations.)

The actual reasons for eliminating the upstream pits listed in the EIS are conclusory and do not explain how the upstream pits differ from downstream

pits. The Intervenors make the opposite claim that the Corps does, stating that the EIS shows that the upstream pits have "unique logistical problems" that the downstream pits do not.[9] Intervenors Br. at 27. However, while the EIS does make this claim, which is contradictory to the Corps' argument, it contains no evidence of these unique logistical problems. This demonstrates that the Corps is making its decisions regarding the upstream pits without reliable information to permit a reasoned choice.

Similarly, there is no evidence in the record to support the Corps' claims that the storage space in Rueter-Hess Reservoir was already spoken for at the time of EIS. Appellee's Br. at 24. The Corps dismissed Rueter-Hess because of its storage commitments at the time of the EIS, claiming that no additional storage was available for sale, not because all of the storage space was already spoken for. PAA0688. There is nothing in the EIS that demonstrates the storage at Rueter-Hess was allocated out as the Corps claims. Appellee's Br. at 24. The page of the EIS the Corps cites to for this proposition simply states

[9] As the party that prepared the EIS, the Corps knows the issues associated with the upstream gravel pits better than the Intervenors, and the Corps abandoned the argument the Intervenors continue to make.

that since the time the reservoir was expanded, storage space was not made available for sale. Appellee's Br. at 24 (citing PAA0684).[10]

The Corps' decision to dismiss the reservoir because Parker Water and Sanitation District had not made any additional storage available for sale is also not based on any evidence in the record. In fact, the Corps was presented with evidence to the contrary in the form of a comment quoting the Colorado Public Works Journal, Vol 6, Issue 3, January 2010 that said "The 45,200 ac.-ft. excess capacity [above needs of Parker, Castle Rock, Castle Pines and Stonegate] will be available for sale, the revenue of which will help reduce PWSD debt." PAA0976. However, instead of fulfilling its independent duty to investigate this claim, the Corps responded with conclusory statements including a repetition of the unsupported statement the commenters were challenging. *See* PAA0976 (repeating that Parker Water had not made any storage capacity available for sale and that the reservoir still required infrastructure for inflows, and outflows from the dam (a statement refuted by

[10] The court should take judicial notice of the fact that, at this time, Rueter-Hess reservoir is only 1/3 full according to the Parker Water and Sanitation District website. https://www.pwsd.org/2195/Reservoir-Volume. Because Parker Water and Sanitation District is the owner and operator of the reservoir, its website cannot reasonably be questioned. Therefore, this fact is not subject to reasonable dispute because it can be accurately and readily determined. *See* Fed. R. Evid. 201(b).

the evidence Denver Audubon seeks to add to the record)). The Intervenors claim that Denver Audubon's citation to a 2010 comment does not contradict the Corps' later statement that Parker Water had not made any storage capacity available for sale. Intervernors' Br. at 30. However, Denver Audubon is relying on that comment to demonstrate that the Corps should have investigated that claim and shown that it did so. Instead, in the EIS, the Corps eliminated Rueter-Hess, claiming, once again, that Parker Water had not made any additional capacity for sale without any further response to the credible source cited by Denver Audubon. PAA0688. [11]

The rule of reason should not excuse the Corps' decision to exclude upstream gravel pits and Rueter-Hess Reservoir from detailed consideration because those determinations were not based on any evidence in the record. When the court applies the rule of reason, it does not excuse an agency from supplying information sufficient to permit a reasoned choice of alternatives. *Dombeck*, 185 F.3d at 1174. In this case, the Corps did not provide that information. The Corps' reasoning that upstream gravel pits and Rueter-Hess Reservoir could not accomplish the purpose of the Project was not based on

[11] The district court stated that Rueter-Hess would not satisfy the purpose of the Project because it would merely transfer the ownership of storage. PAA0529. However, the purpose of the Project is to increase availability, not to increase storage capacity.

evidence. Therefore, it did not provide information sufficient to permit a reasoned choice of alternatives and did not satisfy its procedural requirements under NEPA to evaluate, in detail, all reasonable alternatives.

III. The district court abused its discretion when it denied Denver Audubon's motion to supplement the record because the information Denver Audubon seeks to introduce demonstrates the Corps' procedural failures

The Tenth Circuit recognizes the NEPA exception to the ban on extra-record evidence. *See Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004)(discussing the NEPA exception, but ultimately holding that the facts of the case did not warrant applying the exception). In *Lee*, the Tenth Circuit states "as is often the case in the NEPA context…an initial examination of the extra-record evidence in question may aid us in determining whether [the agency ignored relevant factors it should have considered or considered factors left out of the formal record]". *Id*. In NEPA cases extra-record evidence may be necessary to "illuminate whether an [EIS] has … failed to adequately discuss some reasonable alternative." *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) (citing *Lee).*

Here, Denver Audubon requested to supplement the record with additional information on Rueter-Hess and enhanced water conservation that

fits the NEPA exception because it demonstrates the Corps' procedural failures in conducting its NEPA analysis.[12] This additional information is essential to aid the Court in determining if the Corps ignored relevant factors when evaluating enhanced water conservation and Rueter-Hess Reservoir as alternatives to this Project. The admission of this evidence will illuminate whether the EIS failed to adequately discuss some reasonable alternative by introducing evidence crucial to determining if enhanced water conservation and Rueter-Hess are practicable alternatives that could meet the purpose of the Project. Thus, the NEPA exception applies.

Conclusion

The Corps' CWA analysis precluded it from avoiding discharges into the waters of the United States, and therefore, the analysis was not in accordance with the CWA. Furthermore, the Corps' NEPA analysis was arbitrary and capricious and not in accordance with the law because it did not discuss enhanced water conservation, a reasonable alternative to the Project, as required by NEPA, and it dismissed Rueter-Hess Reservoir and upstream gravel pits without providing any evidence supporting its decision. Therefore, Denver Audubon respectfully requests this court to vacate the ROD and

[12] For an explanation of the information Denver Audubon wishes to include in the record, see Pet'r Br. at 55-63.

remand the EIS back to the Corps for further analysis and issue an injunction against any further construction during that time.

Certificate of Service

I certify that on May 14, 2018, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send notification of such filing to all Counsel of Record.

Certificate of Digital Submission

I hereby certify that with respect to the foregoing:

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

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

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

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Date: May 14, 2018 /s/ Kevin J. Lynch

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