No. 21-1155
***ORAL ARGUMENT REQUESTED***

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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SAVE THE COLORADO, *et al*.,

*Petitioners-Appellants*,

v.

LIEUTENANT GENERAL SCOTT A. SPELLMON,
Chief, U.S. Army Corps of Engineers, *et al.,*

*Respondents-Appellees*,

and

CITY AND COUNTY OF DENVER, acting by and through its Board of Water Commissioners,

*Intervenor-Appellee.*

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ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO IN CASE 1:18-cv-3258 (HON. CHRISTINE M. ARGUELLO)

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# APPELLANTS' OPENING BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellants Save The Colorado, The Environmental Group, WildEarth Guardians, Living Rivers, Waterkeeper Alliance, and Sierra Club state that they are nongovernmental public interest organizations. None of them issues stock of any kind, nor has parent or subsidiary corporations.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**FERC Orders**



**Statutes**

**Regulations**

**Federal Register Notices**

## STATEMENT OF RELATED APPEALS

Pursuant to Tenth Circuit Rule 28.2(C)(3), Petitioners represent that there are no pending or prior related appeals.

# GLOSSARY

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|---|---|
| APA | Administrative Procedure Act |
| CWA | Clean Water Act |
| CZMA | Coastal Zone Management Act |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| EPA | Environmental Protection Agency |
| ESA | Endangered Species Act |
| FERC | Federal Energy Regulatory Commission |
| FPA | Federal Power Act |
| FWS | U.S. Fish and Wildlife Service |
| NEPA | National Environmental Policy Act |
| NGA | Natural Gas Act |
| ROD | Record of Decision |
| STC | Save The Colorado |

## STATEMENT OF JURISDICTION

Petitioners-Appellants Save The Colorado, The Environmental Group, WildEarth Guardians, Living Rivers, Waterkeeper Alliance, and Sierra Club ("Petitioners") contend that the district court had jurisdiction over this action against the U.S. Army Corps of Engineers ("the Corps") and the U.S. Fish and Wildlife Service ("FWS") pursuant to 28 U.S.C. § 1331. On March 31, 2021, that court granted Federal Respondents' and Intervenor's motions to dismiss, and entered judgment against Petitioners. *See* Petitioners' Appendix ("Pet.App.") at 137-46. Petitioners filed a notice of appeal on April 26, 2021. *See* Pet.App.147-48. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.[1]

Respondents do not assert that Petitioners lack Article III standing. Nonetheless, Petitioners' detailed standing allegations establish injury-in-fact, causation, and redressability with respect to the agency actions challenged here. *See* Pet.App.74-81.

## STATEMENT OF ISSUES

The sole issue raised in this appeal is: Whether the Federal Power Act ("FPA")—which requires direct review in federal courts of appeal of "orders"

[1] Pursuant to Fed. R. App. P. 28(d), Petitioners refer to the parties using the designations adopted by the district court—"Petitioners" for Appellants, "Federal Respondents" for Federal Appellees, and "Intervenor" for Denver Water.

issued by the Federal Energy Regulatory Commission ("FERC"), 16 U.S.C. § 825*l*(b)—displaces the default route for judicial review in district courts of other agencies' legally distinct actions triggered by different statutes, such as the Corps' issuance or denial of a permit under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344?

## STATEMENT OF THE CASE

This case concerns the proposed expansion of Gross Reservoir and Dam in Boulder County; if constructed, it will be the tallest dam in Colorado. The project will divert a significant amount of water from the Colorado River, which already fails to supply adequate water for the forty million people in seven States and Mexico who rely on it for drinking water, agriculture, grazing, and other uses.

This appeal raises an important question of first impression in this Circuit, and threatens a split with the Ninth Circuit on this issue. Ordinarily, challenges to the Corps' compliance with Section 404 of the CWA—and related actions necessary to facilitate the Corps' legal compliance in issuing a CWA permit—must be filed in federal district court. District courts have general federal question jurisdiction, *see* 28 U.S.C. § 1331, and Congress has not in the CWA or elsewhere authorized direct review in appellate courts of Section 404 permitting challenges.

Because appellate courts lack direct review authorization from Congress, for decades district courts have exercised jurisdiction over all challenges to Section 404 permits and related legal compliance, even when those permits authorize activities that might require separate regulatory approval from FERC. Likewise, FERC has long concluded, including in its license amendment proceeding for this project, that the FPA has no bearing on Section 404 matters, which fall within the Corps' exclusive authority. For this same reason, FERC does not incorporate the terms of Section 404 permits as enforceable components of FERC's licenses.

However, the district court dismissed Petitioners' challenge to the Corps' Section 404 permit for lack of jurisdiction. This is the first time in the five-decade history of the CWA that a court has extended the FPA's direct review provision to encompass a Section 404 permit issued by the Corps. Despite the plain text of the FPA's direct review provision applying to "order[s] issued by [FERC]," 16 U.S.C. § 825*l*(b), the court found that this provision required Petitioners' challenge to the Corps' CWA permit (and actions that facilitated that permit) to be exhausted twice—first as part of FERC's proceeding and then again on rehearing of FERC's order—before being pursued directly in this Court.

The district court's holding ignored the FPA's plain language, precedent construing it, and FERC's interpretation of it. The court also disregarded how its

ruling would fundamentally alter the scope of FERC proceedings by requiring FERC to resolve disputes about highly technical CWA permitting decisions, despite the fact that FERC concededly lacks relevant authority or competence. The ruling also fails to meaningfully address critical facts such as: that the Corps' Section 404 findings have independent utility by making legal determinations regarding the applicant's ability to proceed with its preferred alternative under the CWA; that the CWA (not the FPA or FERC's licensing process) obligated the Corps to act in response to Denver Water's application for a Section 404 permit; that the terms of the Corps' permit are not enforceable components of FERC's license; and Petitioners attack Denver Water's ability to exercise rights granted by the Corps' permit (rather than rights granted by FERC's license).

The Court should reverse this unprecedented ruling. It lacks legal support, subverts the strong presumption in favor of judicial review, and chills public interest litigation by erecting roadblocks to review of agency actions that have nothing to do with FERC's legal compliance in issuing a license under the FPA.

## STATEMENT OF FACTS

Petitioners' Supplemental Petition for Review contains detailed background information. *See* Pet.App.81-126. Petitioners provide an overview tailored to the question raised on appeal.

# I. STATUTORY AND REGULATORY FRAMEWORK

## A. The Clean Water Act

"Congress enacted the [CWA] with the comprehensive objective of 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.'" *United States v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir. 2006) (quoting 33 U.S.C. § 1251(a)). To that end, the CWA prohibits the discharge of dredged or fill material into United States waters unless authorized by a Section 404 permit. *See* 33 U.S.C. §§ 1311(a), 1344.

The Corps has adopted regulations, called the "public interest" factors, to implement its Section 404 authority. 33 C.F.R. §§ 320.1-320.4. "Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of . . . [t]he benefits which reasonably may be expected to accrue . . . balanced against [an action's] reasonably foreseeable detriments." *Id.* § 320.4(a)(1). "The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process." *Id.*

The Environmental Protection Agency ("EPA") has also promulgated regulations, called the "404(b)(1) Guidelines," 40 C.F.R. Part 230, which apply to all Section 404 permits. 33 U.S.C. § 1344(b)(1). Those regulations create a

presumption that, where an activity "does not require . . . siting within" waters protected by the CWA "to fulfill its basic purpose," and thus "is not 'water dependent,'" practicable alternatives that do not require any discharge "are presumed to be available, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3). These regulations also prohibit the Corps from granting a permit if there is "a practicable alternative" that would have "less adverse impact." 40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i). Practicable alternatives are those that are "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2).

The Corps reviews all proposed permits under the Corps' public interest factors and EPA's 404(b)(1) Guidelines. 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 320.2(f). Before granting or denying a Section 404 permit, the Corps must analyze and make findings regarding several highly technical factors including impacts on physical, chemical, and biological characteristics of the aquatic ecosystem. 40 C.F.R. §§ 230.20-230.54. A permit must be denied if it is contrary to the public interest or does not comport with the Section 404(b)(1) Guidelines, including because a proposal is not the least damaging practicable alternative. *Id.* §§ 230.10, 230.12; 33 C.F.R. §§ 320.4, 323.6; *see also Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1186-90 (10th Cir. 2002) (noting that the test is whether

an alternative with less impact is "impracticable" and "the burden is on the [applicant], with independent verification by the [Corps], to provide detailed, clear and convincing information *proving* impracticability").

### B. The National Environmental Policy Act

Congress enacted the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, to "encourage productive and enjoyable harmony between man and his environment" and to promote government efforts "that will prevent or eliminate damage to the environment." *Id.* § 4321. To accomplish its underlying goals, NEPA requires federal agencies to prepare a "detailed statement"—i.e., an Environmental Impact Statement ("EIS")—for all "major federal actions significantly affecting the quality of the human environment." *Id.* § 4332(c). An EIS must describe (1) "the environmental impact of the proposed action," (2) "the adverse environmental effects which cannot be avoided," and (3) "alternatives to the proposed action." *Id.* § 4332(C)(i)-(iii).

Although NEPA requires an analysis of feasible alternatives, "NEPA does not require the selection of the least damaging practicable alternative." *Utahns*, 305 F.3d at 1186. Instead, "NEPA only requires that [a]gencies '[r]igorously explore and objectively evaluate all reasonable alternatives,'" whereas the "CWA prevents

the [Corps] from issuing a § 404(b) permit if there is a less damaging practicable alternative." *Id.* at 1186-87 (quoting 40 C.F.R. § 1502.14(a)).

### C. The Endangered Species Act

Under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, each agency must "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species." *Id.* § 1536(a)(2). To satisfy this obligation, an "action agency" (here, the Corps) must consult with the relevant wildlife agency (here, FWS) to determine the likely effects of its proposed action. *Id*. Formal consultation culminates with FWS issuing a biological opinion as to whether the proposed action is likely to jeopardize the survival or recovery of listed species. 50 C.F.R. §§ 402.13(c), 402.14(h). If FWS finds that a non-jeopardizing action is likely to result in "take," it issues an incidental take statement and imposes binding "terms and conditions . . . that must be complied with by the [action] agency or applicant, or both" to minimize the impact of incidental take that will result from the proposed action. 16 U.S.C. § 1536(b)(4)(i), (ii), (iv); *id*. § 1532(19) (defining "take"); *see also Bennett v. Spear*, 520 U.S. 154, 169 (1997) (explaining a biological opinion's "powerful coercive effect on the action agency").

### D. The Federal Power Act and the Natural Gas Act

The FPA authorizes FERC to issue and amend licenses for the construction, operation, and maintenance of dams, reservoirs, and related projects. *See* 16 U.S.C. § 797(e). Congress required that FERC licenses must be challenged in the D.C. Circuit or the federal court of appeals where the licensee is located, *see id.* § 825*l*(b), but only after a party intervenes in FERC's licensing proceeding, exhausts all objections to FERC, and again raises such issues to FERC on rehearing, *see id.* § 825*l*(a). However, Congress expressly limited the FPA's direct review provision to FERC orders. *Id.* § 825*l*(b) ("Any party to a proceeding under this chapter aggrieved by *an order issued by [FERC]* in such proceeding may obtain *a review of such order*" in the relevant court of appeals (emphases added)).

For decades, the FPA's direct review provision mirrored another statute—the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717z—which grants FERC the authority to regulate interstate natural gas pipelines by issuing certificates of public convenience and necessity after conducting proceedings similar to those under the FPA. *See, e.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (noting that "the relevant provisions of the two statutes are in all material respects substantially identical," and "citing interchangeably decisions interpreting the pertinent sections of the two statutes" (quotation and citation omitted)).

However, the similarity of these provisions diverged in 2005. In the Energy Policy Act of 2005, Congress amended the NGA's direct review provision, but left the FPA's direct review provision undisturbed, while making *other* amendments to the FPA. *See* Pub. L. 109-58, 119 Stat. 689, 689-90 (expanding the scope of NGA's direct review provision); *see also id.*, 119 Stat. at 674 (amending Section 4(e) of the FPA).[2] Congress significantly expanded the NGA—but not the FPA—to vest "exclusive jurisdiction" in the relevant court of appeals not only for "order[s] issued by [FERC]" under the NGA, 15 U.S.C. § 717r(b), but also for "order[s] or action[s] of a Federal agency (other than [FERC]) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law." *Id.* § 717r(d)(1). Congress also mandated in its NGA amendments that FERC "shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with [NEPA]," *id.* § 717n(b)(1)—a directive that Congress did not impose in the FPA.[3]

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[2] Available at: https://www.congress.gov/109/plaws/publ58/PLAW-109publ58.pdf

[3] In contrast to the FPA, Congress amended the NGA in order to streamline the multi-agency permitting process for natural gas pipelines. *See, e.g.*, *Islander East Pipeline Co. v., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (discussing the legislative history of the NGA's amendment).

Accordingly, since 2005, challenges to non-FERC actions (such as Section 404 permits) associated with projects requiring FERC approval have diverged. In the FPA context, lawsuits against non-FERC actions must, by default, be pursued in district court, whereas such challenges in the NGA context must, by congressional command, be pursued in the relevant court of appeals.[4]

**E. The Co-Existence of the CWA and the FPA (and the NGA)**

Since Congress enacted the CWA in 1972, hundreds of projects have required FERC approval and a CWA permit. Despite this frequent combination, FERC has never required Section 404 issues to be raised in its proceedings under the FPA (or the NGA), nor has a single court held that CWA permits issued by the Corps are "order[s] issued by [FERC]" covered by the FPA's direct review provision. 16 U.S.C. § 825*l*. Instead, for several reasons, FERC has regularly *refused* to address Section 404 matters in its proceedings, and district courts have uniformly resolved Section 404 challenges in such circumstances.

First, FERC has repeatedly stated that Section 404 involves highly technical matters within the Corps' exclusive jurisdiction, and that FERC lacks authority to

[4] Congress did not amend the NGA's exhaustion provision; thus, challenges to non-FERC actions in the NGA context need not be raised with FERC before seeking direct review. *See infra* at 55-56.

adjudicate the validity of Section 404 permits. *See, e.g.*, *Cogeneration, Inc.*, 77 FERC ¶ 61,185, 61,724 (1996) ("To the extent that parties believe that the Corps' permit should have required . . . other [terms and conditions], they should have raised those matters with the Corps" because FERC "ha[s] no authority either to amend the Corps' permit or to determine whether the terms of that permit have been met"; "[t]hose matters lie solely with the Corps."); *Millennium Pipeline Co., LLC*, 161 FERC ¶ 61,186 (2017), 2017 WL 5513717, at *7 (explaining that "the Corps has the exclusive authority to implement" "section 404 of the CWA").[5]

Second, because the FPA does not require an applicant (or FERC) to obtain a Section 404 permit, and such permits are not incorporated as enforceable terms or conditions of FERC licenses, the Corps' issuance of a Section 404 permit is not a legal prerequisite to FERC's issuance of a license under the FPA. *See, e.g.*, *Pub. Util. Dist. No. 1 of Snohomish Cty.*, 151 FERC ¶ 62,204, 64,560 (2015) (concluding that "[t]he issuance of a permit under Section 404 is within the purview of the [Corps], not [FERC]"; "issuance of a permit under section 404 is not a prerequisite to receiving a [FERC] license"; and, on this basis, FERC could

[5] In citing FERC orders, Petitioners cite to the FERC reporter. Where the FERC reporter lacks internal pagination, Petitioners also supply the Westlaw citation.

avoid in its proceeding any "discussion on section 404 compliance"); *Clean River Power MR-7, LLC*, 153 FERC ¶ 62,260 (2015), 2015 WL 9581364, at *15 (same).

Third, because Section 404 permits are not legal prerequisites to FERC licenses, FERC often issues licenses before an applicant seeks—let alone obtains—a Section 404 permit. *See, e.g.*, *BOST4 Hydroelectric LLC*, 158 FERC ¶ 62,113 (2017), 2017 WL 663192, at *13 (issuing license and noting that the applicant "is responsible for obtaining all necessary permits, including any section 404 permit from the Corps," and refusing to consider any CWA matters "[b]ecause compliance with a section 404 of the CWA permit is under the Corps' purview").

Fourth, even when FERC conditions project construction on an applicant first obtaining a Section 404 permit, FERC does not judge the validity of such permit but merely requires documentation that the applicant has obtained it. *See Ruby Pipeline, LLC*, 133 FERC ¶ 61,015, 61,055-56 (2010) (noting the applicant's "independent obligation" to obtain a Section 404 permit and to "verif[y] that the [] Corps has issued a section 404 [permit]"; and that "[t]o the extent the parties challenge the [] Corps' authority to issue a section 404 . . . permit or the process of obtaining the permit, the parties must seek redress with the [] Corps"); *Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,045, 61,299 (2020) (same).

Hence, FERC does not ensure compliance with Section 404, but instead has "limited" "responsibilities related to the CWA" merely "to confirm that the developer ha[s] secured the necessary permits under the CWA" before construction. *Duncan's Point Lot Owners Ass'n v. FERC*, 522 F.3d 371, 378 (D.C. Cir. 2008); *see also* Br. of Resp. FERC at 41, *Duncan's Point Lot Owners Ass'n v. FERC*, 522 F.3d 371 (D.C. Cir. 2008) (No. 05-1421), 2007 WL 4119148, at *41 (noting FERC's view that "section 404 allegations concerning wetland permits were beyond the agency's jurisdiction," and that the Corps is instead responsible for administering Section 404).[6]

Accordingly, because FERC does not adjudicate (let alone enforce) CWA compliance, district courts—rather than appellate courts—have invariably resolved challenges to the Corps' legal compliance in granting or denying Section 404 permits. For example, in a seminal case, the applicant twice challenged the Corps'

[6] In similar contexts, FERC has determined "as a matter of law" that FERC's "role [in its proceedings] [i]s not to judge the validity of another agency's practice or decisionmaking." Br. of Resp. FERC at 12, *High Country Res. v. FERC*, 255 F.3d 741 (9th Cir. 2001) (No. 99-70747), 1999 WL 33626054, at *13; *see also High Country Res. Glacier Energy Co.*, 87 FERC ¶ 61,123, 61,492 (1999). There, the Ninth Circuit accepted FERC's position that it lacks authority under the FPA to resolve the validity of another agency's decision, holding that any "challenge to the 1998 determination should have been raised with the [appropriate agency], rather than FERC, and [the plaintiff] offers no reason why it did not or could not do so." *High Country Res. v. FERC*, 255 F.3d at 748.

denial of a Section 404 permit in district court. *See Monongahela Power Co. v. Alexander*, 507 F. Supp. 385 (D.D.C. 1980), *rev'd sub nom. Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir. 1987); *Monongahela Power Co. v. Marsh*, No. 78-cv-1712, 1988 WL 84262 (D.D.C. July 25, 1988). There, the D.C. Circuit held that FERC's "exclusive jurisdiction" over hydropower projects "simply denote[s] that it was to be the highest unit in a vertical line with respect to decisions in the areas specified, including licensure; it had nothing to do with a relationship of FERC to other federal bodies on a horizontal line," and thus does not "preclude the [Corps] from exerting [its] powers over the Nation's navigable waters" under Section 404. *See* 809 F.2d at 48. The court also held that FERC does "not subject its license applicants to a review under substantive standards comparable to those established pursuant to Section 404(b)(1)" because "[FERC's] unchanneled, precatory invitations for information [are not] equivalent to the rigorous study demanded of the Corps." *Id.* at 51-52.

Likewise, other district courts have resolved challenges to the Corps' Section 404 permitting decisions where a FERC license is also required. *See, e.g.*, *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs*, No. C10-1108-JCC, 2011 WL 1215605 (W.D. Wash. Mar. 30, 2011) (finding the Corps' Section 404 determinations lawful), *aff'd*, 683 F.3d 1155, 1159-60 (9th Cir. 2012) (affirming

and holding that the challenge was not "an improper collateral attack against the FERC license" because "the remedy would be an injunction against the Corps"); *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997) (upholding FERC license and noting that a district court had twice resolved challenges to a Section 404 permit for the project); *Scenic Hudson Pres. Conf. v. Calloway*, 370 F. Supp. 162, 168-72 (S.D.N.Y 1973) (rejecting FPA preemption arguments and requiring applicant to obtain a Section 404 permit); *aff'd*, 499 F.2d 127 (2d Cir. 1974).

## II. RELEVANT FACTUAL BACKGROUND

Petitioners are conservation organizations with missions dedicated to protecting the quantity and quality of water in the Colorado River, and the wildlife and natural resources that depend upon a healthy Colorado River ecosystem.

Before turning to the facts that are essential to this appeal, Petitioners identify several key dates for the Court:

- Sept. 17, 2003: Denver Water applied to the Corps for a Section 404 permit;
- Nov. 25, 2016: Denver Water applied to FERC for an amended license;
- Apr. 2, 2017: FERC's intervention window closed;
- July 6, 2017: The Corps issued its Record of Decision ("ROD");
- Sept. 8, 2017: The Corps granted Denver Water's Section 404 permit;

- Dec. 19, 2018: Petitioners filed this lawsuit against the Corps and FWS;
- July 16, 2020: FERC issued Denver Water's amended license;
- Aug. 17, 2020: Respondents filed motions to dismiss, alerting the district court to potential jurisdictional concerns for the first time.

### A. The Project, the Corps' Primacy, and the Section 404 Permit

Intervenor Denver Water seeks to implement the Moffat Collection System Project to raise Gross Dam, significantly expand Gross Reservoir, and funnel additional water from the Colorado River underneath the Continental Divide into the reservoir, in order to address a perceived imbalance between Denver Water's North and South Systems. The Corps' permit authorizes a significant enlargement of Gross Reservoir and substantial new water diversions from the Colorado River into this enlarged reservoir; FERC's involvement is limited to amending an existing license that for decades has allowed Denver Water to generate power for its own use from hydroelectric facilities at Gross Reservoir. Thus, the project footprint analyzed by the Corps is much larger than that considered by FERC.

In 2003, Denver Water applied for a CWA Section 404 permit from the Corps because whatever project Denver Water developed would implicate jurisdictional waters of the United States. *See* 68 Fed. Reg. 54,432 (Sept. 17, 2003). Over the next fourteen years, the Corps conducted its Section 404 analysis,

which required the Corps to, *inter alia*, determine the "basic project purpose" and the "overall project purpose"; independently verify the need for the permit (i.e., confirm the accuracy of the applicant's stated water demand projections); evaluate impacts to the aquatic ecosystem; analyze the practicability of less damaging alternatives; and ultimately grant or deny the permit. At every stage, Petitioners submitted comments, data, and reports from independent experts calling into question important technical aspects of the Corps' analysis, including its verification of the applicant's water demand projections, the Corps' arbitrary dismissal of alternatives as impracticable, and the Corps' skewing of costs in its practicability analysis by excluding mitigation costs from the baseline cost of the applicant's preferred project against which alternatives were compared. During this process, the Corps made clear that "[o]btaining approvals from FERC is a separate regulatory process from the Corps' Section 404 review." Pet.App.156.

Denver Water did not apply for a FERC license amendment until 2016. *See City & Cty. of Denver*, 172 FERC ¶ 61,063, 61,609 (2020). This was because the Corps' Section 404 process evaluated more than 300 water supply sources and infrastructure components that were combined into 34 distinct alternatives, only a fraction of which included an expanded Gross Reservoir that, if found by the Corps to be the least damaging practicable alternative, would require FERC to consider

amending Denver Water's FPA license. *See* Pet.App.155. Hence, whereas it was mandatory for the Corps to grant or deny a Section 404 permit in response to Denver Water's application, FERC's involvement was contingent on the Corps' threshold CWA findings concerning the need for the project, the practicability of alternatives, and the least damaging practicable alternative.

Consistent with the Corps' primary (and potentially exclusive) role in conferring federal authorization for the project, the Corps at all times served as the lead agency for purposes of NEPA compliance. In contrast, FERC served as a cooperating agency with regard to the hydroelectric aspects of the project under FERC jurisdiction in the event the Corps determined that an expanded Gross Reservoir is the least damaging practicable alternative. *See City & Cty. of Denver*, 172 FERC ¶ 61,063, at 61,610 (describing the NEPA process); *see also* 40 C.F.R. § 1501.7(c) (describing the factors for designating a lead agency). Likewise, under the ESA, the Corps—not FERC—consulted with FWS in connection with several listed species, which resulted in FWS issuing three biological opinions to the Corps between 2013 and 2016. Those biological opinions imposed mandatory terms and conditions on the Corps (but not FERC). *See City & Cty. of Denver*, 172 FERC ¶ 61,063, at 61,611-12 (describing ESA consultation between the Corps and FWS).

The Corps issued its ROD on July 6, 2017, finalizing its Section 404 process and selecting Denver Water's preferred option as the least environmentally damaging alternative. *See id.* at 61,610. The Corps issued Denver Water a Section 404 permit on September 8, 2017. *Id.* Neither the Corps' ROD nor its Section 404 permit notified aggrieved parties of any appeal rights or identified any statute or regulation requiring the exhaustion of administrative remedies prior to litigation.

### B. FERC's Proceeding and Its Determination that the FPA Has No Bearing on Petitioners' Ability to Sue the Corps

On February 1, 2017, while the Corps' Section 404 permitting decision was still pending, FERC commenced Denver Water's license amendment proceeding under the FPA, requiring the submission of all comments and motions to intervene by April 2, 2017. *See* 82 Fed. Reg. 9,566 (Feb. 7, 2017).[7]

Because Petitioners' concerns with the project pertained exclusively to still-pending decisions and analyses under the Corps' jurisdiction—rather than the hydroelectric component of the project under FERC's jurisdiction—Petitioners did not immediately move to intervene in FERC's proceeding. Rather, Petitioners

[7] The Corps stated that FERC's license amendment process would post-date the Corps' CWA permitting decision. *See* Pet.App.154 ("FERC will review a license amendment application submitted by Denver Water to the FERC *following the Corps' permit decision*." (emphasis added)). But FERC inexplicably commenced that process before the Corps acted on Denver Water's permit application.

awaited the outcome of the ongoing Section 404 process, remaining optimistic that the Corps would deny the permit as Petitioners and their independent experts had urged. Once the Corps issued its ROD and Section 404 permit—several months after the deadline for intervention in FERC's proceeding—Petitioners began preparing their legal challenge to the Corps' permit, ROD, and Final EIS, as well as FWS's biological opinion that facilitated the Corps' Section 404 permit.

While Petitioners were preparing this lawsuit, FERC unexpectedly issued a "supplemental" Environmental Assessment ("EA"), which suggested that FERC might reinforce portions of the Corps' legally deficient EIS that Petitioners were preparing to litigate in district court. Out of an abundance of caution, Petitioner Save The Colorado ("STC") filed an out-of-time motion to intervene in FERC's proceeding. *See* Pet.App.214-20. Noting that it intended to challenge the Corps' ROD and Section 404 permit—rather than FERC's license—STC explained its concern that the Corps may attempt to rely on FERC's supplemental EA to comply with the Corps' own legal obligations, even though FERC's EA post-dated the Corps' final permit decision. *See* Pet.App.218. FERC denied STC's intervention in a brief notice. *See* Pet.App.221-22.

STC timely filed a rehearing application, once again explaining its concern that "the Corps will attempt to rely on [FERC's] [s]upplemental EA to defend the

Corps' flawed Final EIS" in court. Pet.App.231. STC also explained that, to the extent the Corps might rely on FERC's supplemental EA in litigation, the "[l]ack of intervenor status [in FERC's proceeding] thus also potentially compromises [STC's] ability to challenge the Corps' Final EIS." Pet.App.231-32.

On November 15, 2018, FERC denied STC's rehearing application, based on two key findings. *City & Cty. of Denver*, 165 FERC ¶ 61,120 (2018). First, FERC explained that rather than fixing the Corps' analysis in the EIS, the supplemental EA only "addressed matters relevant to *the proposal before [FERC]* that were not addressed in the EIS." *Id.* at 61,484 n.17 (emphasis added). Second, FERC assured STC that the denial of intervention would not affect STC's ability to challenge the Corps' EIS. FERC unequivocally concluded that "*[t]his proceeding in no way shields the Corps from judicial review*: the record does not reflect whether [STC] sought judicial review of the Corps' actions, during which it could have raised any deficiencies it saw in the EIS, but *nothing in our proceeding prevented it from doing so*." *Id.* at 61,484 n.26 (emphases added).

Relying on FERC's determination that STC need not participate in FERC's proceeding to obtain judicial review of the Corps' actions (a determination which is supported by robust case law), STC did not challenge FERC's denial of

intervention in this Court. Instead, Petitioners promptly filed suit in district court against the Corps and FWS on December 19, 2018.

### C. This Challenge to the Corps' Section 404 Permit

The original Petition for Review challenged actions and analyses by the Corps under the CWA and NEPA pertaining to matters exclusively within the Corps' jurisdiction, as well as an ESA consultation triggered by the Corps' actions.

Under the CWA, Petitioners challenged the Section 404 permit, ROD, and the Corps' underlying analyses of the project's purpose and need, the range of alternatives, the practicability of alternatives, and the baseline costs of Denver Water's preferred project. *See* Pet.App.63. Under NEPA, Petitioners challenged certain aspects of the EIS that are uniquely within the Corps' authority, such as the Corps' validation of Denver Water's water demand projections. *See* Pet.App.59-63. Under the ESA, Petitioners challenged actions by the Corps and FWS based on a consultation between those agencies, which culminated in a June 17, 2016 biological opinion imposing terms and conditions on the Corps. *See* Pet.App.64-66. Because FERC neither took part in the specific analyses challenged by

Petitioners nor has statutory authority to do so, Petitioners did not name FERC as a respondent or seek any relief against FERC.[8]

In February 2020, the Corps decided to reinitiate ESA consultation with FWS. Rather than issue a new biological opinion, FWS terminated the new consultation and withdrew the prior biological opinion that Petitioners had challenged in court. Pet.App.120-24. As a result, the ESA's citizen suit provision obligated Petitioners to notify the Corps and FWS of any new violations and then file a supplemental Petition for Review incorporating challenges to this new action. Pet.App.124-26. The supplemental Petition for Review raises the same challenges against the Corps, and adds new ESA claims against the Corps and FWS in connection with their withdrawal of the June 2016 biological opinion. *See* Pet.App.130-34. As before, FERC is not a party, nor is any relief sought with respect to FERC's license or the rights conferred by that license to Denver Water.

Days after Petitioners filed this new pleading, and based on FERC's newly amended license, Respondents filed motions to dismiss for lack of jurisdiction.

[8] In December 2019—a year after Petitioners filed suit and nearly three years after FERC's intervention window closed—FERC, for the first time, sought to join the long-standing ESA consultation between the Corps and FWS, but acknowledged that "there are no [listed] trout populations within [FERC's] project area." *See City & Cty. of Denver*, 172 FERC ¶ 61,063, at 61,611-12.

### D. FERC's 2020 License Amendment

On July 16, 2020, FERC issued its order amending Denver Water's license. Although FERC's license has no bearing on Petitioners' ability to pursue this case—as FERC had already concluded—FERC's licensing order reinforced that its EA in no way displaced, let alone addressed, the Corps' analyses challenged in the Supplemental Petition for Review. For example, FERC stated that its EA examined only "the effects of *the portions of the action that were before [FERC]*, to the extent that those effects were not addressed in the Final EIS." *City & Cty. of Denver*, 172 FERC ¶ 61,063, at 61,610 (emphasis added). Importantly, FERC disavowed reopening any issues previously decided by the Corps:

> The Supplemental EA *did not address* issues raised related to the Corps' Final EIS, the need for Denver Water's proposed expansion of the Moffat Collection System, or environmental issues associated with the expansion of the Moffatt Collection System *that do not pertain directly to the FERC license* for the Gross Reservoir Hydroelectric Project. *These issues were appropriately addressed in the 2014 Corps Final EIS* for expansion of the Moffat Collection System.

*Id.* at 61,611 n.25 (emphases added). Thus, FERC left no doubt that its order did not reopen or buttress the Corps' actions challenged here. And, in contrast to other actions required by the FPA that FERC expressly adopted as enforceable terms of its own license (e.g., the Forest Service's decision arising under Section 4(e) of the FPA, 16 U.S.C. § 797(e)), *see City & Cty. of Denver*, 172 FERC ¶ 61,063, at

61,624-61,637, FERC did not incorporate the terms of the Corps' Section 404 permit as enforceable terms of FERC's own license.

None of the parties who intervened in the FERC proceeding sought rehearing of FERC's licensing order, which is required prior to bringing suit against such orders. *See* 16 U.S.C. § 825*l*(a), (b). Hence, there is—and will be—no litigation seeking to invalidate or modify FERC's license.

## III. PROCEEDINGS BELOW

Federal Respondents and Intervenor filed separate motions to dismiss asserting that the district court lacked jurisdiction over Petitioners' CWA and related claims because the FPA requires exhaustion of administrative remedies in FERC's proceeding and then direct review by this Court.

The district court issued a short order granting Respondents' motions. While acknowledging that "Petitioners are not directly challenging FERC's decision," the court concluded that Petitioners' "causes of action inhere in the controversy related to Denver Water's FERC license," which "precludes this Court from exercising jurisdiction." Pet.App.141-42. Noting that "[STC] attempted to intervene in the FERC licensing process," the court mistakenly suggested that STC "rais[ed] many of the same arguments [to FERC] that they raise in this case." Pet.App.142. The court also failed to address FERC's conclusion regarding its own jurisdiction—i.e.,

that Petitioners' intervention in the FERC licensing process was unnecessary because the FPA does not bear on legal challenges to Section 404 permits.

The district court focused on the more specific nature of the FPA's direct review provision compared to general federal question jurisdiction, *see* Pet.App.143, without recognizing that such a comparison matters only if the FPA applies. Moreover, the court found the Corps' Section 404 permit and FERC's license "inextricably intertwined" merely because "each agency's participation was a necessary ingredient in the Project's federal approval process." *Id*. Finally, the court stated that this outcome was warranted to "avoid[] piecemeal litigation," *id.*, even though Petitioners had explained that no lawsuits were filed against FERC's license before the statute of limitations expired.

## SUMMARY OF ARGUMENT

**1.** The district court's unprecedented conclusion that challenges to the Corps' Section 404 permitting decisions—and the highly technical analyses underlying them—must be pursued before FERC and then in the relevant court of appeals is in serious error. It ignores the plain text of the FPA's exhaustion and direct review provisions, which narrowly limit their application to FERC orders. It also disregards an extensive body of precedent drawing a sharp dividing line between, on the one hand, the limited category of non-FERC agency actions that

are essential components of a FERC license and, on the other hand, all other agency actions that have independent utility apart from a FERC license, do not result in enforceable terms or conditions in a FERC license, and do not impose legal obligations on FERC. The ruling below also overlooks FERC's determination that the FPA neither requires Petitioners' participation before FERC nor forecloses district court review of actions by the Corps and FWS.

**2.** Affirmance would have serious adverse policy implications. For instance, it would undermine the strong presumption in favor of judicial review of agency action, both by creating an obligation to exhaust administrative remedies that does not exist in the CWA or the Corps' regulations, and by condoning the Corps' glaring failure to notify the public of any exhaustion requirement when issuing its Section 404 permit. It would also place an impossible burden on the public in deciding whether to expend scarce resources intervening in a FERC proceeding where the applicable intervention window closes before the Corps acts on a Section 404 permit application. And, affirmance would fundamentally transform FERC proceedings by injecting disputes about highly technical matters outside of FERC's authority and expertise, thereby requiring FERC to resolve such matters prior to litigation—something which FERC consistently refuses to do.

# ARGUMENT

## I. STANDARD OF REVIEW

On appeal, "[t]he district court's determination of its jurisdiction is reviewed de novo." *Tilton v. Richardson*, 6 F.3d 683, 685 (10th Cir. 1993) (citations omitted).

"Congress is free to choose the court in which judicial review of agency decisions may occur." *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007) (internal quotation marks and citation omitted). "Because district courts have general federal question jurisdiction under 28 U.S.C. § 1331, the normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals." *Id.* (internal quotation marks and citation omitted). "Initial review occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." *Id.*; *see also Kanatser v. Chrysler Corp.*, 195 F.2d 104, 105 (10th Cir. 1952) ("Courts of appeal are courts of limited jurisdiction; and save for excepted instances, they have jurisdiction to review only final decisions of the district courts." (citations omitted)).

## II. THE DISTRICT COURT ERRED IN FINDING THAT THE FPA'S DIRECT REVIEW PROVISION APPLIES TO THE CORPS' SECTION 404 PERMITTING DECISION

The FPA forecloses the district court's extraordinary outcome. Congress declined in the FPA to mandate direct review for challenges to non-FERC actions such as Section 404 permitting decisions. The ruling below also finds no support in precedent construing the FPA; indeed, the limited circumstances in which courts have found the FPA's direct review provision to encompass non-FERC actions bear no resemblance to Section 404 permitting decisions. Moreover, FERC's determination that Petitioners need not participate in its proceeding to seek judicial review against the Corps is compelling evidence that Congress did not endorse this outcome when enacting the FPA's narrowly written direct review provision.

### A. The FPA and Its Legislative History, in Contrast to the NGA, Expressly Limit Direct Review to FERC Orders

Nothing in the FPA suggests—let alone mandates—that its direct review provision displaces the default mechanism for district court review of legally independent actions by agencies such as the Corps regarding projects that happen to also need a FERC license. Reversal is warranted on this basis alone.

When resolving statutory interpretation questions, the Court's "task is to construe what Congress has enacted"; it must "begin, as always, with the language

of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Congress could not have been clearer in the FPA's direct review provision: in deviating from the default rule that district courts resolve challenges to agency actions, Congress limited appellate jurisdiction to "a review of such order," meaning "an order issued *by the Commission [i.e., FERC]*." 16 U.S.C. § 825*l*(b) (emphasis added). This provision does not mention—let alone encompass—actions by *other* agencies such as the Corps. The same is true of the FPA's provision governing exhaustion of administrative remedies. That provision requires an intervenor to apply for rehearing before FERC only when it is "aggrieved by an order issued *by the Commission [i.e., FERC]*," *id.* § 825*l*(a) (emphasis added), and limits the appellate court's consideration to objections first "urged before the Commission [i.e., FERC] in the application for rehearing," so that FERC has an opportunity to address any objections prior to litigation, *id.* § 825*l*(b).

Congress's decision that the FPA does not require direct review of actions by agencies other than FERC—which is dispositive to the sole question raised in this appeal—is even more telling in light of Congress's enactment of the Energy Policy Act of 2005. In that statute, Congress amended *both* the FPA and the NGA, declining to disturb the FPA's narrowly circumscribed direct review provision, but amending the NGA's previously identical provision to instead broadly encompass

(with one exception) *every* action by a federal or State agency acting pursuant to federal law associated with a project requiring FERC's approval under the NGA. *See supra* at 10-11; 15 U.S.C. § 717r(d)(1).

Congress's deliberate, disparate actions regarding the FPA and NGA are dispositive here. By continuing to exclude non-FERC actions from the FPA's direct review provision, while simultaneously amending a parallel statute administered by FERC to include the *same* non-FERC actions in that direct review provision, Congress made crystal clear its intent to limit the FPA's direct review provision to FERC orders. *See, e.g.*, *Gross v. FBI*, 557 U.S. 167, 174 (2009) ("We cannot ignore Congress'[s] decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." (citation omitted)); *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) ("[N]egative implications raised by disparate provisions are strongest" when the provisions were "considered simultaneously when the language raising the implication was inserted.").

Aside from highlighting the narrower scope of the FPA's direct review provision, Congress's amendment of the NGA is notable in another respect. In requiring direct review of all actions pertaining to natural gas pipelines, Congress exempted actions under the Coastal Zone Management Act ("CZMA"), *see* 15

U.S.C. § 717r(d)(1), over which district courts continue to exercise jurisdiction. *See, e.g.*, *Connecticut v. U.S. Dep't of Commerce*, No. 3:04-cv-1271, 2007 WL 2349894 (D. Conn. Aug. 15, 2007) (vacating CZMA consistency determination for a proposed pipeline). By mandating direct review under the NGA for most non-FERC actions, but retaining district court jurisdiction over CZMA actions, Congress understood that district courts would continue exercising jurisdiction over non-FERC actions in the absence of an amendment. And because Congress did not amend the FPA's direct review provision, Congress's choice in 2005 forcefully undermines the ruling below.

In addition, anomalously, the ruling below creates a *more* restrictive judicial review process for the FPA than under the NGA. The NGA does not require a single, comprehensive lawsuit to challenge a FERC order and all related non-FERC agency actions, nor does it displace the default statute of limitations for non-FERC actions. *Compare Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 267-68 (4th Cir. 2018) (holding that the NGA's sixty-day limitations period for FERC orders does not affect the default period for non-FERC actions in the NGA context); *with Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (resolving challenge by the same parties to FERC's order for the same project in a different court). Here, however, the district court's reasoning

that it must "avoid[] piecemeal litigation," Pet.App.143, wrongly suggests that the FPA requires a party to file a single lawsuit against *all* project-related agency actions within the sixty-day statutory window for challenging a FERC license. The FPA's text does not support such a draconian interpretation.

In sum, because neither the FPA nor its legislative history supports its dramatic expansion to encompass direct review of the Corps' and FWS's actions at issue, reversal is warranted.

### B. Extensive Precedent Construing the FPA Further Supports the Default Mechanism for Judicial Review of the Challenged Actions

Despite fifty years of near-constant interplay between the CWA and the FPA, this is the first time the Corps (or any other agency) has taken the radical and unsupported position that CWA permitting decisions are transformed into FERC orders for purposes of the FPA's exhaustion and direct review provisions.

Before turning to pertinent authority, Petitioners highlight several indispensable facts. Petitioners challenge technical analyses and determinations that Congress assigned exclusively to the Corps in the CWA, as well as the Corps' legal compliance under NEPA and the ESA in making those determinations. These actions were not triggered by the FPA (but rather other statutes), nor were ultimately incorporated as enforceable terms or conditions of FERC's license.

Moreover, the Corps' Section 404 findings challenged here have significant independent utility apart from FERC's license because, *inter alia*, the CWA prohibits the Corps from issuing the challenged permit if enlargement of Gross Reservoir is not the least damaging practicable alternative. For these reasons, FERC is not a party to this litigation, and Petitioners do not seek to set aside or enjoin FERC's license; Petitioners seek relief only from the Corps and FWS.

### *1. Pertinent Authority Reinforces the Limited Scope of the FPA's Direct Review Provision as Restricted to FERC Licenses and Their Essential Components*

The Supreme Court first considered the scope of the FPA's direct review provision in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). There, the State of Washington disputed in state court whether a FERC license lawfully authorized the City of Tacoma to condemn State property (a fish hatchery) under the FPA. The Supreme Court dismissed the lawsuit because the State had participated in FERC's proceeding and "vigorously objected to the issuance of the [FERC] license upon the[se] grounds," "reviv[ed] the foregoing contentions" on rehearing, and then unsuccessfully challenged the FERC license in the Ninth Circuit on this same basis. *Id.* at 337-39. Hence, while observing that the FPA's direct review provision "preclude[s] de novo litigation between the parties of all issues inhering in the controversy," the Court restricted the scope of that

provision to "all objections to *the order*, *to the license* it directs to be issued, and to the legal competence of the licensee to execute *its terms*." *Id.* at 336 (emphases added). In other words, the Supreme Court construed the direct review provision in the same narrow manner as Congress wrote it—i.e., encompassing only those challenges that attack "orders of the Commission." 16 U.S.C. § 825*l*(b).

The Supreme Court recently revisited *City of Tacoma* on this precise issue under the NGA. There, a pipeline developer brought federal district court lawsuits to exercise eminent domain over State-owned lands; the State of New Jersey raised a sovereign immunity defense. *See PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2253 (2021). FERC asserted that *City of Tacoma* compelled direct review of this defense because if sustained it "would modify FERC's order" by preventing the certificate holder from executing its terms. *Id.* at 2254. The Court rejected this contention, finding that "New Jersey does not seek to modify FERC's order," which "neither purports to grant PennEast the right to file a condemnation suit against States nor addresses whether §717f(h) grants that right." *Id.* Thus, the Court held that "New Jersey's appeal is not a collateral attack on the FERC order," because it is "unlike *Tacoma*" where the FPA's "similarly worded exclusive-review provision barred a State from arguing that a licensee could not exercise *the rights granted to it by the license itself*." *Id.* (emphasis added).

Lower courts have likewise drawn this important dividing line when construing direct review provisions, delineating between lawsuits that seek relief that is wholly collateral to an action subject to direct review, and those that seek to attack—and obtain relief from—the action expressly subject to direct review.

For example, the Sixth Circuit addressed a challenge to two related orders by different agencies, only one of which required direct review. *See Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015). Although the district court found the challenges "inescapably intertwined" such that both actions compelled direct review, the Sixth Circuit reversed because this is "a misreading of the doctrine of inescapable intertwinement." *Id.* at 812. Citing *City of Tacoma* as the "leading case," the court noted that "the government in effect urges that we find that a *direct challenge to one agency's order* is inescapably intertwined with *another agency's order*," and held that "[t]his would be an unprecedented departure from the doctrine of inescapable intertwinement . . . ." *Id.* at 814. Thus, it "decline[d] to accept the government's invitation to expand the inescapable-intertwinement doctrine so as to find that [a] claim against [one agency] is pulled within the ambit of the exclusive-review statute that applies to [another agency]." *Id.* "Doing so not only would be inconsistent with existing law but also would run the risk of inadvertently

expanding the number and range of agency orders that might fall under exclusive-jurisdiction provisions that Congress did not intend to sweep so broadly." *Id*.

Similarly, the Second Circuit rejected the government's assertion that a direct review provision applied to an agency action not expressly identified by Congress. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187-88 (2d Cir. 2001) (Sotomayor, J.). The court extensively analyzed *City of Tacoma* and cautioned that while "the notion of issues 'inhering in a controversy' is inherently vague," *City of Tacoma* "must be read" to mean that the FPA's direct review provision "precludes (i) *de novo* litigation of issues inhering in a controversy over an administrative *order*, where one party alleges that it was *aggrieved by the order*, and (ii) all other modes of judicial review *of the order*," but does not bear on agency actions that are "wholly collateral" to the order subject to direct review. *Id.*

More generally, as the Supreme Court held in another case involving a different provision of the CWA, courts must "decline[] the Government's invitation to override Congress'[s] considered choice by rewriting the words of the statute," where a direct review provision plainly does not apply to the challenged action. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018). As the Court explained, where the government seeks to "broaden th[e] narrow language"

of a direct review provision, it "is completely unmoored from the statutory text" because Congress could have, but did not, write it in more sweeping terms. *Id.*

Accordingly, because Petitioners are not aggrieved by FERC's order and seek no relief from FERC's license—and instead seek only to set aside actions by the Corps and FWS—the FPA's direct review provision plainly does not apply. Hence, controlling authority compels reversal to avoid "an unprecedented departure from the doctrine of inescapable intertwinement," *Mokdad*, 804 F.3d at 814, and to avoid overriding Congress's explicit limits on the FPA's scope.[9]

### *2. Cases Finding Inescapable Intertwinement for Non-FERC Actions Are Inapposite because Those Plaintiffs Challenged Necessary, Enforceable Components of a FERC License*

The ruling below that the Corps' and FWS's legally independent actions—which did not invoke FERC's authority or expertise, were not incorporated as enforceable components of FERC's license, and imposed legal obligations only on Denver Water (not FERC)—required direct review as "order[s] issued by the Commission [i.e., FERC]," 16 U.S.C. § 825*l*(b), cannot be reconciled with the limiting principles flowing from *City of Tacoma* and *PennEast*.

[9] Because it fails to meaningfully address *City of Tacoma* and progeny, the district court's two-sentence discussion summarily concluding that the Corps' Section 404 permit is inextricably intertwined with FERC's license is in error. *See* Pet.App.143.

The few cases cited by Respondents below—and adopted by the district court—involved agency actions that do not remotely resemble the actions under review.[10] In every situation cited, the challenged non-FERC action was a legally essential component of FERC's license, either because the FPA required such action or because another statute (such as the ESA) required *FERC* to satisfy its own legal obligations prior to issuing a license. Moreover, in those cases, the challenged actions were adopted as enforceable terms and conditions of the FERC license itself. Thus, when a plaintiff challenges "an important ingredient *of the FERC license*," it is plainly "an attempt to restrain the licensing procedures authorized by FERC," especially where the non-FERC action has "no significance outside [FERC's] licensing process." *Yeutter*, 887 F.2d at 912 (emphasis added).

[10] *See Cal. Save Our Streams Council v. Yeutter*, 887 F.2d 908, 911-12 (9th Cir. 1989) (requiring direct review for challenge to the Forest Service's legal compliance for a decision required by Section 4(e) of the FPA, which FERC expressly incorporated as enforceable conditions of FERC's license); *see also Shafer & Freeman Lakes Envtl. Conservation Corp. v. FERC*, 992 F.3d 1071, 1087 (D.C. Cir. 2021) (requiring direct review for challenge to a biological opinion "prepared in the course of [FERC's] licensing proceeding," in which FWS imposed terms and conditions *on FERC's licensing* of a project that FERC in turn incorporated as enforceable conditions of its license); *Council of Atl. Salmon Fed'n v. Nat'l Marine Fisheries Serv.*, 858 F.3d 690, 692-93 (1st Cir. 2017) (Souter, J.) (same); *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) (same); *Idaho Rivers v. Foss*, 373 F. Supp. 2d 1158, 1161 (D. Idaho 2005) (same); *Sw. Ctr. for Biological Diversity v. FERC*, 967 F. Supp. 2d 1166, 1173 (D. Ariz. 1997) (same).

The Ninth Circuit applied this logic in the sole lawsuit addressing—and emphatically rejecting—the contention that a Section 404 permit, which is not an essential ingredient of a FERC license (or any ingredient at all), is subject to the FPA's direct review provision. There, the applicant (but not the Corps) asserted that the plaintiffs sought to collaterally attack FERC's license by challenging the Corps' Section 404 findings and NEPA compliance, because the "'practical effect' of a judgment against the Corps . . . would be to restrain the licensing procedures authorized by FERC." *Snoqualmie Valley*, 683 F.3d at 1159-60. The court disagreed, noting that although "such remedies would interfere with activities specifically authorized by the FERC license," "it does not follow that this action is an improper collateral attack on the FERC license." *Id.* at 1160. This is because "the remedy would be an injunction against the Corps" to comply with the CWA and "to perform a full NEPA analysis of the proposed action"—neither of which seeks to attack "the validity of FERC's license." *Id.*

Because Petitioners, like the *Snoqualmie Valley* plaintiffs, seek relief ordering the Corps—not FERC—to comply with the CWA and NEPA, 683 F.3d at 1160, there is no sound basis for creating a highly disfavored circuit split on this issue. *See United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012)

(Murphy, J., concurring in the denial of rehearing en banc) ("[T]he circuits have historically been loath to create a split where none exists.").

Outside the CWA context, courts have likewise recognized the crucial distinction between challenges seeking to invalidate FERC's license, and those seeking wholly collateral relief. *Compare Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 195 (3d Cir. 2018) (dismissing district court challenge where the plaintiffs explicitly sought to "modify or set aside FERC's order"), *with PennEast*, 141 S. Ct. at 2254 (holding that sovereign immunity issue is wholly collateral to FERC license because the relief sought did not attack "the rights granted to [the developer] by the license itself"), *and Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 n.4 (9th Cir. 2005) (en banc) (rejecting argument that "the Tribe's treaty-based claims are actually collateral attacks on [FERC's] licensing decision, which are governed by the FPA," and finding that "the Tribe is not attempting to collaterally attack the 1924 licensing decision; rather, it is suing for damages based on impacts *that are not covered by the license*" (emphasis added)).

Hence, once again, the fact that Petitioners seek relief against the rights granted to Denver Water *by the Corps' Section 404 permit*—rather than "the rights granted to [Denver Water] by the license itself," *PennEast*, 141 S. Ct. at 2254—

easily distinguishes this situation from the few cases finding inescapable intertwinement and dooms any argument that direct review is required.

Moreover, in each case in which a court has found a non-FERC action subject to the FPA's direct review provision, the action served no other purpose but to facilitate FERC's issuance of a license. In other words, in those cases FERC's consideration of a license under the FPA triggered another agency to act; but for FERC's license, the other agency would not have acted, and FERC ultimately adopted the other agency's decision as enforceable terms and conditions of FERC's own license. *See, e.g.*, *Yeutter*, 887 F.2d at 912 (finding that Forest Service action has "no significance outside [FERC's] licensing process"); *cf. Nat'l Parks Conservation Ass'n v. FAA.*, 998 F.2d 1523, 1527-28 (10th Cir. 1993) (holding that the Bureau of Land Management's action was subject to direct review provision pertaining to Federal Aviation Administration decisions because the Bureau's actions "were taken to facilitate the actions of the [Federal Aviation Administration]," the Bureau's "decision-making process was initiated by the provisions of the FAA Act," and "[the Bureau's] actions would be meaningless" without approval by the Federal Aviation Administration).

In sharp contrast, neither the FPA nor FERC's license triggered the Corps' obligation to grant or deny a Section 404 permit. Rather, upon receiving Denver

Water's application for such permit, *the CWA* required the Corps to make the findings challenged in this case and to ultimately grant or deny the permit, irrespective of whether FERC engaged in any separate regulatory process.

Furthermore, FERC did not incorporate the terms of the Corps' Section 404 permit as enforceable terms or conditions of *FERC's license*, leaving FERC without any legal authority to enforce the Corps' permit against Denver Water, because Section 404 enforcement authority lies solely with the Corps. *See* 33 U.S.C. § 1344(s). This is in contrast to a separate decision by the Forest Service that was expressly required by the FPA and adopted as an essential ingredient of FERC's license. *See City & Cty. of Denver*, 172 FERC ¶ 61,063, at 61,613 ("The Forest Service's final terms and conditions . . . are incorporated into the license"); *id.* at 61,624-61,637 (expressly incorporating FPA-mandated Forest Service decision into FERC license).

In addition, the Corps' Section 404 findings challenged here are practically and legally meaningful in the absence of FERC's license. Indeed, they determine, *inter alia*, the least damaging practicable alternative to achieve the project's purpose and need—a finding that, if arbitrary as Petitioners contend, forecloses the Corps' issuance of the challenged permit and requires Denver Water to pursue one of the myriad other alternatives for supplying water considered in the Corps' EIS.

Not only do Section 404 permits therefore have significant independent utility apart from a FERC license, but also FERC has correctly concluded that Section 404 matters are outside its jurisdiction, authority, and expertise. *See supra* at 11-14. Thus, the technical objections raised by Petitioners to the Corps' CWA determinations are not appropriately raised in a FERC proceeding and cannot be encompassed by the FPA's exhaustion and direct review provisions. *See, e.g.*, *Williams Nat. Gas. Co. v. City of Okla. City*, 890 F.2d 255, 263 (10th Cir. 1989) (finding that direct review applies only to issues that "could have and should have been raised before FERC," and requiring direct review of a matter that "is not an issue with which FERC is unfamiliar or which it is incapable of addressing"); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994) (noting that the Supreme Court has routinely "upheld district court jurisdiction over claims considered wholly collateral to a statute's [direct] review provision[] *and outside the agency's expertise*" (emphasis added)).[11]

[11] This Court's decision in *Williams* analyzed *City of Tacoma* in concluding that a challenge to the validity of "FERC's determination of its own jurisdiction" to regulate a proposed pipeline under the NGA—an issue that was presented to and resolved by FERC in its proceeding—was an essential component of FERC's order such that a later challenge was a direct "attack [on] the substance and validity of a FERC order." 890 F.2d at 263-64. Because questions about FERC's jurisdiction to issue certificates under the NGA fall squarely within FERC's statutory authority,

Thus, whereas the FPA squarely places certain non-FERC actions within FERC's purview—e.g., Section 4(e) decisions required by the FPA or ESA consultation actions between *FERC* and FWS, either of which must be adopted as enforceable terms and conditions of FERC's license—it is beyond dispute that FERC does not have the competence, let alone the authority, to resolve technical matters under the CWA. *See, e.g.*, *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 730 (4th Cir. 2009) (noting that "FERC is not charged in any manner with administering the Clean Water Act"). As a result, the FPA's exhaustion and direct review provisions do not apply to Section 404 permitting decisions.

### C. FERC's Findings Underscore the FPA's Inapplicability to Petitioners' Challenges

Petitioner STC sought to intervene in FERC's proceeding solely out of an abundance of caution to ensure that it could effectively litigate against the Corps' Section 404 permit and related actions under NEPA and the ESA that facilitated the Corps' permit. *See supra* at 21-23. However, FERC denied STC's intervention, finding that "*[t]his proceeding in no way shields the Corps from judicial review*: the record does not reflect whether [STC] sought judicial review of the Corps'

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*Williams* has no application to the facts of this case involving Section 404 matters that are far afield of FERC's jurisdiction and competence.

actions, during which it could have raised any deficiencies it saw in the EIS, but *nothing in our proceeding prevented it from doing so*." *City & Cty. of Denver*, 165 FERC ¶ 61,120, at 61,484 n.26 (emphases added). Petitioners reasonably relied on FERC's conclusion that the FPA has no bearing on their ability to sue the Corps. Yet, the ruling below did not address as an alternative basis for jurisdiction FERC's finding that the Corps' actions could be subjected to judicial review, even if Petitioners did not participate in FERC's proceeding.

FERC's determination that the FPA is inapplicable to Petitioners' claims is not only in accord with the narrowly drawn scope of the FPA, but is also consistent with FERC's long-standing construction of the FPA in other proceedings. *See supra* at 11-14. Indeed, FERC has long *refused* to address Section 404 matters, reasoning that it lacks the authority (and competence) to address such matters that fall within the Corps' exclusive jurisdiction, and has persuaded courts that such matters fall outside FERC's domain. *Id.*; *see also Duncan's Point*, 522 F.3d at 378.

Accordingly, because FERC has repeatedly determined—including in its license amendment proceeding for this project—that Section 404 matters are outside the scope of the FPA and must instead be pursued through the default process for challenging the Corps' compliance with the CWA and related laws, it was entirely reasonable for Petitioners to rely on FERC's determination in

pursuing litigation against the Corps and FWS. For this reason as well, the ruling below must be reversed in light of the inescapable conclusion that the FPA has no bearing on Petitioners' challenge to the Corps' legal compliance under the CWA, NEPA, and the ESA in issuing a Section 404 permit.[12]

## III. SEVERAL IMPORTANT PUBLIC POLICY RATIONALES ALSO STRONGLY COUNSEL IN FAVOR OF REVERSAL

This appeal has enormous public policy implications. If this Court affirms the ruling below, it will result in significant adverse consequences for litigants, courts, FERC, and environmental protection.

[12] The district court wrongly concluded that it must apply "the more specific jurisdictional statute" (i.e., the FPA), and that Petitioners' view "would violate the longstanding judicial preference for avoiding piecemeal litigation." Pet.App.143. Both findings are predicated on the error that the FPA applies to Petitioners' claims. Because it plainly does not, the *only* mechanism for judicial review of the challenged action is 28 U.S.C. § 1331. *See Mineral Res. Int'l v. Dep't of Health and Human Servs.*, 53 F.3d 305, 310 (10th Cir. 1995) (rejecting argument for direct review "to prevent duplicative litigation in district court" because this "ignores the principle that this court lacks jurisdiction over a subject matter unless it is conferred by Congress"). Further, because no entity pursued litigation against FERC's license within the statutory window for doing so, there is in fact no concern here about piecemeal litigation. *See supra* at 26.

### A. Affirmance Would Undermine the Strong Presumption in Favor of Judicial Review of Agency Actions and Allow Agencies to Create New Exhaustion Requirements to Avoid Litigation

The Supreme Court has repeatedly affirmed the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015). The ruling below eviscerates this presumption, allowing the Corps to erect roadblocks to judicial review that run afoul of two distinct administrative law principles.

First, the Supreme Court has construed the APA's finality requirement in 5 U.S.C. § 704 to mean that "an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993). Hence, "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under [the APA]." *Id.* To do so would "transform" this provision from one "designed to remove obstacles to judicial review of agency action . . . into a trap for unwary litigants." *Id.* at 147 (quotation marks and citations omitted).

It is unassailable that the CWA and its regulations do *not* contain any requirement that those aggrieved by Section 404 permitting decisions must exhaust

administrative remedies prior to judicial review. *See* 33 C.F.R. § 331.10 (permit decision is final and ripe for litigation upon "the initial decision to issue . . . a permit"); *cf.* 33 C.F.R. § 331.12 (requiring exhaustion only for certain permit *denials*). And, the Corps most certainly did not indicate in the ROD or permit under review that those decisions were not final or that the permit was inoperative pending further review by the Corps (or FERC). Indeed, the Corps' public statements indicated that it viewed FERC's process as entirely *distinct* from its own. *See* Pet.App.156 ("[o]btaining approvals from FERC is a *separate regulatory process* from the Corps' Section 404 review" (emphasis added)). Accordingly, the ruling below circumvents the APA, as well as the Supreme Court's holding in *Darby*, by allowing the Corps to manufacture an exhaustion requirement that does not exist in statute or regulation, and of which the Corps never notified the public in issuing the permit. Such a result cannot pass muster or common sense.[13]

Second, because the Corps was silent about exhaustion in its permit and ROD—because there is no statutory or regulatory exhaustion requirement for Section 404 permits—the Corps' assertion of a mandatory exhaustion requirement

[13] As a practical matter, the Corps' maneuvering has created an after-the-fact, non-statutory *double* exhaustion requirement. This is because the FPA requires an intervenor to exhaust objections to FERC twice (including on rehearing) before pursuing direct review in this Court.

for the first time in litigation is a textbook example of an impermissible post hoc rationalization that this Court must reject. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

Likewise, because the Corps never alerted the public of this radical new position in its ROD or permit, Petitioners have been forced to chase a moving target regarding the application of the FPA in this case. Indeed, Respondents have failed to coherently explain how the district court properly exercised jurisdiction over this case for nearly two years until FERC issued its license—including overseeing the Corps' and FWS's compilation of the administrative record—but such jurisdiction spontaneously vanished when FERC issued a license in a separate regulatory proceeding. This contravenes judicial efficiency and economy, and causes serious prejudice to Petitioners and the public interest in transparent agency decisionmaking and effective judicial review of agency actions. *See Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (rejecting litigation position because "[p]ermitting agencies to invoke belated justifications . . . can upset the orderly functioning of the process of review, . . . forcing both litigants and courts to chase a moving target").

For these reasons, the Court should reverse the ruling below to signal that agencies may not issue concededly final decisions only to later invoke in litigation purported exhaustion requirements that do not exist in statute or regulation. This approach flouts the APA and is not consistent with notions of fair play.

### B. Affirmance Would Ignore the Practical Realities Faced by Potential Litigants Aggrieved by CWA Permitting Decisions

The ruling below concluded that Petitioners were required to exhaust administrative remedies before FERC and then seek direct review of the Corps' legal compliance in issuing its Section 404 permit. This conclusion disregards the fact that when the window closed in April 2017 to intervene in FERC's proceeding (i.e., a precondition to exhaustion and direct review under the FPA), the Corps had not yet issued a permit or even finalized the Section 404 findings underlying it. That did not occur until months later, when the Corps issued its ROD in July 2017 and its permit in September 2017. Until the Corps issued its ROD—*after* the window for intervention in FERC's proceeding closed—the Corps had taken no action subject to challenge (whether in district court or before FERC). The district court's ruling thus sets up a Catch-22: Petitioners could not timely intervene in FERC's proceeding to challenge the Corps' Section 404 permit because that permit

(and the findings underlying it) did not exist; yet, under the district court's ruling, Petitioners were nevertheless obligated to do just that.

Under functionally indistinguishable circumstances, courts have found the FPA's direct review provision inapplicable to non-FERC actions. In fact, the Ninth Circuit rejected the same jurisdictional argument in the context of another Section 404 permit, holding that "the instant claims against the Corps could not have been raised in the challenge to the FERC license amendment because the Corps had not yet" made a final decision when FERC issued its license. *Snoqualmie Valley*, 683 F.3d at 1159. Here, the practical import is the same—at the time the window closed to intervene in the FERC proceeding, which is a necessary step in subsequently seeking rehearing of FERC's license and direct review of it, the Corps had not yet made a final Section 404 permitting decision. Hence, as in *Snoqualmie Valley*, Petitioners "could therefore not have brought any of their present claims" in FERC's proceeding (and later on direct review) due to the incongruous timing of the two federal processes. *Id.*[14]

In addition, neither the district court nor Respondents have explained how Petitioners could be required to intervene in a FERC proceeding to object to the

[14] Public policy also strongly supports avoiding a disfavored circuit split, which as explained above would be the result should this Court affirm. *See supra* at 41-42.

outcome of a yet-to-be-finalized Corps permitting decision. This approach would require a party that *might* ultimately be aggrieved by an ongoing Corps permitting process—e.g., conservation organizations, individual landowners, or the permit applicant—to speculate as to the outcome of the Corps' process, intervene before FERC on that basis, and somehow prepare meaningful objections to the Corps' still-pending process. Not only is this an illogical way of structuring worthwhile participation in FERC's proceeding, but it places an unnecessary financial burden on affected parties—especially where, as here, FERC's license (as opposed to the Corps' permit) will not aggrieve the affected parties in any concrete way.

In short, there is no sound public policy in forcing a party potentially aggrieved by an ongoing Section 404 permitting process to expend scarce resources intervening in a separate FERC proceeding in which FERC lacks the legal authority or any practical mechanism for remedying a party's then-theoretical concerns under Section 404.

### C. Affirmance Would Substantially Expand the Scope of FERC Proceedings, Requiring FERC to Adjudicate Matters Outside Its Authority and Expertise

FERC has disavowed jurisdiction, authority, or competence to address Section 404 matters in its proceedings. *See supra* at 11-14. If affirmed, the ruling below would fundamentally alter the well-established scope of these proceedings,

thereby imposing personnel, resource, and other burdens on an already overtaxed agency. *See, e.g.*, *Allegheny Def. Proj. v. FERC*, 964 F.3d 1, 9-10 (D.C. Cir. 2020) (en banc) (noting FERC's inability to timely act on rehearing petitions in 99% of its NGA proceedings); *Calpine Corp.*, 171 FERC ¶ 61,034, 61,217-18 (2020) (denying rehearing petition under the FPA nearly two years after FERC's licensing order, despite the statutory requirement for resolution within thirty days).

Affirmance would create a more expansive framework for FERC proceedings, in which FERC must resolve, in the first instance, challenges to highly technical matters arising not only under Section 404, but also Sections 401 and 402 of the CWA that often relate to projects requiring FERC approval. *See* 33 U.S.C. §§ 1341, 1342. Moreover, affirmance would designate FERC as the arbiter of other technical statutory processes that routinely operate in parallel to the FPA, such as the Clean Air Act. This is not what Congress contemplated when enacting these specialized laws that are administered by other agencies and, like the CWA, apply far more broadly than to hydroelectric projects under FERC's domain.

This significant enlargement of FERC proceedings could also extend to the NGA context. Although Congress amended the NGA in 2005 to require direct review of non-FERC actions related to natural gas pipelines, it did not see fit to alter the NGA's exhaustion provision that remains similar to the FPA's. *See* 15

U.S.C. § 717r(a). Thus, at present, parties need not intervene in FERC's proceeding under the NGA to raise extraneous matters arising under Section 404 or other specialized laws outside FERC's jurisdiction before seeking direct review of such actions; yet, affirmance would almost certainly require parties to do just that to avoid losing their ability to subsequently pursue such challenges in court.

Absent express congressional intent to exponentially expand the scope of FERC proceedings in this manner, this Court must avoid deputizing FERC to resolve disputes regarding highly specialized matters about which FERC candidly acknowledges it lacks expertise, which would only exacerbate FERC's well-documented problems in timely resolving its proceedings.[15]

### D. Affirmance Could Upset State Court Review of State-Issued Section 401 Certifications

Section 401 of the CWA "requires States to provide a water quality certification before a federal license or permit can be issued for activities that may

[15] If CWA permits for hydroelectric projects are swept into FERC's purview, the FPA would provide the exclusive mechanism to enforce permit conditions when seeking redress for CWA violations, *see* 16 U.S.C. § 823(b), and FERC's enforcement orders would be subject to direct review. *Id.* § 825*l*(b). This flies in the face of common sense and pertinent precedent. *See Deschutes River All. v. Portland Gen. Elec. Co.*, 249 F. Supp. 3d 1182, 1185 (D. Or. 2017) (rejecting the argument that "[FERC] may enforce [CWA] permit conditions" and holding instead that the CWA expressly authorizes enforcement actions in district court).

result in any discharge into intrastate navigable waters." *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 707 (1994) (citing 33 U.S.C. § 1341(a)). Thus, State-issued Section 401 certifications are required for most FERC-approved projects under the FPA. However, like Section 404, Section 401 applies broadly to many other activities that have nothing to do with FERC (including, coincidentally, Section 404 permits), because the CWA's scope is far more sweeping than the FPA's narrow focus on hydroelectric projects.

In any event, despite the fact that a State-issued Section 401 certification is triggered by a particular FERC license and is incorporated as an express condition of FERC's ultimate license—in sharp contrast to Section 404 permits—courts have nevertheless uniformly recognized that States, not FERC, may impose mandatory conditions under Section 401, and that those certifications must be challenged in *state* court. *See, e.g.*, *PUD No. 1*, 511 U.S. 721-23 (1994) (upholding State's Section 401 certification after state court challenge to conditions imposed by the State); *U.S. Dep't of the Interior v. FERC,* 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates."); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (holding that "the proper forum to review the appropriateness of a state's [Section 401] certification is the state court, and that

federal courts and agencies are without authority to review the validity" of such certifications). This further reinforces that Congress never envisioned CWA matters to be encompassed within the FPA's direct review provision.

However, if affirmed, the ruling below could upset settled law by placing CWA decisions, including State-issued Section 401 certifications, squarely before FERC for substantive adjudication prior to litigation. And, in so doing, it would subject those adjudicatory decisions to direct review under the FPA, stripping state courts of their long-held jurisdiction over challenges to such decisions. This outcome—which would unravel decades of precedent and potentially run afoul of constitutional principles—underscores that reversal is the only appropriate course. *See, e.g.*, *Am. Rivers v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997) (holding that FERC "does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401").

## CONCLUSION

Petitioners respectfully request that the Court reverse the unprecedented and unsupported ruling that challenges to the Corps' legal compliance in granting or denying a Section 404 permit are encompassed by the FPA's exhaustion and direct review provisions, and remand this matter to the district court for merits resolution.

## STATEMENT OF REASONS SUPPORTING ORAL ARGUMENT REQUEST

Petitioners hereby request oral argument because this appeal raises an exceptionally important and precedential issue of first impression in this Circuit, and affirmance could result in a Circuit split. The outcome of this appeal implicates serious policy questions regarding the scope of FERC proceedings and judicial review of legally distinct agency actions arising outside of FERC's jurisdiction and competence. In addition, oral argument is warranted because affirmance would foreclose Petitioners from pursuing their claims against the Corps and FWS in *any* court, despite the fact that Petitioners timely filed this lawsuit roughly one year after the Corps issued its legally deficient CWA permit, and more than a year before FERC issued its amended license. Finally, because the appeal involves complex legal and factual issues, Petitioners believe the Court would benefit from hearing oral argument in this matter.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type and volume limitations of Fed. R. App. P. 32(a)(7). The brief contains 12,975 words.

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**CERTIFICATE OF SERVICE**

I, William S. Eubanks II, hereby certify that on August 13, 2021, I served copies of Petitioners-Appellants' Opening Brief on all counsel of record in this case by way of electronic mail (ECF filing), and I further certify that all parties to this case are registered to receive ECF filings in this matter.

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# Attachment A to Petitioners' Opening Brief:

## *Order Granting Motions to Dismiss (ECF No. 70 in No. 1:18-cv-3258 (D. Colo.))*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge Christine M. Arguello**

Civil Action No. 18-cv-03258-CMA

SAVE THE COLORADO,
THE ENVIRONMENTAL GROUP,
WILDEARTH GUARDIANS,
LIVING RIVERS,
WATERKEEPER ALLIANCE, and
SIERRA CLUB,

Petitioners,

v.

TODD T. SEMONITE, in his official capacity as the Chief of the U.S. Army Corps of Engineers,
DAVID BERNHARDT, in his official capacity as Acting Secretary of the Interior, and
AURELIA SKIPWITH, in her official capacity as Acting Director of the U.S. Fish and Wildlife Service,

Respondents, and

CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS,

Respondent-Intervenor.

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**ORDER**

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This case concerns a proposed reservoir expansion in Boulder County, Colorado. (Doc. # 45-1, ¶¶ 1-2). The Denver Board of Water Commissioners ("Denver Water") seeks to enlarge a reservoir that collects water for the City of Denver and surrounding counties. (Doc. # 49-1, p. 6). Denver Water applied for and received federal approval for the project. (Doc. # 49-1, pp. 12-15).

A collection of environmental groups then sued to block the project, alleging that approval was improperly granted. (Doc. # 45-1, ¶ 7). They argue that Respondents – the heads of three Federal Agencies who played a role the approval process – violated federal law by greenlighting the reservoir expansion. (Doc. # 45-1, ¶ 7). Respondents now move to dismiss the lawsuit for lack of jurisdiction. (Docs. # 49). Denver Water intervened as a Respondent, and it has also filed a motion to dismiss. (Doc. # 47). For the following reasons, the motions to dismiss are granted.

## I. BACKGROUND

Denver Water owns and operates the Gross Reservoir and Dam ("Reservoir") in Boulder County, Colorado. (Doc. # 49-1, p. 11). The Reservoir collects and stores water for the City of Denver and the surrounding counties. (Doc. # 49-1, p. 11). Denver Water operates the Reservoir under a license issued by the Federal Energy Regulatory Commission ("FERC"). (Doc. # 48, p. 6).

Some years ago, Denver Water began exploring options to expand the Reservoir to meet growing need. (Doc. # 49-1, pp. 6, 12). It settled on a plan to raise the height of the dam and increase the Reservoir's storage capacity (the "Project"). (Doc. # 49-1, p. 12). Before beginning construction on the Project, however, Denver Water had to apply for various federal permits and approvals. (Doc. # 48, p. 15). These included (1) a permit from the Army Corps of Engineers ("Corps") under Section 404 of the Clean Water Act (to discharge fill material during construction); and (2) an amendment to Denver Water's FERC license for the Reservoir (to operate a larger dam). (Doc. # 48, p. 15; Doc. # 49-1, p. 6).

Both the Corps and the FERC approved Denver Water's requests, and Denver Water was poised to move forward with the Reservoir expansion. (Doc. # 49-1, p. 6).

Petitioners, a collection of environmental groups that oppose expansion of the Reservoir, filed this lawsuit against the Corps and the Service, seeking to cancel their authorization for the Project. (Doc. # 45-1, 68). (Doc. # 45-1, ¶¶ 11-31). Though they concede that Denver Water obtained all necessary permits for the Project, Petitioners argue that those permits should not have been issued. (Doc. # 45-1, ¶ 7). Specifically, they claim that the Corps failed to fully consider the environmental impacts of the Project before authorizing it, thus violating various federal environmental laws. (Doc. # 45-1, ¶ 7). Petitioners also argue that the U.S. Fish and Wildlife Service ("Service") issued a "fatally flawed" biological opinion about the environmental impact of the Project, which led to Corps approval. (Doc. # 45-1, ¶ 160).

Respondents filed a motion to dismiss this case for lack of jurisdiction, arguing that the Federal Power Act ("FPA") gives the federal courts of appeals exclusive jurisdiction over cases, like this one, involving "a controversy over a[n] FERC licensing decision." (Doc. # 49, p. 7).

Petitioners counter that they are not directly challenging a FERC order, so the FPA does not apply. (Doc. # 54, pp. 13-14).

As explained in more detail below, the Court concludes that dismissal is proper.

## II. LEGAL STANDARD

"[S]ince the courts of the United States are of limited jurisdiction, there is a presumption against jurisdiction." *City of Lawton, Okl. v. Chapman*, 257 F.2d 601, 603

(10th Cir. 1958). The party invoking the Court's jurisdiction bears the burden of overcoming this presumption. "[T]he party invoking the jurisdiction of the court[] has the burden of pleading and proving the existence of jurisdiction." *Wilshire Oil Co. of Tex. v. Riffe*, 409 F.2d 1277, 1282 (10th Cir. 1969); *see also Port City Props. v. Union Pac. R.R. Co.*24, 518 F.3d 1186, 1189 (10th Cir. 2008) ("The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction."). Dismissal pursuant to Rule 12(b)(1) is appropriate if the Court lacks subject matter jurisdiction over claims for relief asserted in the complaint. "When reviewing a factual attack on a complaint pursuant to Rule 12(b)(1), the Court is free to consider facts and information outside the complaint to resolve any jurisdictional disputes." *Hale v. Ashcroft*, 683 F. Supp. 2d 1189, 1196 (D. Colo. 2009).

## III. ANALYSIS

The FPA provides that federal courts of appeals have "exclusive" jurisdiction over challenges to FERC actions:

> Any party to a proceeding under this chapter aggrieved by an order issued by the [FERC] in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia[.] . . . [S]uch court shall have jurisdiction, which upon the filing of the record with it shall be exclusive.
>
> 16 USC § 825*l*(b).

Respondents argue that Petitioners' complaint falls within the exclusive jurisdiction of the courts of appeals pursuant to the FPA. Although Respondents concede that Petitioners are not directly challenging the FERC's decision to amend Denver Water's

license, they argue that Petitioners "are raising claims that inhere in the controversy over the FERC order." (Doc. # 49-1, p. 19). Specifically, Respondents argue that the Corps' and the Services' actions were "steps on the path to FERC's decision to amend the license," (Doc. # 48, p. 8), and that "[t]he issues raised in the Petition are inescapably intertwined with FERC's licensing process." (Doc. # 48, p. 26). Therefore, they argue, the FPA's exclusive-jurisdiction provision applies to this action, and this Court is without jurisdiction to hear this case.

Petitioners counter that they are not directly challenging any order of the FERC; they are challenging only "the Corps' and Service's separate, independent actions." (Doc. # 53, p. 8). Therefore, they argue, the FPA's exclusive-jurisdiction provision does not apply.

The Court agrees with Respondents.

The FPA vests the federal courts of appeals with exclusive authority to review FERC licensing orders. 16 USC § 825*l*(b). This exclusive-jurisdiction provision prevents district courts from hearing not only challenges to a FERC order itself, but also from hearing "all issues inhering in the controversy" related to a FERC order. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (the FPA "necessarily precluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review."). Thus, where a party does not challenge a FERC order itself, but challenges another agency order that is inextricably linked to the FERC order, the FPA's exclusive-jurisdiction provision applies and precludes this Court from exercising

jurisdiction. *Id*. *See also* NEW OXFORD AMERICAN DICTIONARY 893 (3d ed. 2010) ("inhere" means "to exist essentially or permanently in").

It is clear from Petitioners' arguments that their causes of action "inhere in the controversy" related to Denver Water's FERC license. Although Petitioners claim that they are challenging only the decisions of the Corps and the Service, they concede that those decisions were part and parcel of the FERC licensing process: "the Corps' CWA decision is the 'but for' cause that triggered FERC's license." (Doc. # 53, p. 8). Indeed, Petitioners attempted to intervene in the FERC licensing process, raising many of the same arguments that they raise in this case. *City and Cnty of Denver, CO*, 165 FERC P 61120, 2018 WL 6015905 (FERC, November 15, 2018). It was only after their attempt to intervene was denied as untimely that Petitioners filed this lawsuit. *Id*. Petitioners even go so far as to describe the FERC as "the Corps' sister agency and a cooperating agency on this project." (Doc. # 45-1, ¶ 116). Thus, the Court has little trouble concluding that, by their own admission, Petitioners' claims "inhere in the controversy" related to Denver Water's FERC license.

Petitioners argue, however, that the FPA does not apply because the Corps' decision "operate[s] independently from FERC's licensing order." (Doc. # 53, pp. 12-13). Therefore, they contend, this Court should apply the more general jurisdictional provisions contained in the Administrative Procedure Act, 5 U.S.C. §§ 702, 704. (Doc. # 53, pp. 12-13). The Court disagrees.

Petitioners' argument has at least three major flaws. First, "when two jurisdictional statutes draw different routes of appeal, the well-established rule is to

apply only the more specific legislation." *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989); *see also Connors v. Amax Coal Co.*, 858 F.2d 1226, 1231 (7th Cir.1988) ("Generally, when jurisdiction to review administrative determinations is vested in the courts of appeals these specific, exclusive jurisdiction provisions preempt district court jurisdiction over related issues under other statutes."). Here, the FPA is the more specific jurisdictional statute, so it should apply.

Next, although Petitioners attempt to characterize the actions of the Corps and the Service as "separate" and "distinct" from the FERC's licensure decision, (Doc. # 53, p. 23), it is clear that the three decisions are inextricably intertwined. All three decisions concern the Gross Reservoir expansion Project, and Plaintiff concedes that the Project could not go forward without the approval of all three agencies. (Doc. # 53, p. 8 ("the Corps' CWA decision is the 'but for' cause that triggered FERC's license")). Thus, each agency's participation was a necessary ingredient in the Project's federal approval process.

Finally, if the Court were to accept Petitioner's argument, it would violate the longstanding judicial preference for avoiding piecemeal litigation. Where a lawsuit involves multiple federal agencies, and one agency's actions can be reviewed in this Court while another's cannot, "the bifurcated suit could result in inconsistency, duplication, and delay." *Nat'l Parks and Conservation Ass'n v. F.A.A.*, 998 F. 2d 1523, 1529 (10th Cir. 1993). Thus, "if there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals," the Court "must resolve that ambiguity in favor of review by a court of appeals." *Id*. (internal quotation omitted).

Applying these principles, the Court concludes that it lacks jurisdiction to hear this case, and the case must be dismissed.

## IV. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Respondent-Intervenor's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) (Docs. ## 47, 49) and GRANTS Federal Defendants' Motion to Dismiss for Lack of Jurisdiction (Docs. ## 49, 49-1). The Case is hereby dismissed without prejudice, and the Clerk is directed to close the case.

DATED: March 31, 2021

BY THE COURT:

CHRISTINE M. ARGUELLO
United States District Judge

# Attachment B to Petitioners' Opening Brief:

## *Final Judgment (ECF No. 71 in No. 1:18-cv-3258 (D. Colo.))*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 18-cv-03258-CMA

SAVE THE COLORADO,
THE ENVIRONMENTAL GROUP,
WILDEARTH GUARDIANS,
LIVING RIVERS,
WATERKEEPER ALLIANCE, and
SIERRA CLUB,

Petitioners,

TODD T. SEMONIITE, in his official capacity as the Chief of the U.S. Army Corps of Engineers,
RYAN ZINKE, in his official capacity as Secretary of the Interior, and
MARGARET EVERSON, in her official capacity as Acting Director of the U.S. Fish and Wildlife Service,

Respondents, and

CITY AND COUNTY OF DENVER, acting by and through its Board of Water Commissioners (Denver Water),

Respondents-Intervenor.

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**FINAL JUDGMENT**

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In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order (Doc. # 70), entered by Judge Christine M. Arguello on March 31, 2021, it is

ORDERED that Respondent-Intervenor's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) (Docs. ## 47, 48) is GRANTED. It is

FURTHER ORDERED that Federal Defendants' Motion to Dismiss for Lack of Jurisdiction (Docs. ## 49, 49-1) is GRANTED. Is it

FURTHER ORDERED that this case is hereby DISMISSED WITHOUT PREJUDICE. It is

FURTHER ORDERED that this case is closed.

Dated: March 30, 2021.

FOR THE COURT

JEFFREY P. COLWELL, CLERK

By: s/S. West, Deputy Clerk