UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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, Intervenor - Appellees.	Case No. 18-1004

Appellant's Motion for Injunction Pending Appeal

Certificate of Compliance with Duty to Confer

Pursuant to 10th Cir. R. 27.1 counsel for Petitioner – Appellant,

Audubon Society of Greater Denver ("Denver Audubon"), conferred via email

with opposing counsel who indicated that all other parties oppose this motion.

Statement of Jurisdiction

The district court exercised subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). Petitioner – Appellant challenged the United States Army Corps of Engineers' ("Corps") compliance with the Clean Water Act, 33 U.S.C., § 1251 *et seq*., and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. The action was brought pursuant to the Administrative Procedure Act. 5 U.S.C. § 702.

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

Introduction

Pursuant to Fed. R. App. P. 8, Denver Audubon respectfully asks this Court to enjoin the Corps from approving any further plans to implement the Chatfield Reallocation Project ("Project"). Furthermore, Denver Audubon asks this Court to enjoin the Castle Pines Metropolitan and North Metropolitan

Districts, the Centennial Water and Sanitation District, the Center of Colorado Water Conservancy District, Central Colorado Water Conservancy District, the Town of Castle Rock, and the Colorado Department of Natural Resources from starting or continuing the construction at Chatfield State Park ("Park").[1] This includes commencing any construction on the new recreational facilities and the associated clearing of vegetation because such work will irreparably harm Denver Audubon and its members. The district court denied Denver Audubon's request for an injunction pending appeal because, having ruled to uphold the agency action, it thought that Denver Audubon failed to demonstrate a likelihood of success on the merits. (Ex. K, Order Affirming Agency Decision at 14, 24); (Ex. L, Order Den. Prelim. Inj.) Accordingly, Denver Audubon requests an injunction pending appeal from this Court.

The District Court for the District of Colorado erred in affirming the Corps' Record of Decision because this Project was approved based on the Corps' faulty Clean Water Act ("CWA") analysis and its arbitrary and capricious decisionmaking. Denver Audubon will demonstrate that: (1) it is likely to succeed on the merits of its appeal; (2) it will suffer irreparable harm

[1] The Intervenors-Appellees formed the Chatfield Reservoir Mitigation Company ("CRMC") to implement the Chatfield Reallocation Project and control the CRMC.

if this injunction is not granted; (3) the opposing parties will not be substantially harmed as a result of this injunction; and (4) the injunction is in the public interest. Accordingly, Denver Audubon requests that this Court prevent the opposing parties and their agent, CRMC, from beginning to carry out this Project. The implementation will cause irreparable harm to Denver Audubon by eliminating the ability of its members to utilize and enjoy the natural and diverse environment throughout the Park. Denver Audubon has continuously monitored the Park and hoped that a decision on the merits of its claims would prevent irreparable harm from occurring. However, as soon as Denver Audubon became aware of the Intervenors' concrete plans to begin implementing the Project, it requested an injunction from the district court. (Ex. F, Pet'r. Mot. Prelim. Inj.) Once the district court issued its order affirming the decision of the Corps, it issued its denial of the Petitioner's motion for an injunction, and explicitly denied Denver Audubon's request for an injunction pending appeal. (Ex. L, Order Den. Prelim. Inj.) Thus, Denver Audubon prepared this motion to prevent any further irreparable harm from occurring. (Ex. I, Gene Reetz Decl. ¶ 4-7.)

Legal Background

Injunctions pending appeal, pursuant to Fed. R. App. P. 8 and 10th Cir. R. 8.1, are an appropriate remedy if the movant demonstrates a right to relief by

addressing four factors: (1) whether the applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent the relief requested; (3) whether the requested relief will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. 10th Cir. R. 8.1; *Pueblo of Pojoaque v. New Mexico*, No. 16-2228, 2017 U.S. App. LEXIS 13042, at *1-2 (10th Cir. Mar. 14, 2017).[2]

First, the Movant must demonstrate that it is likely to succeed on the merits of its appeal. In order to establish a substantial likelihood of success on the merits the movant need not show a certainty of winning. *Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin. US Dept. of Transp.,* 843 F.3d 886, 901 (10th Cir. 2016.)[3] To succeed on the merits of an APA case, the movant must show that the agency action is arbitrary and capricious or

[2] Although denial of a request for an injunction is reviewed for abuse of discretion, in this case the district court based its denial solely on the likelihood of success on the merits, which is a legal determination that this Court reviews de novo. *Heideman v. South Salt Lake City,* 348 F.3d 1182, 1188 (10th Cir. 2003).

[3] Although *Art Smart* discusses a preliminary injunction, a request for an injunction pending appeal "requires plaintiffs to show the same four elements necessary to obtain a preliminary injunction." *Town of Superior v. U.S. Fish and Wildlife Service,* No. 11–cv–03294, 2012 WL 6737183, at *1 (D. Colo Dec. 28, 2012).

otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). For this Project, the Corps was required to follow the substantive requirements of the CWA and the procedural requirements of the National Environmental Policy Act ("NEPA"). Section 404 of the CWA authorizes the Corps to issue permits to regulate the discharge of dredge or fill material into waters of the United States. 33 U.S.C. § 1344. However, the Corps shall not permit a discharge that would result in the degradation of waters of the United States unless the process is the least environmentally damaging practicable alternative ("LEDPA"). 40 C.F.R § 230.10. The Corps performs this analysis even when the Corps is the party carrying out the action. 33 C.F.R. § 335.2. The CWA guidelines state that, outside of unusual circumstances, the NEPA alternatives should provide the information for a 404(b)(1) analysis. 33 C.F.R. § 230.10(a)(4). Furthermore, the Corps' Planning Guidance Notebook states that the Corps should integrate the NEPA process in all its planning processes involving environmental statutes, including the CWA. *Planning Guidance Notebook,* U.S. Army Corps of Engineers at 2-16.

Next, the Movant must demonstrate that it will suffer irreparable harm absent the injunction. A movant suffers irreparable harm if: (1) its environmental interests are injured because "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often

permanent or at least of long duration i.e., irreparable," and (2) the harm demonstrated is clear and establishes a present need for equitable relief. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *Pinson v. Berkebile*, No. 12-1363, 2012 U.S. App. LEXIS 27134, at *3-4 (10th Cir. Oct. 31, 2012). Therefore, if a movant can demonstrate that it will suffer harm to its environmental interests prior to a decision on the merits of its appeal it has satisfied its burden of demonstrating irreparable harm.

Third, the Movant needs to demonstrate that the issuance of an injunction will not substantially harm the opposing party. Any harms suffered by the opposing party are discounted, and therefore, are deemed less substantial when they are minimal due to the temporary nature of the injunction. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (discussing how to weigh the harm to opposing parties).

Lastly, the court will weigh the public's interest in the injunction. The public has an "undeniable interest" in an agency's compliance with the National Environmental Policy Act ("NEPA") and the CWA. *Colorado Wild Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213, 1223 (D. Colo. 2007); *Sierra Club v. City of Colo. Springs*, No. 05-cv-01994-WDM-BNB, 2009 U.S. Dist. LEXIS 73922, at *51 (D. Colo. Aug. 20, 2009).

Factual Background

In 1999, Denver Audubon established its office and nature center in the Park because it is one of the best birding destinations in Colorado, is very close to Denver, and has the unique benefit of having developed infrastructure. (Ex. G, Norm Lewis Decl. ¶ 11.) Since then, Denver Audubon has been providing Park visitors with educational and recreational opportunities to view the variety of rare bird species that live in and migrate throughout the Park. (Ex. C, Hugh Kingery Decl. ¶10.)

In 2013, the Project was approved and has since presented a substantial threat to the diverse environment within the Park that the members of Denver Audubon use and enjoy. (Ex. N, AR040957.) The Project will allow water providers to store additional water in the reservoir by raising the maximum water level for storage of municipal water from 5,332 feet above sea level to 5,444 feet. (Ex. N, AR036150.)

As a result of this elevated high-water level, many of the Park's recreational facilities in their current locations would be submerged when the water is at its highest. (Ex. N, AR041040.) To implement the Project, the Intervenors were forced to agree to relocate all of these facilities. (Ex. N, AR041043.) They intend to relocate some of the facilities to where the new shoreline will be or raise the plots that some of the facilities are on using fill

material to accommodate that new water level. (Ex. N, AR044448.) However, the new shoreline will rarely be at the new high water level, making it likely that in most years the new facilities will be far away from the shoreline of the reservoir in addition to having an ugly mud ring around the reservoir. (*See* Ex. N, AR038272.)

In each of these areas the first step prior to beginning construction is what is known as "clear and grub." (Ex. N, AR038320-42.) Furthermore, the CRMC's Tree Management Plan describes that in the interest of safety to boaters, it will remove "wood debris," which is defined as vegetation on the ground greater than two inches in diameter. (Ex. I, Gene Reetz Decl., Attach. E.)[4]

Due to a concern that it would suffer irreparable harm if the Project was implemented, Denver Audubon unsuccessfully sought information about the Corps' and the Intervenors' plans for implementing this Project numerous times. (Ex. I, Gene Reetz Decl., Attach. A-C.) Finally, in late November 2017, the CRMC released a schedule of construction activities and associated closures of various areas of the Park on its website. (Ex. I, Gene Reetz Decl., Attach. D.)

[4] Respondent - Appellee and Intervenor - Appellees stipulate that the Chatfield Construction Schedule and Tree Management Plan attached are accurate copies of portions of the CRMC's website.

According to the schedule, construction on the Balloon Launch Area, Catfish Flats Day Use Area, Deer Creek Day Use Area, Fox Run Day Use Area, Jamison Day Use Area, Massey Draw Day Use Area, North Boat Ramp, and Swim Beach, began on December 4, 2017. *Id.* All of these areas will be closed to the public during construction. *Id.* Construction on these areas and the associated closures have already begun throughout the Park. (Ex. I, Gene Reetz Decl. ¶ 7.)

Argument

The implementation that has already begun, specifically, the effects of operating construction machinery, and the habitat removal along with the eventual flooding of the Park is irreparably harming the individual members of Denver Audubon and the organization itself. Courts have issued injunctions pending appeal where such action was necessary to preserve the status quo or where the legal questions were substantial and matters of first impression. *Peak Med. Oklahoma No. 5, Inc. v. Sebelius*, No. 10-CV-597-TCK-PJC, 2010 WL 4809319, at *2 (N.D. Okla. Nov. 18, 2010) (citing *Sweeney v. Bond*, 519 F.Supp. 124, 132, 133 (E.D.Mo.1981)). Here, the issue of whether anti-segmentation applies to the CWA is an important issue that has never been decided by the Tenth Circuit (or any other circuit), thus a matter of first impression, and as such the Court should grant the injunction pending appeal to preserve the status quo while the Court carefully analyzes the case.

Furthermore, Denver Audubon has made a strong showing that it is likely to succeed on the merits of its appeal. Also, Denver Audubon demonstrated that it will be irreparably injured absent this injunction, any harms the opposing parties will suffer absent the injunction will be minimal rather than substantial if they suffer any harm at all, and an injunction would be in the public interest by ensuring that harms associated with the Project will not occur if it does not comply with the CWA.

I. Denver Audubon is substantially likely to succeed on the merits of its appeal because the Corps' approval of the Project was based on a faulty CWA analysis and resulted from arbitrary and capricious decisionmaking.

This Project was approved based on a faulty CWA analysis and is the result of arbitrary and capricious decisionmaking. (Ex. A, Pet'r Opening Br. at 16.) This Court should hold the Corps responsible for not following its own guidance documents and thus, failing to comply with CWA requirements. This eventually led to the Corps' failure to select the LEDPA as it was required to do by the CWA. *Id.* Furthermore on appeal, Denver Audubon intends to show that the Corps did not comply with the procedural requirements of NEPA. Therefore, Denver Audubon is likely to succeed on the merits.

The Corps failed to abide by its own regulations by segmenting this Project for the purposes of a 404(b)(1) analysis in order to avoid using the

NEPA alternatives for its analysis, and as a result, the Corps chose an alternative for the Project that is the most environmentally damaging of all of the NEPA alternatives. (Ex. A, Pet'r Opening Br. at 17.)

Despite the established practice of the Corps, which recommends integrating the NEPA process throughout planning processes which involve environmental statutes such as the CWA, the Corps segmented this Project. *Planning Guidance Notebook,* U.S. Army Corps of Engineers at 2-16. In its 404(b)(1) analysis the Corps stated that the environmental mitigation and recreational modifications were incidental to the reallocation for the first time in the entire EIS. (Ex. N, AR038961.) Throughout the EIS prior to the 404(b)(1) analysis, the Corps continuously referred to the recreational modifications as an integral piece of the Project. (*See* Ex. N, AR036104, AR036138, AR036560, AR036564, AR036568, AR036601.) Thus, the recreational modifications are definitely an integral part of the chosen alternative because the Project cannot be performed without relocating the recreational facilities. Thus, the relocation of recreational facilities cannot be treated as a segmented project. This segmentation allowed the Corps to ignore the drastic environmental impacts of its chosen alternative under NEPA and perform an ineffective 404(b)(1) analysis in which it only analyzed alternatives to the recreational modifications and environmental mitigation

pieces of the chosen alternative. This led to a 404(b)(1) analysis that permitted discharges into waters of the United States even though there were viable alternatives to the Project that would only require minimal discharges. (Ex. N, AR041044; AR036443.) Had the Corps performed its 404(b)(1) analysis by comparing the alternatives to the entire project, it would have determined that Alternative 3 is the most environmentally damaging alternative and it would have chosen an alternative that required minimal discharge, the result intended by the CWA.

It is because results like this are possible that the anti-segmentation rule should apply to the CWA. The anti-segmentation rule in NEPA essentially states that a federal agency may not segment a project into portions that standing alone do not appear to present serious environmental impacts, but when viewed as a whole would require the performance of an EIS. *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1028 (10th Cir. 2002). The policy behind the rule is to prevent federal agencies from circumventing the protections afforded to the public that the NEPA was intended to provide. *Id*. Because there was a similar motive and opportunity for the Corps to circumvent the protections of the CWA, specifically, the requirement that the Corps should avoid discharges wherever possible, the

Corps should not be able to segment a project in a way that would allow it do so.

The purpose of section 404 of the CWA is to avoid discharges of material into waters of the United States whenever possible. *See* 33 C.F.R. § 320.4(b). "For actions subject to NEPA … the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines." 40 C.F.R. § 230.10. Here, there is nothing to suggest that this Project is different than most cases that justifies the practice of segmenting the project to allow the Corps, as it did here, to circumvent accomplishing that purpose. Thus, this Court should enjoin the opposing parties from moving forward with this Project by approving this Motion for Injunction Pending Appeal while determining this important issue for the first time of whether the CWA should be subject to the anti-segmentation rule of NEPA.

II. Denver Audubon will suffer irreparable harm that is imminent absent this injunction because the implementation of this Project will disrupt the diverse environment of the Park.

The implementation of the Project will negatively impact the wild and natural areas of the Park that Denver Audubon and its members use and enjoy in a variety of ways. Because these impacts negatively affect the

environmental, recreational, educational, and aesthetic interests of the organization and its members, they constitute irreparable harm that cannot be compensated through monetary damages. Furthermore, because the implementation is currently underway, these harms are imminent.

A. The implementation of the Project will have significant negative impacts on the interests of Denver Audubon.

The implementation of this Project will irreparably harm Denver Audubon and its members because the noise and other impacts associated with construction, the removal and destruction of habitat, and the eventual flooding of the Park will render specific areas of the Park either unenjoyable or unusable for the organization and its members.

Construction activities harm Denver Audubon and its members as soon as they begin. Construction of this magnitude involves the use of machinery and will force the Corps to close areas of the park while construction is ongoing. (Ex. I, Gene Reetz Decl., Attach. D.) Many members of Denver Audubon recreate and lead birding field trips in the densely vegetated areas surrounding the Swim Beach and Plum Creek, two areas that are currently closed and under construction. (Ex. G, Norm Lewis Decl. ¶ 5.) The noise from machinery and these closures will diminish or eliminate the ability of Denver Audubon's members to use and enjoy these areas peacefully. (Ex. G, Norm

Lewis Decl. ¶ 8.) For example, construction will likely scare off the more skittish species of bird (species that are highly prized by birders), and reduce the recreational value of the Park for members of the organization that enjoy birding in these areas. (Ex. G, Norm Lewis Decl. ¶ 7.)

The clearing and grubbing of vegetation and the removal of underbrush, which the Corps dismissively refers to as "removing debris," will cause further irreparable harm to Denver Audubon and its members. The vegetation and underbrush is essential habitat for a variety of animals including the various species of bird found throughout the Park. (Ex. B, Ann Bonnell Decl. ¶ 11.) It provides several important ecological functions including food, water, and cover for resident and migratory bird and wildlife species. (Ex. G, Norm Lewis Decl. ¶ 7.) And, although it is difficult to ascertain the exact quantity of harm that will result to these species, the harm is certain, not theoretical. *Id.* The removal of this habitat will, at a minimum, make the areas inhospitable to animals and force the birds to relocate. *Id.* This reduction in bird habitat and wildlife in the Park will force the members of Denver Audubon, many of whom live very close to the Park, to have to travel a potentially great distance to view what they previously could in their own backyard. (Ex. G, Norm Lewis Decl. ¶ 10.)

Lastly, the flooding of the Park and its associated impacts will lead to a less attractive, and therefore, less utilized state park by Denver Audubon, its members, and the general public. Because the high water level will only occur three out of every ten years, most years there will be an unsightly mud ring around the edge of the reservoir. The Project will diminish the aesthetic appeal of the Park and will reduce Colorado Parks and Wildlife revenue generated by the Park by $3.4 million and the Park's recreation economic development value by $15.6 million, over a 50 year period. (Ex. N, AR036242.) The reduction in the Park's value will negatively impact the ability of Denver Audubon to carry out its organizational mission. (Ex. G, Norm Lewis Decl. ¶ 11.)

In pursuit of its mission to educate the Denver Community, Denver Audubon provides wildlife education trips to schools, birders, corporate groups and others who want to experience and learn about birds and their environment. (Ex. B, Ann Bonnell Decl. ¶ 5.) These programs are so successful because of the Park's infrastructure, its incredibly diverse environment, and its proximity to Denver. (Ex. G, Norm Lewis Decl. ¶ 11.) Removing it would diminish, or prohibit altogether, Denver Audubon's ability to offer these services that are the core of its organizational mission. (Ex. B, Ann Bonnell Decl. ¶ 5.)

The Corps may argue, as it did in the EIS, that the environmental harms caused by this Project will be fully mitigated. However, as the Supreme Court stated in *Amoco*, environmental injury is often permanent or long lasting. *Amoco,* 480 U.S. at 545. Even if the Corps does mitigate these impacts by replacing vegetation in the Park and elsewhere, it will take decades for that vegetation to mature to the point where it is able to support the diverse wildlife that the existing vegetation can. (Ex. G, Norm Lewis Decl. ¶ 7.) Furthermore, much of this replacement will not mitigate the harm suffered by Denver Audubon because the majority of it will occur outside the Park, some of it on private land inaccessible to Denver Audubon's members. (Ex. N, AR036570-71.)

The loss of habitat that will occur should the underbrush and vegetation be removed cannot be adequately replaced. As a result, Denver Audubon members will no longer be able to bird or peacefully enjoy the serenity of the Park, and the organization will no longer be able to fulfill its mission "to connect people with nature through conservation, education, and research." (Ex. G, Norm Lewis Decl. ¶ 11.)

B. Because this Project has begun and will continue to expand, these harms are likely to occur prior to the Court making a decision on the merits of Denver Audubon's appeal.

While the district court reviewed its claims, Denver Audubon refrained from attempting to enjoin the implementation of this Project. However, because the CRMC began construction activities in December, 2017, Denver Audubon faces the threat of continuing and imminent irreparable harm. As of late December, it appeared that the opposing parties were proceeding with implementing the Project before the district court could make a decision on the merits. As a result, Denver Audubon requested that the district court enjoin the CRMC and the Corps from continuing to move forward with the Project until it made a decision. Now, because the district court erred in affirming the Corps' decision, and the Corps will continue construction through 2019, Denver Audubon requests that this Court temporarily enjoin both the Corps and the Intervenors from carrying out this Project which will cause irreparable harm to Denver Audubon and its members.

The construction that has already begun is currently causing irreparable harm to Denver Audubon and will continue to expand. The noise from the construction machinery will hinder the organization's members' ability to quietly enjoy the peaceful environment of the Park, and it will scare away any birds in the area eliminating the ability for private and educational birding. (Ex. G, Norm Lewis Decl. ¶ 8.)

One of the first stages of the modifications to recreational facilities is the removal of any underbrush and "wood debris" that the Corps believes will pose safety hazards to boaters. (Ex. I, Gene Reetz Decl., Attach. E.) This will destroy essential habitat for birds and other animals, irreparably harming Denver Audubon's members and the organization itself. Because this is one of the first steps of the construction that began in December, 2017, it is likely that the irreparable harm it will cause to Denver Audubon will occur prior to the conclusion of Denver Audubon's appeal on the merits.

If the Corps continues to approve various portions of the implementation of this Project, and the Intervenors are allowed to continue construction, Denver Audubon will suffer irreparable harm because significant wildlife and habitat in the Park will be destroyed. Because construction has already begun throughout the areas of the Park that the members use, this harm is imminent. Therefore, the further implementation of the Project should be enjoined until the Court makes a decision on the merits of this appeal.

III. The opposing parties are unlikely to suffer substantial harm as a result of this injunction.

It is highly unlikely that the opposing parties will suffer substantial harm from a temporary delay to the resumption of construction on this

Project caused by this injunction. Any harm that is possible would be minimal at most. The Corps will likely not suffer any harms as a result of this delay because it is not responsible for funding or completing any of the construction associated with the recreational modification. (Ex. N, AR041043.) Any harms suffered by the Intervenors as a result of a short term injunction would be minimal rather than substantial. The injunction would only enjoin the parties from continuing with the implementation of the Project until this Court issues a decision on the merits of Denver Audubon's appeal.

The Intervenors may claim that this injunction harms their ability to provide increased water availability for public use. However, similar to the harm in *League of Wilderness*, the harm imposed by this injunction would be de minimis when diminished to reflect the limited amount of time the injunction will be in place. Any delay would be minor when compared to the amount of time this Project will take to complete and would not likely impact the date that the water providers could start storing water. Thus the opposing parties will not suffer substantial harm from the issuance of this injunction.

IV. This injunction would be in the public interest because it would maintain the status quo and vindicate the public interest served by the CWA and NEPA.

The public has an undeniable interest in compliance with NEPA and the enforcement of the CWA. *Colorado Wild,* 523 F.Supp.2d at 1223; *Sierra Club*

2009 U.S. Dist. LEXIS 73922, at *51. Because Denver Audubon is seeking this injunction to prevent the implementation of a federal project that does not comply with either NEPA or the CWA, the public interest weighs in its favor.

V. Because this Court has discretion when deciding whether to require security, and Denver Audubon is seeking to vindicate the public interest served by NEPA, this Court should waive the surety bond.

The Court of Appeals may condition the issuance of an injunction pending appeal on a party's obtaining a bond or other appropriate security in district court. Fed. R. App. P. 8(a)(2)(E). However, similar to the bond requirements for a preliminary injunction, this is a permissive rather than mandatory rule. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (stating that Federal Rule of Civil Procedure 65 simply states that a court **may** condition the issuance of a preliminary injunction on obtaining a bond, not that it is required).

This Court should exercise its discretion to waive a security bond because: (1) the Corps is attempting to commence construction on a project that is the result of a faulty CWA analysis and arbitrary and capricious decisionmaking, making it unlikely that the Corps will be wrongfully enjoined; (2) Denver Audubon is seeking to vindicate the public interest served by the

CWA and NEPA; and (3) Denver Audubon is a public interest organization with limited ability to secure a bond. (Ex. H, Karl Brummert Decl. ¶ 3.)

Conclusion

For the foregoing reasons, this Court should grant Denver Audubon's Motion for an Injunction Pending Appeal.

Dated: January 8, 2018 Respectfully submitted,

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For Petitioner-Appellant Audubon Society of Greater Denver

Certificate of Service

I certify that on January 8, 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 Norton anti-virus, and according to the program are free of viruses.

Certificate of Compliance with Type-Volume Limit

This document complies with the type-volume limitation of Fed. R. App. P. 32(g) and the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (the caption, signature block, proof of service, and exhibit list) this document contains 4,910 words. Furthermore, this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using the 2016 version of Microsoft Word in 14 point Cambria font.

Date: January 8, 2018 /s/ Kevin J. Lynch

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Movant's List of Exhibits

Exhibit A	Petitioner's Opening Brief
Exhibit B	Declaration of Ann Bonnell
Exhibit C	Declaration of Hugh Kingery
Exhibit D	Respondent's Response Brief
Exhibit E	Intervenors' Response Brief
Exhibit F	Petitioner's Motion for Preliminary Injunction
Exhibit G	Declaration of Norm Lewis
Exhibit H	Declaration of Karl Brummert
Exhibit I	Declaration of Gene Reetz
Exhibit J	Declaration of Polly Reetz
Exhibit K	Order Affirming Agency Decision
Exhibit L	Order Denying Petitioner's Motion for Preliminary Injunction
Exhibit M	Final Judgment of the District Court
Exhibit N	Relevant Portions of the Administrative Record