IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS,	)	
	)	
Plaintiff,	)	Case No. 1:15-cv-00159-WJ-KBM
	)	
v.	)	
	)	
U.S. ARMY CORPS OF ENGINEERS and U.S. FISH AND WILDLIFE SERVICE,	)	
	)	
Federal Defendants.	)	
	)	

WILDEARTH GUARDIANS' REPLY BRIEF

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I. The Corps Failed to Consider a Reasonable Range of Alternatives.

A. The Court Should Determine Whether the Corps Should Have Considered a Middle Ground Alternative.

The U.S. Army Corps of Engineers ("Corps") should have considered a "Middle Ground Alternative," one comprised of a *combination* of non-structural and structural flood control measures. Instead, the Corps considered only a substantially similar set of structural alternatives.

WildEarth Guardians ("Guardians") raised the concept of a Middle Ground Alternative in its comments on the Supplemental Environmental Impact Statement ("SEIS"). USACE010430-31. This obligated the Corps to consider it. "Plaintiffs . . . need only raise an issue with sufficient clarity to allow the decision maker to understand and rule on the issue raised . . . ." *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1065 (9th Cir. 2010) (quotation omitted); *see Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 550 (1978) (National Environmental Policy Act ("NEPA") plaintiffs must "bring sufficient attention to an issue to stimulate the [agency's] consideration of it" during public comment).

Guardians presented the "Middle Ground Alternative" to the Corps even though Guardians did not use this term in its comments. Guardians' use of the term in its opening brief to describe "an alternative combining structural and non-structural flood control measures" was simply a shorthand reference to this concept rather than an alternative "created . . . for the purpose of this litigation," as the Corps asserts. Resp. Brf. 11. The

Corps' argument that Guardians did not use the term itself elevates form over substance. The Corps does not argue that it was unaware of Guardians' position that the agency had to analyze a combination alternative, or that Guardians failed to raise the issue with enough clarity for the Corps to understand it.

Therefore, the Court should determine whether the Corps violated NEPA's requirement to analyze all reasonable alternatives when it failed to consider the Middle Ground Alternative.

B. The Corps Should Have Considered the Middle Ground Alternative Because It Meets Project Purpose and Need.

The Corps should have considered the Middle Ground Alternative because it is a reasonable alternative. Op. Brf. 11-18. The Corps argues that its failure to analyze the alternative in detail did not violate NEPA because the agency considered something similar to it. Resp. Brf. 12. In the alternative, the Corps argues that it was not required to analyze the Middle Ground Alternative because it did not meet the San Acacia Levee Project ("Project") purpose. *Id*. Both arguments lack merit.

The Corps misguidedly cites to the SEIS's discussion of local levees and intermittent levee replacement to support its assertion that it evaluated the equivalent of the Middle Ground Alternative. Resp. Brf. 12 (citing USACE008582, 8590). But this discussion considered the viability of alternative structural measures as stand-alone solutions, not in combination with non-structural flood control measures, which are appropriate outside of populated areas. USACE008590; *see also* Op. Brf. 13. The Tenth Circuit found a piecemeal alternatives analysis such as the Corps' insufficient to comply

with NEPA. *Davis v. Mineta*, 302 F.3d 1104, 1121 (10th Cir. 2002).[1] Because a combination alternative is reasonable, the Corps was required to subject it to detailed analysis, even if the agency preferred an engineered levee. *See 40 Most Asked Questions Concerning CEQ's NEPA Regulations,* 46 Fed. Reg. 18,026 (March 16, 1981) (stating that when "determining the scope of alternatives . . . the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative.").

The Corps also argues that the Middle Ground Alternative does not meet the Project's purpose because "nonstructural methods would not effectively address gaps in protection left by limited levee construction." Resp. Brf. 12-13. This argument is not supported by any analysis, either in the SEIS or elsewhere in the record. *Id*. The SEIS did not consider an alternative that *combined* engineered levees near population centers such as Socorro with nonstructural measures outside of urban areas. An agency's decision under NEPA can be upheld, if at all, based on "only the agency's reasoning at the time of decisionmaking," not "post hoc rationalizations concocted by counsel." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009) (citation omitted).

C. The Engineered Levee Alternatives the Corps Considered Do Not Represent a Reasonable Range of Alternatives.

The Corps does not deny that all the alternatives it analyzed involved the construction of a levee. Its only defense of this inadequate range of alternatives is a

[1] The Corps' attempt to distinguish *Davis* on the ground that a combination alternative could meet the project purpose in *Davis* but could not meet the purpose here fails because the Corps never analyzed a combination alternative to determine whether such an alternative would meet the Project purpose. Resp. Brf. 13; Op. Brf. 16.

summary of its process for selecting alternatives and the SEIS's conclusions. Resp. Brf. 8-10. However, the Corps' *failure* to analyze an additional, reasonable alternative violated NEPA. The asserted adequacy or "superiority" of the levee alternatives does not cure this violation. *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (holding "[t]he existence of a viable but unexamined alternative renders an [EIS] inadequate."). The Corps' defense of the reasonableness of the levee alternatives are "irrelevant to the reasonableness of the omitted" alternative.[2] *Id*.

The record establishes that the Corps did not consider alternatives other than a levee during its screening process, but rather made conclusory statements about other alternatives. The Corps cites to a section in the SEIS entitled "Alternatives Eliminated from Further Consideration" as the basis for its decision to discard all other reasonable options. Resp. Brf. 9-10 (citing USACE008581 [Sec. 4.5])). However, this section merely summarizes each individual non-structural measure in isolation and summarily dismisses each as an "incomplete solution" not meeting the Project purpose and need. USACE008578, 8588-90; *see also* Op. Brf. 15-16. Although the introduction to Section 4.5 purports to have evaluated all of the alternatives "individually and collectively," there is no indication in the remainder of this section that the Corps analyzed any *combination* of alternatives that would meet the purpose and need. *See* USACE008582-92. "Stating

[2] The Corps' discussion of the selected alternative being the National Economic Development ("NED") alternative is irrelevant to the question of whether the Corps analyzed a reasonable range of alternatives. Resp. Brf. 8-9. Under the Water Resources Planning Act, the Corps is required to analyze in detail the NED alternative, and must select it unless there are overriding reasons for selecting a different alternative. USACE005544.

that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. and Loan Ins. Corp.*, 805 F.2d 1050, 1055, 1057 (D.C. Cir. 1986) (holding that a "conclusory recitation" failed to satisfy a statutory requirement that the agency "consider" a specified factor).

While NEPA's regulations require only that an agency "briefly discuss" the reasons for eliminating alternatives from further study, 40 C.F.R. § 1502.14, the agency's reasoning must still have record support. *See*, *e.g.*, *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1244-46 (10th Cir. 2011) (upholding an agency's elimination of alternatives where "the record is replete with evidence" supporting the agency's decision). Here, the Corps' references are comprised of nothing more than statements that each alternative, in isolation, will not meet the Project purpose. USACE008582-92. Such discussions do not comply with 40 C.F.R. § 1502.14, nor do they constitute consideration of a combination alternative, such as Guardians' proposed Middle Ground Alternative.

II. The Corps' Decision Not to Supplement the SEIS Was Arbitrary.

Even though the yellow-billed cuckoo was listed after the Corps completed the SEIS, the agency failed to supplement the SEIS with a discussion of Project impacts to the cuckoo. This is the crux of Guardians' NEPA supplementation claim. The cuckoo requires a 200-acre continuous breeding territory, referred to as a "habitat patch." D011351. The Project might reduce cuckoo habitat patches to less than 200 acres. Yet the Corps failed to consider this.

The Corps argues that it determined supplementing the SEIS was unnecessary "[b]ecause the cuckoo and the flycatcher use similar riparian habitat," so harm to cuckoos

would be the same as harm to flycatchers, and flycatcher mitigation would also mitigate cuckoo harm. Resp. Brf. 17. Although the flycatcher and the cuckoo require a similar type of habitat—riparian woodlands with dense thickets of trees—they differ in terms of the size of habitat patches necessary for breeding success. USACE008417 (cuckoo); D009535 (flycatcher). The flycatcher requires only a 50-acre habitat patch. *Id*.

The Corps' proposal to provide 50.4 acres of replacement habitat to mitigate Project impacts to the flycatcher therefore would not offset impacts to the cuckoo, despite the Corps' claim. USACE09081; Resp. Brf. 17. Thus, the Corps' decision not to supplement the SEIS was arbitrary because the record does not "provide[] a reasoned explanation" for the Corps' decision. *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1238 (10th Cir. 2002), *rev'd on other grounds*; *see also Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1178 (10th Cir. 1999).[3]

[3] Guardians' NEPA supplementation claim is not barred by the doctrine of primary jurisdiction because Guardians was not required to raise its supplementation claim with the Corps prior to litigation. Resp. Brf. 18. The cuckoo was listed after completion of the SEIS and Record of Decision. The record shows that the Project could have significant impacts on cuckoo habitat patches, and the Corps did not analyze these impacts in the SEIS. *See Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558-59 (9th Cir. 2000) (discussing need for supplementation triggered by newly-designated species). The Corps has not provided, and Guardians is unaware of, any cases where a court dismissed a NEPA supplementation claim on primary jurisdiction grounds.

III. The Corps Failed to Take a Hard Look at Project Impacts on Listed Species.

A. The Corps' Assumption That the Aggradation[4] Rate Will Be the Same With or Without the Project is Arbitrary.

Contrary to the Corps' assertion, the record does not support its conclusion that there would be "no significant difference" in aggradation or attendant species impacts with or without the Project. Resp. Brf. 21. The Corps relied on modeling that uses historical aggradation trends in the Project Area for the 30-year period spanning 1972 to 2002 to derive a "rate of aggradation." USACE009589-90; *see also* Resp. Brf. 21 (citing same). However, "[t]he Corps *assumed* the same aggradational rates for the with-project conditions," without ever considering the effect that construction of a levee would have on the future rate of aggradation in the Project Area. USACE009591 (emphasis added). The record provides no support or explanation for this assumption. Therefore the assumption and the Corps' conclusions about Project impacts based on it are arbitrary.[5] *See WildEarth Guardians v. BLM*, 870 F.3d 1222, 1235 (10th Cir. 2017) (holding that any assumption relied on by an agency to draw conclusions regarding project impacts must have record support and "analysis which rests on this [unsupported] assumption is arbitrary and capricious").

The Corps' failure to consider whether the Project would increase the aggradation

[4] "Aggradation" refers to the process whereby sediment drops out of suspension and causes the riverbed to rise, here causing a river channel perched 10-12 feet above the historic floodplain. USACE008518.

[5] The Corps' mention that the existing spoil banks will be maintained if the Project is not built does not provide a basis for assuming that with-and without-Project aggradation rates will be the same. Resp. Brf. 20, 22.

rate, and the concomitant impacts to listed species, is particularly egregious because the *U.S. Fish and Wildlife Service* ("Service") determined that the Project *would* exacerbate aggradation and "result in flycatcher habitat loss in the future." D006017; *see also* R024523; Op. Brf. 24.

The Corps vainly attempts to dismiss the Service's contradictory findings, but it erred by ignoring them. *See*, *e.g.*, 40 C.F.R §§ 1502.9(a)-(b) (requiring EIS to discuss and disclose "all major points of view on the environmental impacts" including "any reasonable opposing view"); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003) (stating agency "shall discuss at appropriate points . . . any responsible opposing views") (quoting 40 C.F.R § 1502.9(b)); *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) (recognizing that the "court may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.") (internal citations omitted).

NEPA explicitly requires the Corps to provide reasoned explanations for its analytical assumptions. An analytical assumption "unsupported by hard data does not provide 'information sufficient to provide a reasoned choice' between the preferred alternative and no action alternative" with respect to Project impacts on listed species. *WildEarth Guardians*, 870 F.3d at 1235. "NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public." *New Mexico ex rel. Richardson*, 565 F.3d at 707.

The Service's conflicting analysis of aggradation effects does not represent a

difference of opinion among experts, as the Corps argues. Resp. Brf. 23. Regardless, this Court does not have to "enter into [a] controversy of experts" to recognize that the Corps' aggradation analysis was arbitrary. *Manygoats v. Kleppe*, 558 F.2d 556, 560 (10th Cir. 1977). The Court merely has to examine "whether the challenged method had a rational basis and took into consideration the relevant factors." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 782 (10th Cir. 2006) (quotation omitted). "There must be a rational connection between the factual inputs, modeling assumptions, modeling results, and conclusions drawn from these results." *Sierra Club v. Costle*, 657 F.2d 298, 333 (D.C. Cir. 1981).

Here, the Corps' assumption that the aggradation rate will not increase as a result of the Project lacks a rational basis, rendering its evaluation of impacts to listed species arbitrary. USACE009591 (the Corps "assumed the same aggradational rates for the with-project conditions"). The Corps provided no explanation in its analysis or the SEIS for making this assumption. The Corps thus failed to "insure the professional integrity" of its aggradation analyses, as required under NEPA. 40 C.F.R. § 1502.24.

B. The Corps Failed to Take a Hard Look at Construction Impacts.

The Corps failed to take a hard look at species impacts from construction activities, because it erroneously relied on the Service's incomplete discussion of construction impacts in a 2013 Biological Opinion ("BO") that pre-dated the SEIS. Ironically, the BO itself critiqued the Corps for failing to analyze impacts to listed species from construction noise and riprap installation

The Corps did not fill these analytical gaps in the SEIS. Op. Brf. 27-28. The Corps

had to do more than incorporate the BO's analysis by reference. Although NEPA allows an agency preparing an EIS to incorporate by reference the studies of another agency, the Corps remains responsible for complying with NEPA's requirement that it "adequately consider[] and disclose[] the environmental impact of its actions." *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1208 (10th Cir. 2002). That the Corps made no attempt to address the deficiencies in its discussion of the Project's construction impacts renders meritless the Corps' argument on this issue.

IV. The Service's No Jeopardy Conclusions Were Arbitrary Because they Failed to Adequately Account for Harm to Listed Species Caused by Aggradation and Water Operations and Management.

A. The Service's Analysis Failed to Realistically Assess The Threat of Aggradation to Listed Species.

The Service admitted that it anticipates up to twelve feet of aggradation as a result of the Project, but it then arbitrarily "discounted" half of that aggradation when estimating future depth-to-groundwater and resultant habitat loss. *Compare* D006018 *with* D006019. Nothing in the record establishes that discounting the rate of aggradation was reasonable. The Service's decision to discount was classic arbitrary decisionmaking. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574-75 (10th Cir. 1994) (citation omitted).

By discounting expected aggradation, the Service concluded that over the next 50 years aggradation would cause an increase in depth-to-groundwater that would leave riparian vegetation from 9.0 to 17.6 feet from groundwater depending on their location in the Project Area. However, aggradation will actually leave that vegetation 9.8 to 23.2 feet

from groundwater. *See* D006019. This discrepancy is highly significant because the willows and cottonwoods essential to flycatchers and cuckoos die at ten and sixteen feet from groundwater, respectively. R024509; D005987. The un-discounted aggradation would cause willows to die throughout the Project Area and would cause cottonwoods to die downstream of River Mile 78. D006019. Upon discounting aggradation, the Service also arbitrarily abandoned its estimate of habitat that would be lost to aggradation (195-460 acres), as well as the Draft BO's requirement that the Corps create 200 acres of mitigation habitat. E002035. The Service was 95% certain that habitat lost to aggradation would be 195-460 acres. E002035.

The Service's reduced estimate of habitat loss—as little as 50.4 acres—has no basis in science or the record, and it appears to be the result of political pressure.[6] The Service adhered to its original estimate of habitat loss as late as early January 2013, after the Corps asserted in November 2012 that the Project will not cause *any* additional aggradation. The Service's primary biologist reiterated the Service's contrary position on January 22, 2013, explaining

> The … Service, including our regional management team, has made a determination of [the Project's responsibility for aggradation]. The U.S. Department of the Interior, Office of the Solicitor, has concurred with the Service's determination.

[6] On January 18, 2013, the Corps sent a letter to high-ranking Service officials, the Office of the Solicitor, Senators Tom Udall and Martin Heinrich, and Representative Steve Pearce challenging the Service's decision that Project aggradation would cause 195-460 acres of habitat loss. E001326-31; *see also* R016727-28 (similar December 7, 2012 letter from MRGCD targeting congressional representative and the Governor). Shortly afterward, the Service did an about-face on its position and issued the 2013 BO with an arbitrary 50.4-200 acre estimate of aggradation habitat loss. E001456.

E00121.[7]

The Service's final estimate of the range of habitat that would be lost to aggradation does not reflect the estimate *either* of the Corps *or* the Service. There is no evidence in the record that the Service ever determined that 50.4 acres is a reasonable estimate of habitat loss. This figure appeared out of thin air.

The Service, as the expert agency with respect to jeopardy determinations, must base its determinations on the best available science. 16 U.S.C. § 1536(a)(2). It did not, rendering its determinations arbitrary. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. Reclamation*, 426 F.3d 1082, 1091-95 (9th Cir. 2005) (jeopardy determination must be supported by scientific reasoning in the record); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (agency decisions influenced in whole or in part by congressional representatives are invalid); *W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173, 1176, 1187-89 (D. Idaho 2007) (political interference with an agency's determination that must be based on the best available science renders decision arbitrary).

[7] Contrary to Defendants' assertion that the Service "took a conservative approach in favor of listed species . . . by attributing aggradation impacts to the Project," Resp. Brf. 29, the Service's analysis of aggradation impacts in the Draft BO was the Service's best assessment of the environmental baseline and the effects of the action, endorsed by the Office of the Solicitor. E001321. Defendants also challenge Guardians' citations to the draft documents, Resp. Brf. 30-31, but this is a record review case and decisions have to be based on analysis in the record. *Olenhouse*, 42 F.3d at 1575. References to documents relating to the decisionmaking process are entirely proper to show the Service's conclusions in the BOs are unexplained and unsupported.

B. The Service Failed to Analyze the Serious Harm Caused by the Corps' and Reclamation's Water Operations and Management Activities.

The BOs arbitrarily avoided analysis of the extreme baseline harm being caused by the Corps' and Reclamation's water operations and management ("O&M") activities. Op. Brf. 34-36.[8] In fact, the 2013 BO explicitly said it avoided analysis of these harms because they will be included in a different consultation. D005979. However, the Corps has subsequently refused to be part of that consultation, meaning these harms have not been, and never will be, considered. R020138.

The Service provides a lengthy, irrelevant string cite to portions of the 2013 BO it claims shows it considered O&M activities. Resp. Brf. 34. However, these portions do not amount to an analysis of O&M activities. Instead, they generally only present basic factual material taken from the 2003 O&M BO. *See, e.g.,* D005906 (history of spoil bank); D005917 (discussing unsuitable minnow habitat types); D005921 (no citation to any referenced documents); D005923 (effects of prolonged drought on short-lived species).

Instead of meaningfully addressing its failure to include an analysis of O&M activities in the 2016 cuckoo BO, the Service makes the conclusory assertion that there was no deficiency to correct. Resp. Brf. 35. The record squarely contradicts the Service's

[8] Defendants claim that the Service did not find that the Corps' and Reclamation's O&M activities jeopardize the species, but a reasonable and prudent alternative ("RPA"), the outcome of the 2003 O&M BO, is only required when the proposed action will jeopardize the species. 16 U.S.C. § 1536(b)(3)(A). Now that this BO has expired without replacement, the Corps and Reclamation are proceeding unconstrained by the jeopardy-avoiding RPA. E046900 (expired February 28, 2013).

conclusory statement.[9] Op. Brf. 35. The Service thus arbitrarily failed to meaningfully analyze O&M in the BOs.

C. The Service Failed to Ensure Against Flycatcher and Cuckoo Jeopardy Because it Segmented its Analysis of Aggradation Impacts to the Species.

The Service improperly segmented its jeopardy analysis by agreeing to an arbitrary amount of Project-caused habitat loss from aggradation and then relying on inevitable reinitiation of consultation to cure that deficiency when habitat loss surpasses that amount, as the Service predicts it will. This approach to assessing the Project's impacts to listed species kicks the can down the road until Project construction is complete and it is too late to change the proposed action. Op Brf. 36-37; *see also Wild Fish Conservancy v. Salazar,* 628 F.3d 513, 521-25 (9th Cir. 2010); *Conner v. Burford,* 848 F.2d 1441, 1453-58 (9th Cir. 1988). As discussed above, aggradation-induced habitat loss seriously threatens flycatchers and cuckoos, and the Service's failure to adequately analyze this threat precludes it from complying with its duty to ensure against jeopardy. 16 U.S.C. § 1536(a)(2).

The Service's reliance on T&C 3.5 in the BO, requiring future monitoring by the Corps to "clarify" Project impacts, to rectify the Service's analysis of habitat loss is

[9] The Service also cites to other portions of the 2013 BO that purport to analyze O&M. Resp. Brf. 34. However, the majority of these citations do not discuss any aspects of O&M, and the others do not amount to an analysis of this vitally important issue. Furthermore, even if the cited sections did provide a complete analysis of the Middle Rio Grande Conservancy District's ("MRGCD") O&M activities, which they do not, the MRGCD's actions are only a small subset of the Corps' and Reclamation's O&M activities. *Compare* E046909-18 (Reclamation and Corps O&M activities) *with* Resp. Brf. 34-35 (random assortment of citations to the BO).

contrary to the Endangered Species Act ("ESA"). Resp. Brf. 37. The Service's arbitrary decision to discount Project-exacerbated aggradation and reinitiate consultation in the near future instead of accounting for total expected harm now results in piecemeal consideration of impacts to listed species. *Wild Fish*, 628 F.3d at 524 (recognizing piecemeal consideration of impacts violates ESA); *Conner*, 848 F.2d at 1457-58 (the ESA "does not permit the incremental-step approach" of consultation because "biological opinions must be coextensive with the agency action."); *American Rivers v. U.S. Army Corps of Eng'rs,* 271 F. Supp. 2d 230, 255 (D.D.C. 2003) (ESA "requires that the consulting agency scrutinize the *total scope* of agency action.") (citation omitted); *Conner*, 848 F.2d at 1453 ("the scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the *entire* agency action.") (citation omitted); *Intertribal Sinkyone Wilderness Council v. Nat'l Marine Fisheries Serv.*, 970 F. Supp. 2d 988, 1003–07 (N.D. Cal. 2013). Defendants attempt to excuse this failure by saying that the extent of harm is uncertain, but the Service must still use the *best available information* to prepare a comprehensive evaluation of the total harm caused to the species. *Wild Fish,* 628 F.3d at 525; 50 C.F.R. § 402.14(g)(8). The Service has not complied with this mandate here, and the duty to reinitiate consultation does not allow the Service to temporally limit consultation and unlawfully segment its analysis now. *Wild Fish*, 628 F.3d at 524 n.9, 525. Additionally, because the Service did not attribute any *take* to aggradation in its incidental take statement ("ITS") (Resp. Brf. 37 (citing D006028)), aggradation habitat loss exceeding 50.4 acres would not trigger reinitiation of consultation. 50 C.F.R. § 402.16(a); *Town of Superior v. U.S. Fish &*

Wildlife Serv., 913 F. Supp. 2d 1087, 1143 (D. Colo. 2012), *aff'd sub nom. Guardians v. The Service*, 784 F.3d 677 (10th Cir. 2015) (ITS provides reinitiation trigger). The Service's decision to segment its analysis fails to ensure against jeopardy and was arbitrary.

D. The Service's No Jeopardy Determinations Improperly Relied on the Uncertain Mitigation Measures Tied to Discounted Aggradation.

The mitigation measures the Service relied on for its no jeopardy determinations do not provide "a clear, definite commitment of resources for future improvements." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935-36 (9th Cir. 2008) (finding mitigation measures uncertain where not accompanied by "specific and binding plans" even where record showed agencies were "committed" to the mitigation). Specifically, term and condition ("T&C") 3.5 does not require specific measures and its implementation is inadequately ensured. *See* Op. Brf. 38-39.

For instance, the record does not establish that mitigation measures are funded. The Service only cites to evidence for funding of a study, not actual mitigation. Resp. Brf. 39 (citing USACE009682). Furthermore, no specific requirements or projects are provided, only a general commitment to provide "commensurate" mitigation. D006029. In addition, contrary to T&C 3.5, the Corps does not intend to start monitoring for harm from aggradation or to mitigate any that occurs until 2025, ten years after construction begins. D001577; D001583.

As a more general matter, mitigation beyond the 50.4 acres of Project footprint replacement habitat is uncertain because it is largely left to the Corps' discretion. T&C

3.5.5 provides *the Corps* with the responsibility for resolving aggradation uncertainty related to the Project through modeling, monitoring, and analysis and to "determine and develop commensurate mitigation for the duration of the project." D006029. The Corps does not deny that aggradation will occur in the future. However, the Corps' position is that all aggradation is part of the environmental baseline and that the Project is not responsible for any aggradation. *See, e.g.,* USACE008960; USACE003607. The Corps has not changed its position on this matter. Resp. Br. at 20-24 (arguing that the Corps' "no new aggradation" determination in the SEIS is valid). Therefore, the Service's decision to task the Corps with the responsibility of determining and implementing aggradation mitigation rendered that mitigation uncertain.

V. The Service Failed to Meaningfully Address Harm to Listed Species from Project Construction Activities.

A. The Service's Analysis of Likely Harm to the Endangered Minnow Caused by Construction Below San Acacia Diversion Dam Ignores the Vital Nature of This Area for the Species' Survival.

The Service's generic analysis of the Corps' construction activities below the San Acacia Diversion Dam ("SADD") failed to account for the fact that these activities could cause catastrophic, species-level harm if they occur when a majority of the minnow population is in this vital minnow refuge. While minnow densities below SADD are sometimes low, the percentage of the total minnow population located in this area sometimes exceeds that in all other minnow habitat combined. *See* Op. Brf. 40-41 (citing E020420-30 (4 minnows directly below SADD; only 3 more minnows at all other survey sites); E020391-400 (8 minnows directly below SADD; only 4 more minnows at all other

sites)).[10] In other words, this area sometimes supports the majority of the minnow population.

The Service has explained that its construction activities below SADD could harm minnows by causing harassment of individuals; water quality degradation (including increased turbidity, decreased oxygen content, increased pH, increased pollutants, and increased temperature); minnow entrapment, including possible direct physical harm; both temporary and permanent adverse modification of minnow critical habitat; and loss of riparian organic matter for food or substrate. D005907-10; D005999-6007. However, the Service's construction harm analysis focuses solely on generic minnow density. Because this area is a vital minnow refuge, focusing on average density alone when assessing construction harm fails to realistically assess this potentially grave threat to the

[10] Defendants challenge Guardians' reliance on "many" unnamed documents, claiming Guardians is using post-decisional information to challenge the 2013 BO. Resp. Brf. 41 n.16. However, the 2016 BO was a supplemental, not superseding, BO, and thus the record documents relating to the 2016 BO are also properly part of the record for the 2013 BO. *See, e.g.,* D001876-77 (2016 BO considering effect of information post-dating 2013 BO determinations on those determinations). Additionally, despite criticizing Guardians, Defendants rely on documents from the Corps' *NEPA decision administrative record* to support the Service's February 28, 2013 BO decision even though these records post-date the 2013 BO and are not part of the consultation record. Resp. Brf. 39 (citing USACE000002-03 (May 20, 2014 ROD); USACE009682 (appendix to October 2013 SEIS)).

minnow.[11] Defendants' continued exclusive focus on minnow density underscores their failure to grasp this vital point. Resp. Brf. 40-42.[12]

Defendants' statement that some of the minnows located below SADD are stocked is a baseless attempt to downplay the importance of those minnows. Resp. Brf. 41. Stocked fish represent virtually the entire population in many years. E045414; D005925; R008670. Without stocking, the species would likely have already gone extinct. D005925 ("Hatchery-propagated and released fish … most likely prevented extinction during the extremely low water years of 2002, 2003, and 2012…"); R024258. Therefore, Defendants' attempt to trivialize stocked fish has no legal or biological basis and does nothing to explain the Service's arbitrary jeopardy determination.

B. The Service Failed to Specifically Consider Likely Harm to the Endangered Minnow from Increased Pollutants Caused by the Project.

The Service did not specifically consider harm to minnows from pollutant releases caused by the Project. The record shows pollutants pose unique risks to minnows. D005970-72.

The Service's general discussion of Project-caused "water quality degradation" cited in its response brief was no substitute for its duty to specifically consider harm from pollutants. Because the Service's defense is not specific to pollutants released by the

[11] Defendants assert that the Service's proposed minnow refuge extends beyond where the river crossing and other construction will occur. Resp. Brf. 41. This is irrelevant because the above information indicates the area directly below SADD, where the construction will occur, is the core of that refuge. Op. Brf. 40-41; *see also* E020169.

[12] Defendants did not address Guardians' argument that the Service failed to consider that this construction could increase water temperatures, thus decreasing dissolved oxygen, in this vital refuge habitat.

Project, the agency has conceded this point. Additionally, the Service's citations to the record only relate to limited activities, not including spoil bank removal. The Service has thus conceded that it did not analyze whether increased pollutants due to spoil bank removal will harm the minnow in the Project Area.

C. The Service Failed to Adequately Consider and Minimize Harm to Flycatchers and Cuckoos Caused by Project-Related Traffic.

The BOs did not adequately consider and minimize the harm to flycatchers and cuckoos caused by Project-related traffic. The Service indicated that the traffic T&Cs it originally proposed would not be sufficient to protect the species and then subsequently further weakened those T&Cs instead of proposing new T&Cs that would minimize harm Op. Brf. 43-45; E000132; E002156-57; 16 U.S.C. § 1536(b)(4)(C)(ii) (Service must minimize impacts).

The Service proposed draft measures to reduce traffic harm to the cuckoo and flycatcher, but it did not believe that even these draft measures were adequate to minimize harm to the species. Op. Brf. 43-44 (citing E000132; D006013; D001904). Nevertheless, the Corps pressed the Service to further reduce the protections it deemed insufficient, but proposed anyway. Op. Brf. 44-45 (citing E002156-57). At first, the Service called the Corps' position a "deal breaker" and rejected the Corps' proposed alternative in full. But the Service subsequently adopted the Corps' proposed alternative verbatim. *Id.* (citing E002156-57; D006028; D001923). There is no basis in the record for the Service's flip-flop on this issue.

The Service argues that Guardians misinterpreted the record, and it provides its own interpretation of its prior statements. Resp. Brf. 43-44. However, the Service's interpretation does not square with the plain language in the record. The Court must not simply accept the agency's post hoc interpretation of the record in its response brief. *New Mexico ex rel. Richardson*, 565 F.3d at 704. The Court must "engage in a substantive review" of the record to determine if it includes "a reasoned basis" for the Service's change in course. *Olenhouse*, 42 F.3d at 1580. Here, the record shows that the Service considered and rejected as insufficient the Corps' proposed traffic mitigation measures, but then arbitrarily adopted them anyway.

VI. The Service Arbitrarily Assumed that Conservation Pool Habitat Can Indefinitely Neutralize Losses in the Project Area.

The Elephant Butte Reservoir conservation pool ("Conservation Pool")[13] is indisputably vital to the flycatcher and cuckoo populations in the MRG. Op. Brf. 46-47; R016562. The record indicates that habitat in the Conservation Pool will likely decline due to overmaturity of vegetation, prolonged flooding, and aggradation, reducing flycatcher and cuckoo numbers. Specifically, Reclamation stated that a population decline in the Conservation Pool "seem[s] imminent in the near future and emphasizes the need for additional suitable habitat elsewhere within the [MRG]." Op. Brf. 46-47 (quoting R016562); *see also* R006427 (Reclamation stating that "[f]rom 2009 to 2014

[13] This refers to the current Reservoir pool and riparian areas upstream that become inundated when Reservoir levels rise. The Conservation Pool includes the San Marcial Reach of the Middle Rio Grande ("MRG"). *Compare* R016530 (LF-17 is northern portion of San Marcial Reach) *with* R016545 (LF-17 is northern end of Conservation Pool).

[flycatcher] detections [in the San Marcial Reach] have decreased 26 percent and territories have dropped nearly 12 percent."); R016651 (Reclamation indicating more than 4,500 acres of suitable flycatcher habitat in the San Marcial Reach in 2012, most in Conservation Pool, "[h]owever, through the years, much of the habitat in the upper pool as well as that upstream of the reservoir has declined in quality. Adverse changes due to an incised river channel, prolonged flooding, and drought have all contributed to reduced habitat quality."). In addition, the Service's own data indicates that it expects a forty percent loss of suitable flycatcher and cuckoo habitat due to aggradation in the San Marcial Reach of the Conservation Pool. E047288; R023785 (San Marcial Reach is aggrading).[14]

Notwithstanding the record, the BOs arbitrarily assumed that current Conservation Pool population booms will continue indefinitely, downplaying Project-caused habitat loss in the remainder of the MRG. Op. Brf. 46-48.[15] Defendants insist the flycatcher and cuckoo populations will remain stable, but the portion of the record they cite does not validate their position. That portion instead merely states that the population "*should* persist and be a valuable source population for the surrounding areas into the foreseeable future." R016563 (emphasis added). The BOs rely heavily on this unsupported assumption for disregarding Project-caused habitat degradation in the MRG. *See, e.g.,*

[14] Defendants challenge Guardians' use of the maps from E0047278-79, but those maps are unnecessary to prove that Conservation Pool habitat will likely decline. Resp. Brf. 46 n.20.

[15] The Service's discussion of rangewide minnow impacts does not excuse the Service's failure to adequately consider local impacts. *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1035-37 (9th Cir. 2001).

D005955; D006022; D006025; D001877; D001921. The Service's no jeopardy determinations are therefore arbitrary.

VII. Vacatur of the Agency Decisions is the Appropriate Remedy.

Guardians is entitled to equitable relief if the Court finds that Defendants violated federal law. Resp. Brf. 48. "Vacatur is the normal remedy for an agency action that fails to comply with NEPA." *High Country Conserv. Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1263 (D. Colo. 2014). Under the Administrative Procedure Act ("APA") courts "shall…hold unlawful *and set aside* agency action" that is found to be arbitrary or capricious. 5 U.S.C. § 706(2)(A) (emphasis added). Here, vacatur is the only remedy that serves NEPA's fundamental purpose of requiring agencies to look *before* they leap, and the only one that avoids a "bureaucratic steam roller." *Davis*, 302 F.3d at 1115. NEPA regulations instruct that the NEPA process must "not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5. While courts retain discretion to depart from vacatur to craft an alternate remedy for violations, they do so only in unusual and limited circumstances. *See*, *e.g.*, *FCC v. NextWave Pers. Commc'ns*, 537 U.S. 293, 300 (2003) ("*[i]n all cases agency action must be set aside* if the action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.") (emphasis added, citation omitted); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (explaining that "[i]f the decision of the agency is not sustainable on the administrative record made, then the . . . decision *must be vacated* and the matter remanded") (citation omitted); *W. Oil & Gas v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980)

(fashioning alternative remedy where vacatur would thwart objective of the statute at issue).

The Corps argues that Guardians not entitled to equitable relief enjoining future Levee construction—even if the Court finds that the agencies violated federal law—because Guardians has not demonstrated that it meets the necessary elements for injunctive relief. Resp. Brf. 48. Should Guardians prevail on the merits, Guardians respectfully asks the Court to bifurcate the remedy phase of this case and allow for additional briefing, at which point, Guardians will satisfy the prerequisites for a permanent injunction, as articulated in *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). *See also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 795-96 (9th Cir. 2005).

CONCLUSION

For the foregoing reasons, and the reasons discussed in Guardians' Opening Brief, Guardians respectfully requests that this Court (1) declare that the Corps' approval of the Levee Project violated NEPA, and that the Service's 2013 and 2016 BOs violated the ESA and APA; (2) remand the Levee Project authorization to the Corps for compliance with NEPA; (3) remand the 2013 and 2016 BOs to the Service for compliance with the ESA and APA; and (4) enjoin the Corps from proceeding with any levee construction beyond the two phases currently underway to protect the town of Socorro and from depositing any material into the Tiffany Basin until it has complied with NEPA and the Service has issued new, valid biological opinions for the Levee Project.

Respectfully submitted on this 22nd day of January 2018.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief and attached exhibits are being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record, this 22nd day of January, 2018.

/s/ Stuart Wilcox_____

CERTIFICATE OF WORD LIMIT COMPLIANCE

Pursuant to Rule 32(a)(7)(B)(1) of the Federal Rules of Appellate Procedure, I hereby certify that the body of this Reply Brief contains 6,039 words. I relied on my word processing program, Microsoft Word, to obtain this word count.

/s/ Stuart Wilcox