No. 21-1155

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAVE THE COLORADO, et al.,
Petitioners/Appellants,

v.

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

On Appeal from the United States District Court for the District of Colorado
Case No. 1:18-cv-3258 (Hon. Christine M. Arguello)

ANSWERING BRIEF FOR FEDERAL APPELLEES

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Oral argument is requested.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals in this matter.

GLOSSARY

BLM	Bureau of Land Management
CWA	Clean Water Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FAA	Federal Aviation Administration
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
NEPA	National Environmental Policy Act

INTRODUCTION

In Section 313(b) of the Federal Power Act, Congress assigned the courts of appeals exclusive jurisdiction to review orders by the Federal Energy Regulatory Commission (FERC) licensing hydroelectric projects. In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Supreme Court interpreted Section 313(b) to apply to any issue inhering in the controversy over a FERC order. This Court later held that a similar exclusive review provision applies not just to agency orders expressly covered by the provision but also to closely related decisions by other agencies. *National Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523 (10th Cir. 1993) (*NPCA*).

Petitioners-Appellants Save the Colorado, et al. (Appellants) sued in district court, challenging actions and analyses by the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service for a municipal water supply project that would expand the reservoir and raise the dam at a FERC-licensed hydroelectric project in Boulder County, Colorado. The district court dismissed the suit for lack of jurisdiction, holding that Appellants' claims raised issues inhering in the controversy over FERC's order amending the hydroelectric project license, so those claims could be brought only in the courts of appeals under Section 313(b).

The district court correctly interpreted Section 313(b) and faithfully applied *City of Tacoma* and this Court's precedent. The judgment should be affirmed.

STATEMENT OF JURISDICTION

(A) Although Appellants invoked subject matter jurisdiction under 28 U.S.C. § 1331, the district court correctly dismissed Appellants' Supplemental Petition for lack of jurisdiction. Pet.App. 73.[1]

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment. Pet.App. 145.

(C) That judgment was entered on March 31, 2021. *Id*. Appellants timely filed their notice of appeal on April 26, 2021, or 26 days later. Pet.App. 147; *cf.* Fed. R. App. P. 4(a)(1)(B).

(D) The appeal is from a final judgment disposing of all parties' claims.

STATEMENT OF THE ISSUE

Whether the Federal Power Act's exclusive jurisdiction provision applies to Appellants' claims challenging actions and analyses by the Corps and the Service, when those claims raise issues inhering in the controversy over FERC's order authorizing expansion of the reservoir and dam at a hydroelectric project.

PERTINENT STATUTES

Pertinent statutes are in the Addendum.

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[1] Petitioners' August 13, 2021 Appendix is cited as "Pet.App." Federal Appellees' Supplemental Appendix is cited as "Supp.App."

STATEMENT OF THE CASE

A. Statutory and regulatory background

The parties' "jurisdictional dispute involves a latticework of statutory provisions." *Owner-Operators Indep. Drivers Ass'n of Am., Inc. v. Skinner*, 931 F.2d 582, 584 (9th Cir. 1991). We briefly describe the five most relevant statutes.

1. The Federal Power Act

The Federal Power Act establishes a "complete scheme" for federal regulation and development of water power resources. *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 180 (1946); 16 U.S.C. § 791a *et seq*. The Act requires a FERC license for any entity to build or operate a hydroelectric project, including a dam or reservoir, on any navigable stream or on "any part of the public lands and reservations of the United States." 16 U.S.C. § 797(e); *First Iowa*, 328 U.S. at 180.

FERC's responsibilities under the Federal Power Act include issuing licenses to construct new projects and to maintain existing projects, and overseeing ongoing project operations, including dam safety inspections and environmental monitoring. *See Coalition for Fair and Equitable Regulation of Docks on Lake of the Ozarks v. FERC*, 297 F.3d 771, 774-75 (8th Cir. 2002). Although FERC licenses are normally binding for several decades, FERC may amend them, as here, upon application by the licensee. 16 U.S.C. § 799.

Section 313 of the Act establishes the procedures by which an aggrieved party may obtain judicial review of FERC's final orders. 16 U.S.C. § 825*l*. Before seeking judicial review, however, a party must satisfy administrative exhaustion requirements, first by participating in FERC's proceedings, then by seeking rehearing before FERC. *Id*. § 825*l*(a). If FERC denies the rehearing application, an aggrieved party "may obtain a review of such order" by filing a petition for review within 60 days after the rehearing order. *Id*. § 825*l*(b). The petition for review may be filed in (1) the court of appeals for any circuit where the licensee is located or has its principal place of business, or (2) in the D.C. Circuit. *Id*.

Section 313(b) provides that "[u]pon the filing" of a petition for review, the court of appeals "shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." 16 U.S.C. § 825*l*(b). In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Supreme Court held that Section 313(b) "prescribe[s] the specific, complete and exclusive mode for judicial review of [FERC]'s orders." *Id*. at 336. The Court further held that the provision necessarily precluded de novo litigation between the parties on "all issues inhering in the controversy" and prohibited "all other modes of judicial review." *Id*.

2. The Administrative Procedure Act

The Administrative Procedure Act (APA) does not confer jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). Rather, the APA creates a general cause of action for a person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; *see id*. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). That cause of action, however, does not "(1) affect[] other limitations on judicial review or the power or duty of the court to dismiss any action" or "(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id*.; *see also id*. § 703 (specifying the form of judicial review).

3. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires federal agencies to prepare of an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3 (2019).[2] If the environmental impacts of an action are less than significant, an agency may comply with NEPA by preparing an environmental assessment (EA) and a finding of no significant impact. 40 C.F.R.

[2] This brief cites the prior NEPA regulations applicable to the agency decisions.

§§ 1501.3; 1501.4(c), (e); and 1508.9. NEPA is a procedural statute that "does not mandate particular results." *Utahns for Better Transportation v. U.S. Department of Transportation*, 305 F.3d 1152, 1162 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003). Upon the lead agency's request, any other Federal agency with jurisdiction by law may be a cooperating agency. 40 C.F.R. § 1501.6.

4. The Clean Water Act

The Clean Water Act (CWA) prohibits the "discharge of any pollutant," including spoil, dirt, and rock, without a permit into "navigable waters," defined as "the waters of the United States." 33 U.S.C. §§ 1311(a), 1362(6), 1362(7), 1362(12). Section 404 authorizes the Corps to issue permits for discharges of "dredged or fill material" into waters of the United States. *Id*. § 1344(a). The Corps reviews permit applications to ensure compliance with statutorily mandated regulations known as the "Section 404(b)(1) Guidelines," codified at 40 C.F.R. Part 230, and with its permit regulations at 33 C.F.R. Parts 320–332. *See* 33 U.S.C. § 1344(b)(1). The Corps' Section 404(b)(1) Guidelines analysis of alternatives often will overlap with its NEPA analysis. *See Utahns for Better Transportation*, 305 F.3d at 1163.

5. The Endangered Species Act

Under the Endangered Species Act (ESA), each Federal 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 or result in the destruction or adverse modification of" a species' critical habitat. 16 U.S.C. § 1536(a)(2). Thus, the action agency consults with the expert wildlife agency (here, the Service) on the likely effects of its proposed actions. *Id*.

B. Factual background

1. The Moffat Project

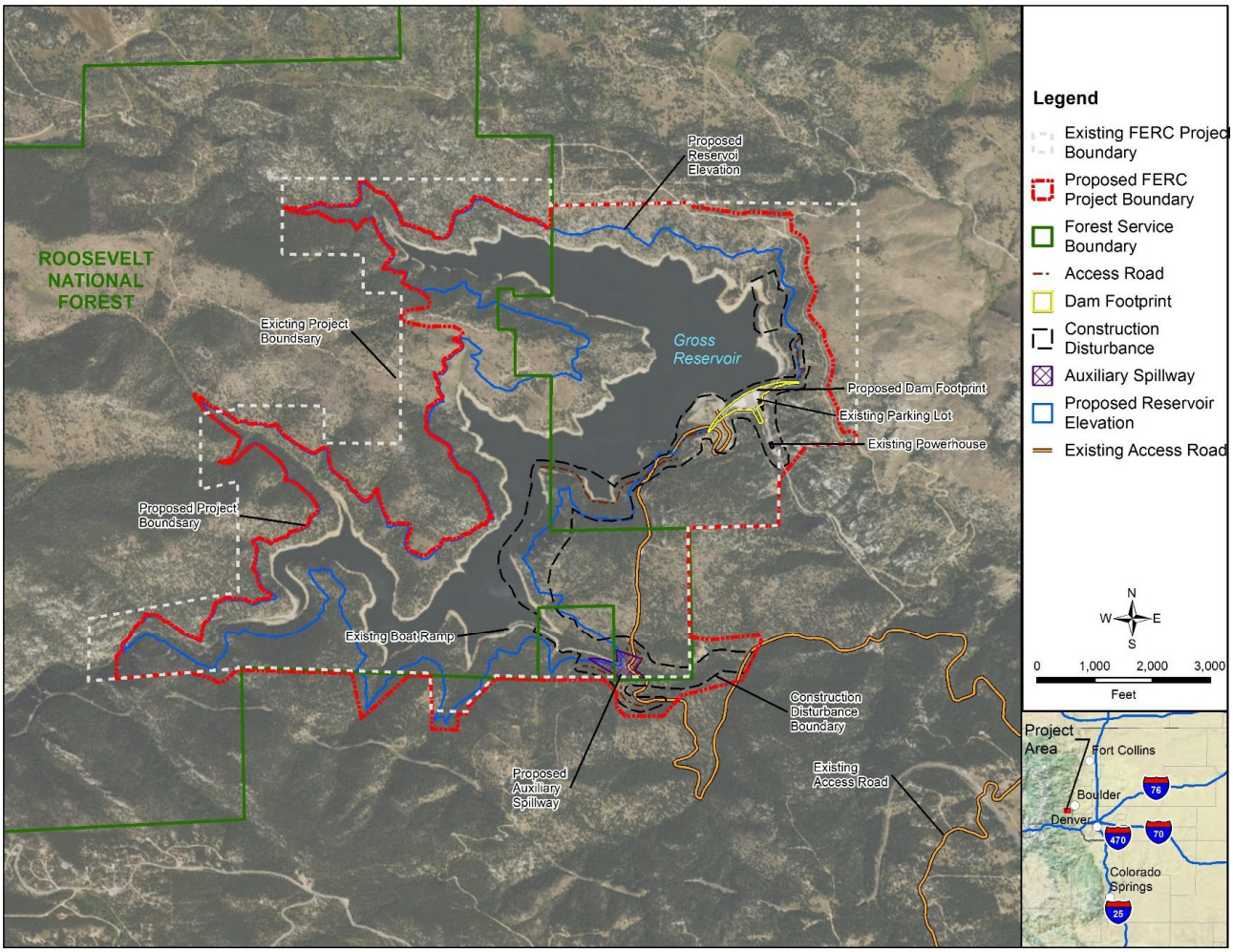
Intervenor-Appellee Denver Water owns and operates Gross Dam and Gross Reservoir under a FERC license. *City and County of Denver, Colorado*, 94 FERC ¶ 61,313 (2001). The Dam and Reservoir are pictured below. Supp.App. 79.

In 1951, FERC issued the original license for the Gross Reservoir Hydroelectric Project, FERC Project No. 2035. *Id*. at ¶ 62,153-54. In 2001, FERC granted Denver Water a new 40-year license and approved construction and operation of hydroelectric generation facilities with 5 megawatts of capacity. *Id*. at ¶ 62160-61. In 2004, FERC approved increased capacity of 7.5 megawatts. Supp.App. 172.

The Gross Dam and Gross Reservoir (also known as the North System or Moffat Collection System), is one of two areas in Denver Water's massive water collection and storage system for the City of Denver and surrounding counties. Pet.App. 164. Denver Water draws most of its current reservoir capacity from the other area (the South System). *Id*. Denver Water predicts that if it does not increase the North System's capacity, it will face water supply shortages as soon as 2022. *Id*. Thus, Denver Water proposed a project known as the Moffat Project, to raise the height of Gross Dam by 131 feet, from 340 to 471 feet and to increase Gross Reservoir's capacity to store water. *Id*.

To build the Moffat Project, Denver Water needed FERC to amend its license for the Gross Reservoir Hydroelectric Project. Pet.App. 165. Denver Water also needed a CWA Section 404 permit to allow discharge of fill material into wetlands from the proposed construction work on the Dam and to inundate wetlands when it expanded the Reservoir. Pet.App. 167. The map below shows the existing boundary of the Gross Reservoir Hydroelectric Project (in white) and

the proposed new boundary after Denver Water completes the Moffat Project (in red). Supp.App. 125.



2. Environmental review of the Moffat Project

From 2003 to 2019, the Corps, FERC, and the Service collaboratively studied the environmental issues related to the Moffat Project. Supp.App. 1-3, 52, 58, 64-65, 68.

The Corps served as the lead agency for the Project's EIS, and FERC was a cooperating agency. Pet.App. 165. In 2014, the Corps issued the final EIS, which

exhaustively evaluated the potential environmental effects of the Moffat Project. Supp.App. 64. In the EIS, the Corps integrated the NEPA analysis with the Section 404(b)(1) Guidelines analysis. Supp.App. 52; Pet.App. 155, 164, 171-72, 178.

To address ESA issues at the Moffat Project, the Corps consulted with the Service over listed terrestrial and aquatic species, leading to three biological opinions. Pet.App. 179. Relevant here, in June 2016, the Service issued a Biological Opinion for green lineage cutthroat trout, which concluded that the proposed Section 404 permit for the Project would not jeopardize the species' continued existence. Pet.App. 111.

The Corps concluded its NEPA process in 2017. It issued the Record of Decision (ROD) in July 2017, and issued the CWA Section 404 Permit to Denver Water in September 2017. Pet.App. 157-200, 201-13. The 404 Permit authorized Denver Water to impact 5.78 acres of waters of the United States "associated with the enlargement of Gross Dam and Reservoir." Pet.App. 206.

In February 2018 and February 2019, FERC issued additional NEPA documents (a draft Supplemental EA and Final Supplemental EA) further analyzing the potential effects of amending Denver Water's FERC license. Supp.App. 178. In so doing, FERC relied on the EIS and the Corps' ROD, stating that "[t]ogether, this series of documents provides a complete record of analysis for

Denver Water's proposals to expand the Moffat Collection System and amend the [FERC] license." Supp.App. 127.

In October 2019, the Corps requested that the Service reinitiate ESA consultation for the green lineage cutthroat trout, and in December 2019, FERC asked to join the consultation. Supp.App. 162-66. In April 2020, the Service concluded the reinitiated ESA consultation. Supp.App. 167-71. The Service found that green lineage cutthroat trout are not members of a threatened or endangered species under the ESA. Supp.App. 171. Thus, the Service determined that consultation under ESA Section 7 was not required and withdrew the 2016 Biological Opinion. *Id*.

In July 2020, FERC granted an amendment to the license for the Gross Reservoir Hydroelectric Project (the License Amendment), authorizing Denver Water to raise Gross Dam's elevation and enlarge Gross Reservoir. Supp.App. 172-209 (*City & County of Denver*, 172 FERC ¶ 61,063 (2020)). In so doing, FERC reiterated that the draft and final EIS and draft and final Supplemental EA provided "a complete record of analysis of the environmental effects of Denver Water's proposal to amend the license for the Gross Reservoir Project." Supp.App. 178. FERC also considered the Service's biological opinions, *id*. at 180-82, and noted that raising the Dam required a CWA Section 404 permit because of direct impacts to jurisdictional waters of the United States, *id*. at 177.

3. Appellants' failure to participate in FERC's proceedings

On February 1, 2017, FERC issued a public notice of Denver Water's final application for a license amendment, providing a 60-day period for motions to intervene. Supp.App. 129. Federal, state, and local agencies, organizations, and individuals responded to the notice. *Id*. The U.S. Forest Service and Boulder County, Colorado, timely intervened. *Id*. Appellants did not.

Roughly one year later, on March 26, 2018, Appellant Save the Colorado moved to intervene out-of-time, which FERC denied. Pet.App. 214-22. Save the Colorado then sought rehearing, asserting that FERC's Supplemental EA was "an extension of" and "part and parcel of" the EIS for the Moffat Project. Pet.App. 224, 227, 228. In November 2018, FERC denied the request for rehearing, concluding that Save the Colorado had failed to show good cause for failing to timely seek intervention. Supp.App. 111-17. FERC found it "difficult to understand why Save the Colorado would have been surprised" by FERC's decision to rely on the 2014 EIS, noting that the Corps had "studied numerous aspects of the proposed expansion of Gross Reservoir." Supp.App. 116.

C. Proceedings below

About a month after FERC denied Save the Colorado's rehearing request, in December 2018, Appellants filed the present suit in district court against the Corps and the Service. Pet.App. 68-136. Appellants' Supplemental Petition for Review

alleges three claims for violating NEPA, the CWA, and the ESA, each of which also asserts violations of the APA. Pet.App. 126-34. Appellants invoked the district court's jurisdiction under 28 U.S.C. § 1331 (federal question).[3] Appellants requested that the district court set aside the 2014 EIS, the 2016 Biological Opinion, the Corps' ROD and 404 Permit, and the Service's April 2020 decision withdrawing the Biological Opinion. And Appellants requested that the court enjoin the Corps and the Service "from taking any further actions in furtherance of this project." Pet.App. 135.

After FERC issued the License Amendment in July 2020, the Corps and the Service and Denver Water (Appellees) moved to dismiss the Supplemental Petition for lack of subject matter jurisdiction. Appellees contended that under the Supreme Court's decision in *City of Tacoma*, Appellants' claims inhered in the controversy over FERC's order and therefore could be pursued only in the courts of appeals under the Federal Power Act's exclusive jurisdiction provision.

The district court agreed and dismissed the case. Pet.App. 137-44.

[3] The Supplemental Petition also invoked jurisdiction under the Endangered Species Act's citizen suit provision, 16 U.S.C. § 1540(c), (g). Pet.App. 73. On appeal, Appellants have declined to raise that provision as a basis for jurisdiction. Opening Brief 1, 29.

SUMMARY OF ARGUMENT

The district court's judgment dismissing the Supplemental Petition for lack of jurisdiction should be affirmed.

1. Appellants urge this Court to interpret Section 313(b) of the Federal Power Act as if it were writing on a blank slate. But Appellants' arguments are foreclosed by precedent, beginning with the Supreme Court's decision in *City of Tacoma* on Section 313(b) and continuing with this Court's decisions interpreting similar exclusive jurisdiction provisions, including *Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 261 (10th Cir. 1989) and *National Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523 (10th Cir. 1993) (*NPCA*). These authorities establish that Section 313(b) provides the exclusive path for judicial review of FERC's orders for a hydroelectric project *and* all issues inhering in the controversy over those orders. Appellants provide no persuasive reason to depart from this precedent.

2. The district court correctly dismissed Appellants' claims for lack of jurisdiction because those claims raise issues inhering in the controversy over FERC's order amending the license for the Gross Reservoir Hydroelectric Project. This conclusion is evident from the Supplemental Petition. Evidence outside the Petition confirms that conclusion. The Moffat Project intends to increase Denver Water's municipal water supply by raising Gross Dam and expanding Gross

Reservoir—actions requiring FERC's approval. Together, the Corps and FERC cooperatively studied the environmental issues raised by the proposed Moffat Project. When it issued the License Amendment, FERC relied on the EIS and the Corps' ROD.

3. Appellants offer no alternative argument why their claims do *not* inhere in the controversy over FERC's order. Instead, they offer four policy reasons why this Court should reverse the district court. If public policy is relevant to the jurisdictional question—it is not—Appellants' policy rationales lack merit.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal for lack of subject matter jurisdiction. *Stuart v. Colorado Interstate Gas Co.*, 271 F.3d 1221, 1224 (10th Cir. 2001). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) may take "one of two forms," either a facial attack on the sufficiency of the complaint or a factual attack, when "a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction is based." *Stuart*, 271 F.3d at 1225 (cleaned up). "In reviewing a factual attack, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id*. at 1225 (cleaned up). This Court reviews the district court's "findings of jurisdictional facts for clear error." *Id*.

ARGUMENT

I. Section 313(b) of the Federal Power Act provides the exclusive path for judicial review of FERC's orders and all issues inhering in the controversy over those orders.

We begin with first principles, laying the foundation for a proper understanding of the jurisdictional issue in this appeal. Then we focus on the proper interpretation of Section 313(b) in *City of Tacoma*. Finally, we explain why Appellants' narrow reading of Section 313(b) conflicts with *City of Tacoma* and this Court's decisions interpreting direct review provisions.

A. Exclusive review provisions like Section 313(b) displace general federal question jurisdiction in the district court.

Federal courts are courts of limited jurisdiction, possessing only those powers granted by the Constitution or Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). All matters are presumed to lie outside the limited jurisdiction of federal courts until the plaintiff carries its burden of establishing that subject matter jurisdiction is proper. *Id*. at 376-78; *see also Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). If a court determines that it lacks subject matter jurisdiction to hear and decide a claim, the claim must be dismissed. Fed. R. Civ. P. 12(b)(1), (c), (h)(3); *Basso v. Utah Power & Light Co*., 495 F.2d 906, 909 (10th Cir. 1974) (courts "must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking").

"Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider," including "when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007); *see also City of Tacoma*, 357 U.S. at 336 ("It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had."). Congress granted the federal district courts general subject matter jurisdiction over all civil cases arising under federal law. 28 U.S.C. § 1331. "But sometimes Congress leapfrogs district courts by channeling claims through administrative review and directly to federal appellate courts." *Bank of Louisiana v. FDIC*, 919 F.3d 916, 922 (5th Cir. 2019) (cleaned up). Congress may "preclude district court jurisdiction either explicitly or implicitly." *Id*. at 923. When it does so, Congress divests the district courts of jurisdiction. *Id*.; *see also NPCA*, 998 F.2d at 1527.

The APA recognizes this principle. APA Section 703 provides that the "form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action." 5 U.S.C. § 703. When Congress "provides for a 'special statutory review proceeding' in one specific court"—as does Section 313(b) of the Federal Power Act—"challenges to the

administrative action must take place in the designated forum." *Preminger v. Principi*, 422 F.3d 815, 821 (9th Cir. 2005).

Congress has enacted many provisions providing for direct, exclusive review of agency action in the court of appeals. It does so with several goals in mind, including to promote the speed, efficiency, and consistency of judicial review of agency action. *See Carpenter v. Department of Transportation*, 13 F.3d 313, 316 (9th Cir. 1994); *Selco Supply Co. v. U.S. EPA*, 632 F.2d 863, 865 (10th Cir. 1980). Many direct review statutes also include an express administrative exhaustion requirement to ensure that the expert agency addresses an issue before the court of appeals does. *Yakus v. United*, 321 U.S. 414, 433 (1944).

To promote these goals, courts have identified several "basic propositions" that apply when interpreting exclusive jurisdiction provisions. *NPCA*, 998 F.2d at 1527. First, "[s]pecific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts." *Skinner*, 931 F.2d at 589. This follows from the "well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies." *Hinck v. United States*, 550 U.S. 501, 506 (2007) (cleaned up).

To hold otherwise would be problematic. It would "encourage circumvention of Congress's particular jurisdictional assignment." *Skinner*, 931 F.2d at 589. And it could lead to bifurcated review of agency actions in both

district court and the courts of appeals, "which could result in inconsistency, duplication, and delay." *NPCA*, 998 F.2d at 1529; *see also Skinner*, 931 F.2d at 589 (warning against "fractured judicial review of agency decisions, with all of its attendant confusion, delay, and expense."). To avoid these unwelcome results, "if there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals," this Court "must resolve that ambiguity in favor of review by a court of appeals." *NPCA*, 998 F.2d at 1529 (cleaned up).

Consistent with these principles and relying on *City of Tacoma*, the district court correctly held in a concise order that the exclusive review provision in Section 313(b) of the Federal Power Act precluded it from exercising jurisdiction over Appellants' claims against the Corps and Service alleging violations of NEPA, CWA, and ESA related to the Moffat Project. Pet.App. 137-44. This holding stems from the Supreme Court's interpretation of Section 313(b) in *City of Tacoma* and guidance in this Court's precedents.

B. The Supreme Court established the broad reach of Section 313(b) in *City of Tacoma*.

Appellants contend that the district court erred in holding that Section 313(b) of the Federal Power Act precluded district court jurisdiction over their claims. In their view, the plain text of Section 313(b) narrowly limits its applicability to direct review of FERC's orders. Opening Brief 30-34. Appellants contend that when Section 313(b) says "order," it authorizes review of *only* FERC's orders, so the

provision "does not require direct review of actions by agencies other than FERC." *Id*. at 31. Nowhere in this part of its Brief, however, do Appellants acknowledge that the Supreme Court interpreted the plain language of Section 313(b) in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). As this Court has recognized, *City of Tacoma* is the "watershed case" on the scope of exclusive jurisdiction provisions, including Section 313(b). *Williams Natural Gas*, 890 F.2d at 261.

In *City of Tacoma*, FERC (through its predecessor, the Federal Power Commission) granted the City of Tacoma a license to construct a 510-foot-tall hydroelectric dam across the Cowlitz River in Washington State. 357 U.S. at 322-24. During the FERC proceedings, the State challenged the project, asserting that the City had breached applicable state laws and failed to obtain state permits and approvals to destroy a fish hatchery. *Id*. at 324–26. FERC granted the City a license to build the dam, and the Ninth Circuit denied the petitions for review challenging the license. *Id*. at 326–28.

While the license dispute was ongoing, the City filed a state court action against its taxpayers and the State, seeking a declaratory judgment that it could issue revenue bonds to finance the Cowlitz project. *Id*. at 329. The State answered and filed a cross-complaint alleging that the dam would interfere with navigation of the Cowlitz River in violation of state law. *Id*. at 331. The State's cross-

complaint did not directly challenge the Commission's licensing order, did not sue the Commission, and did not allege any violations of federal law. The state trial court entered judgment for the State and enjoined the City from constructing the dam. *Id*. The Washington Supreme Court held that as a municipal corporation, the City lacked legal capacity under state law to condemn the State's fish hatchery, and it therefore affirmed an injunction against the project. *Id*. at 332–33.

The United States Supreme Court reversed, finding the State's counterclaims in the state court lawsuit to be an impermissible collateral attack on the Commission's license that was barred by Section 313(b). *Id*. at 334-41. In so holding, the Supreme Court observed that Section 313(b) "is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent." 357 U.S. at 335-36. The provision "prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." *Id*. If the Court had stopped there, Appellants' narrow reading of Section 313(b) would have more force. But the Court then explained the full reach of the provision, relying on its exhaustion and exclusivity language.

The Court observed that in Section 313(b), Congress "provided that any party aggrieved by the Commission's order may have judicial review, upon all issues raised before the Commission in the motion for rehearing, by the Court of Appeals, which 'shall have exclusive jurisdiction to affirm, modify, or set aside

such order in whole or in part,' and that '(t)he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court . . . .'" *Id*. at 336. Having surveyed the full text of Section 313(b), the Court held that the provision "necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." *Id*.

Seeking to cabin *City of Tacoma* and Section 313(b), Appellants urge that the Supreme 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*." Opening Brief 35-36 (quoting *City of Tacoma*, 357 U.S. at 336 (emphasis added by Appellants)). But that narrow view fails to explain the preceding sentence in which the Court stressed that the provision precluded de novo litigation "of all issues inhering in the controversy." 357 U.S. at 336. And Appellants overlook *City of Tacoma*'s repeated emphasis on "issues," not orders. As the Court reasoned, even if "the issue" were not raised during a direct challenge to FERC's order in the court of appeals, "it cannot be doubted that it could and should have been." *Id*. at 339. "And the State may not reserve the point, for another round of piecemeal litigation, by remaining silent on *the issue* while its action to review and reverse the Commission's order was pending in that court."

Id. (emphasis added). In short, Section 313(b) applies not just to FERC's orders but more broadly to "all issues inhering in the controversy."

One reason why *City of Tacoma* necessarily extends Section 313(b) further than FERC's orders is to ensure that the provision's exhaustion, finality, and timeliness requirements are enforced. Otherwise, plaintiffs will find endless ways to evade those requirements while collaterally attacking FERC's orders. The Supreme Court addressed the evasion problem in *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984), where it noted that "[l]itigants may not evade these [exclusive jurisdiction] provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." In that case, it found that plaintiffs had sought to do that because "[i]n substance, the complaint filed in the District Court raised the *same issues* and sought to enforce the *same restrictions* upon agency conduct as did the petition for rulemaking that was denied by the FCC." *Id*.

City of Tacoma held that the "objections and claims" raised by the State, its citizens, and the City's taxpayers in the state court bond validation suit "were *impermissible collateral attacks* upon, and *de novo* litigation between the same parties of *issues* determined by, the final judgment of the Court of Appeals." 357 U.S. at 341 (emphasis added). That is, the state court bond suit did not directly

challenge FERC's orders, but it raised "issues" related to those orders that could not be raised outside of the exclusive review process in Section 313(b).

Furthermore, the lower courts, including this Court, have long understood *City of Tacoma* to construe Section 313(b) broadly to cover all "issues," not just FERC's orders. As this Court described *City of Tacoma*'s inhering-in-the-controversy standard, "We would be hard pressed to formulate a doctrine with a more expansive scope." *Williams Natural Gas*, 890 F.2d at 262; *see also Maine Council of Atlantic Salmon Federation v. National Marine Fisheries Service*, 858 F.3d 690, 693 (1st Cir. 2017) ("The Supreme Court has made it clear that the jurisdiction provided by [Section 313(b)] is 'exclusive,' not only to review the terms of the specific FERC order, but over any issue 'inhering in the controversy.'" (quoting *City of Tacoma*, 357 U.S. at 336)) (Souter, J., sitting by designation); *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 197 (3d Cir. 2018) (invoking *City of Tacoma*'s "inhering in the controversy" test to affirm district court's dismissal of complaint for lack of jurisdiction).

Contrary to Appellants' contention (at 36), the Supreme Court's recent decision in *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021), did not upset *City of Tacoma*'s interpretation of the scope of Section 313(b). In *PennEast*, the Court determined that the direct review provision in the Natural Gas Act, 15 U.S.C. § 717r(b), worded similarly to Section 313(b), did not preclude

New Jersey from asserting a sovereign immunity defense against condemnation proceedings by PennEast, a company holding a FERC certificate to construct a natural gas pipeline. *Id*. at 2254. As the Court observed, to resolve New Jersey's defense, the court below "needed to decide whether [15 U.S.C.] § 717f(h) grants natural gas companies the right to bring condemnation suits against States." *Id*. But FERC's order "neither purports to grant PennEast the right to file a condemnation suit against States nor addresses whether § 717f(h) grants that right." *Id*. Under these circumstances, the Court distinguished *City of Tacoma* because New Jersey's defense in the eminent domain proceeding was "not a collateral attack on the FERC order." *Id*.

This makes sense because Section 717f(h) authorizes certificate holders to exercise the right of eminent domain "*in the district court* of the United States for the district in which such property may be located, or in the State courts." 15 U.S.C. § 717f(h) (emphasis added). In other words, Section 717f(h) contemplates proceedings in district court apart from the exclusive review provided for in Section 717r(b) of the Natural Gas Act. And the Court did not imply, let alone state, that it was overturning or narrowing *City of Tacoma*'s inheres-in-the-controversy standard.

Seeking to bolster their plain language argument, Appellants highlight Congress' disparate amendments of the Federal Power Act and the Natural Gas

Act in the Energy Policy Act of 2005, characterizing that action as "dispositive here." Opening Brief 32. In the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 980 (Aug. 8, 2005), Congress added a new judicial review provision to the Natural Gas Act granting the court of appeals "original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency." 15 U.S.C. § 717r(d)(1). Although Congress also amended parts of the Federal Power Act in the Energy Policy Act, it did not add a similar judicial review provision. According to Appellants, Congress' amendments "made crystal clear its intent to limit the [Federal Power Act's] direct review provision to FERC orders." Opening Brief 32.

This reads too much into Congress' action. First, Section 313(b) of the Federal Power Act and Section 717r(b) of the Natural Gas Act are "in all material respects substantially identical," so for many decades, courts have cited "interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1321 n.3 (10th Cir. 2004). This has not changed since the Energy Policy Act amendments. *See Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1298 n.10 (2016) (observing that "the relevant provisions of the two statutes are analogous," so courts "routinely rel[y] on

[Natural Gas Act] cases in determining the scope of the [Federal Power Act], and vice versa."); *Adorers of Christ*, 897 F.3d at 197.

And in 2005, Congress presumably was aware of *City of Tacoma*, along with decades of decisions from the lower courts applying *City of Tacoma* to interpret Section 313(b) and Section 717r(b). Despite this history, Congress left those provisions intact. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). "When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 808 (1976). *City of Tacoma*'s remains controlling on the scope of Section 313(b).

To be sure, Section 717r(d)(1) of the Natural Gas Act sweeps in more federal agency decisions than either Section 717r(b) or Section 313(b). After the Energy Policy Act, an individual CWA Section 404 permit for a natural gas project is likely subject to direct review in the courts of appeals under Section 717r(d)(1), even ones raising no issues inhering in the controversy over FERC's orders. But just because Section 717r(d)(1) *expanded* exclusive review in the courts of appeals, it does not follow that Congress also intended to *curtail* review under Section

717r(b) or Section 313(b). It is equally logical to glean from Congress' action a continued commitment to direct review in the courts of appeals, combined with a recognition that natural gas projects often traverse hundreds of miles, involve many federal, state, and local agencies, and straddle multiple states. And Congress' choice to carve the Coastal Zone Management Act out of Section 717r(d)(1) speaks to specific concerns about natural gas pipelines. In short, Congress' addition of Section 717r(d)(1) to the Natural Gas Act is not a clear signal that after 2005, Section 313(b) must be read to cover only FERC's orders.

Appellants contend that the district court's ruling "anomalously . . . creates a *more* restrictive judicial review process for the [Federal Power Act] than under the [Natural Gas Act]." Opening Brief 33. But this contention fails to distinguish between the Natural Gas Act's two judicial review provisions. For agency decisions that fall within the scope of Section 717r(d)(1), the requirement to first exhaust proceedings before FERC does not apply. But for challenges to FERC's orders or to agency decisions that raise issues inhering in the controversy over those orders, the exhaustion requirement in Section 717r(b) applies, as it does under Section 313(b) of the Federal Power Act.

In summary, *City of Tacoma* establishes the scope of Section 313(b) to cover any issues inhering in the controversy over a FERC hydropower license. Appellants' attempt to escape controlling Supreme Court precedent must fail.

C. Appellants' narrow reading of Section 313(b) is foreclosed by *City of Tacoma* and this Court's decisions.

Doubling-down on their flawed interpretation of Section 313(b), Appellants contend that the Federal Appellees have "taken the radical and unsupported position that CWA permitting decisions are transformed into FERC orders for purposes of the [Federal Power Act's] exhaustion and direct review provisions." Opening Brief 34. This is hyperbole because Federal Appellees have never suggested that the Corps' permitting decisions are FERC orders or that every CWA Section 404 permit inheres in the controversy over a related FERC order. Federal Appellees' position is supported by *City of Tacoma* and this Court's later decisions interpreting exclusive jurisdiction provisions. These same decisions—and decisions from other circuits—reject Appellants' main reasons why their claims should not be covered by Section 313(b).

Appellants' position reduces to three basic points. They contend that Section 313(b) does not apply because the Corps' Section 404 Permit and the Service's ESA actions are (1) "legally independent actions" that "did not invoke FERC's authority or expertise," (2) "were not incorporated as enforceable components of FERC's license," and (3) "imposed legal obligations only on Denver Water (not FERC)." Opening Brief 39. But this Court's decisions do not slice exclusive jurisdiction provisions so thin. Rather than look at the substance of the claims, or focus solely on which agency took the action, this Court has

considered whether the *issues* underlying an agency's action are related enough to the agency order subject to an exclusive jurisdiction provision.

For example, in *NPCA* this Court held that it had jurisdiction under an exclusive jurisdiction provision for Federal Aviation Administration (FAA) orders to review both an FAA order and a Bureau of Land Management (BLM) final agency action related to a project to construct, operate, and fund a new airport. 998 F.2d at 1525-26. Two potential sites considered for constructing the airport were on public lands administered by the BLM under the Federal Land Policy and Management Act, and part of the final site of the airport was on BLM land designated as an "area of critical environmental concern." *Id*. at 1525. Thus, "to permit conveyance" of the land to the airport, BLM "had to amend the land plan, which required compliance with NEPA." *Id*. at 1526. The FAA prepared the EIS, and BLM relied on the EIS for its NEPA compliance for its plan amendment decision. *Id*. Given the statutory provision providing for exclusive jurisdiction over FAA's orders in the courts of appeals, the Court had to decide "whether jurisdiction to review petitioners' claims" against FAA and BLM rested "with this court, the district court, or both courts." *Id*. at 1526-27.

The Court had little trouble concluding that it had direct review jurisdiction to review all of FAA's actions, including its compliance with NEPA. *Id*. at 1527-28. The Court then confronted the "[s]omewhat more difficult" question of

whether it also had exclusive jurisdiction over BLM's challenged actions. *Id*. at 1528.

Unlike the inflexible "legally independent" standard advocated by Appellants (Opening Brief 30), in *NPCA* this Court explained that to find jurisdiction over claims challenging BLM's actions, it had to determine that those actions were "taken to facilitate the actions of the FAA, and that such facilitation places the BLM's actions under our jurisdiction." 998 F.2d at 1528. In other words, even though BLM's "decision to convey the land focused on statutes separate from the FAA Act," the Court dug deeper into the actual relationship between the agencies' actions. *Id*. at 1528. The Court carefully analyzed that relationship, observing that "if the BLM had determined that the land could not be conveyed, the FAA's project would not have been able to proceed on that land." *Id*.

The Court also expressed concern that "if the BLM actions could not be directly reviewed by us while the FAA actions could, the bifurcated suit could result in inconsistency, duplication, and delay." *Id*. at 1529. And the Court explained that "any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals" must be resolved "in favor of review by a court of appeals." *Id*. (cleaned up). Thus, the Court held—in tension with Appellants'

narrow reading of Section 313(b)—that it had jurisdiction to review BLM's actions under the exclusive jurisdiction provision that applied to the FAA's orders.

Years later, this Court again held that it had jurisdiction to review the decisions of two agencies—the FAA and the Air National Guard—even though the plain text of the direct review provision covered only FAA's orders. *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 (10th Cir. 2001). Notably, while in *NPCA*, the FAA prepared the EIS that BLM relied on, in *Custer County*, the opposite occurred: the Air National Guard prepared the EIS, and the FAA incorporated the EIS into its final decision. *Id*. at 1027. The jurisdictional result, however, was the same. *Id*.; *see also City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) ("[W]hen a [biological opinion] is prepared in the course of a FERC licensing proceeding, the only means of challenging the substantive validity of the [biological opinion] is on review of FERC's decision in the court of appeals.") (citing *City of Tacoma*, 357 U.S. at 336).

Appellants barely mention *NPCA* and fail to address *Custer County* at all. Opening Brief 43. Instead, they urge this Court to adopt the approach in two out-of-circuit cases, *Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015), and *Merritt v. Shuttle*, 245 F.3d 182 (2d Cir. 2001). Opening Brief 37-39. But *Mokdad* and *Merritt* both narrowly interpreted the Federal Aviation Act's exclusive jurisdiction provision, in tension with this Court's decisions in *NPCA* and *Custer County*. *See*

also Mokdad, 804 F.3d at 815-16 (Batchelder, J., concurring in part and dissenting in part). This Court should follow its precedent.

Appellants compare this case to *Snoqualmie Valley Preservation Alliance v. U.S. Army Corps*, 683 F.3d 1155 (9th Cir. 2012), where the Ninth Circuit held that Section 313(b) did not preclude the district court's jurisdiction to review a CWA permit for a hydropower project. Opening Brief 41. But *Snoqualmie* is distinguishable for many reasons. For one thing, the court's fleeting discussion of the jurisdictional issue does not address *City of Tacoma*. *Id*. at 1159-60. For another, the challenged action was the Corps' verification for a *nationwide* permit, not an individual 404 permit, as the Corps issued here. *Id*. at 1158-60. In *Snoqualmie*, the Corps was not required to do project-specific NEPA analysis for the nationwide permit verification. *Id*. Here, by contrast, the Corps did extensive NEPA analysis of the Moffat Project in an EIS prepared in collaboration with FERC, and FERC relied on that EIS in the License Amendment.

Finally, in *Snoqualmie*, the court found that the plaintiff "could . . . not have brought any of their present claims in the earlier lawsuit" against FERC because the Corps "had not yet" made its verification. *Id*. at 1159. Here, FERC issued its order *after* the Corps issued the 404 Permit. Ruling against Appellants will not create a split with the Ninth Circuit. *See also California Save Our Streams, Inc. v. Yeutter, Inc.*, 887 F.2d 908, 910-12 (9th Cir. 1989) (holding Section 313(b)

provided the exclusive route for judicial review of the Forest Service's conditions under Section 4(e) of the Federal Power Act, including the Service's NEPA analysis).

Appellants also assert that FERC's lack of authority and expertise under the CWA are reasons why Section 313(b) does not apply. Opening Brief 39. This argument cuts against Appellants on their NEPA claim because FERC, like the Corps, has authority and expertise to implement NEPA. Nobody denies that the Corps is one of two expert agencies that Congress charged with administering the CWA, EPA being the other one. But the more relevant question is which *court* should hear the claims. And Appellants cannot dispute that the court of appeals is equally capable as the district court to resolve CWA claims.

To that end, courts agree that the substantive nature of a claim does not dictate whether an exclusive jurisdiction provision applies. This is for two primary reasons. First, dividing claims between the court of appeals and the district court based on their substantive content would require bifurcating judicial review—a result directly contrary to Congress' clear purpose in enacting exclusive jurisdiction provisions.

Second, "FERC may hear any claim raised before it—even potential violations of federal law." *Adorers of Christ*, 897 F.3d at 197; *id*. at 193-98 (Religious Freedom Restoration Act claim subject to Section 717(b) of the Natural

Gas Act). "There is no inherent inhibition to FERC hearing a potential claim in the first instance because it is statutorily granted the authority to hear any claim from an affected party when raised timely." *Id*. at 197. If timely raised, FERC "may adjudicate these claims in a way it believes appropriate." *Id*. Then if "an affected party disagrees with the adjudication of her claim, she has the opportunity for direct appeal before a federal court of appeals." *Id*. The same principle applies to Appellants' CWA claim.

Williams Natural Gas illuminates these principles. There, this Court leaned heavily on *City of Tacoma* to hold that a state court action between a competitor and a FERC licensee was barred by Section 717r(b) of the Natural Gas Act. 890 F.2d at 260-64. This Court reasoned that "nothing in the substantive character" of the state court plaintiff's challenges "would exempt those arguments from the statutory appellate scheme." *Id*. at 262. Invoking *City of Tacoma*'s interpretation of Section 313(b) to preclude "*de novo* litigation between the parties of *all issues inhering in the controversy*," the Court struggled to "formulate a doctrine with a more expansive scope." *Id*. (emphasis original). And the Court "fail[ed] to find provision in" Section 717r(b) "for the bifurcation of judicial review along substantive lines." *Id*. "This is not surprising, however, given that such a procedure" allowing bifurcation of judicial review along substantive lines "would negate most of the benefits attending the 'exclusive' scheme of review." *Id*.

Other circuits agree. The question is *not*, as Appellants assert, whether the claims arise under a particular substantive statute—NEPA or the CWA for instance. The question is whether the claims raise issues that should be resolved through exclusive review in the court of appeals. As the D.C. Circuit explained in *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979), the "choice of forum" is for Congress to decide, and "we cannot imagine that Congress intended the exclusivity *vel non* of statutory review to depend on the substantive infirmity alleged." *Id*. at 936. That is because the "policy behind having a special review procedure in the first place similarly disfavors bifurcating jurisdiction over various substantive grounds between district court and the court of appeals." *Id*.; *see also Palumbo v. Waste Technologies Industries*, 989 F.2d 156, 161 (4th Cir. 1993) ("[W]hen Congress has chosen to provide the circuit courts with exclusive jurisdiction over appeals from agency decisions, the district courts are without jurisdiction over the legal issues pertaining to those decisions—whether or not those issues arise from the statute that authorized the agency action in the first place.").

Finally, although Appellants' brief emphasizes the CWA, their cause of action for CWA violations is properly an APA claim. A party ordinarily may challenge the Corps' decision on a Section 404 permit through an APA claim in district court. *See National Ass'n of Manufacturers v. Department of Defense*, 138

S. Ct. 617, 626 (2018) (observing that "final EPA actions falling outside the scope of § 1369(b) . . . are typically governed by the APA," which provides for review of "final agency action for which there is no other adequate remedy in a court" (quoting 5 U.S.C. § 704)). But the APA provides that a "special statutory review proceeding" is controlling unless inadequate or absent. 5 U.S.C. § 703; *Preminger*, 422 F.3d at 821; *Skinner*, 931 F.2d at 588 n.8. Section 313(b) is such a provision.

In sum, this Court's decisions confirm the broad scope of Section 313(b) illuminated by the Supreme Court in *City of Tacoma* and the applicability of the inhering-in-the controversy standard in this case.

II. Appellants' claims raise issues inhering in the controversy over FERC's order for the Gross Reservoir Hydroelectric Project, so Section 313(b) precludes jurisdiction in the district court.

Section 313(b) of the Federal Power Act precludes district court jurisdiction over Appellants' claims because they raise issues inhering in the controversy over FERC's order. *First*, this is evident both from the allegations in Appellants' Supplemental Petition for Review and from abundant evidence outside the Petition's four corners. *Second*, Appellants' claims and the relief sought constitute an impermissible collateral attack on FERC's order, reinforcing why the district court lacked jurisdiction. *Finally*, to the extent public policy plays any role in evaluating this Court's subject matter jurisdiction, it further undermines Appellants' position.

A. The Supplemental Petition and other evidence shows that the claims raise issues inhering in the controversy over FERC's order.

The Supplemental Petition alone demonstrates that Appellants' claims raise issues inhering in the controversy over FERC's order amending the license for the Gross Reservoir Hydroelectric Project. Evidence in the record for the Corps' and Service's actions and in FERC's licensing proceedings confirms this conclusion. Appellants make little effort to contest the district court's factual findings, which are correct and should be upheld under this Court's clear error review. *Stuart*, 271 F.3d at 1225.

1. The Supplemental Petition's allegations raise many environmental issues about the Dam and Reservoir.

The Supplemental Petition shows that Appellants' claims raise issues inhering in the controversy over FERC's order. Although the Petition does not name FERC as a defendant, nor directly challenge FERC's order, application of Section 313(b) does not "hang[] on the ingenuity of the complaint," and cannot be avoided "through careful pleading." *California Save Our Streams*, 887 F.2d at 911-12. The Petition repeatedly raises issues tied directly to FERC's order.

Even a cursory review of the allegations reveals that the Supplemental Petition is a sweeping challenge to the entire Moffat Project, including the Reservoir and Dam expansion authorized by FERC. Pet.App. 68-136. Indeed, the *first sentence* of the Petition alleges that the Corps "has authorized construction

and operation of . . . 'the Moffat Project' . . . *which would constitute the tallest dam in the history of Colorado*, serve as the largest construction project ever in Boulder County, and cause extensive environmental damage on both sides of the Continental Divide." Pet.App. 68 (emphasis added). The Petition repeatedly bears out this tight relationship between the Corps' decisions and analyses for the Moffat Project and FERC's License Amendment.

First, the Petition spotlights the Dam and Reservoir as the Project's centerpiece. The Petition alleges that the Project would enlarge the existing Gross Reservoir, and the "enlargement would be accomplished by raising the existing concrete gravity arch dam by 131 feet, from 340 to 471 feet high—i.e., essentially building a new massive dam in front of, and on top of, the current dam, resulting in the tallest dam in Colorado." Pet.App. 94-95; *see also id*. at 69 (asserting that the "project would raise the existing dam height by 131 feet, double the surface area of the existing Gross Reservoir, and nearly triple the reservoir's water storage capacity"); *id*. (discussing the "dam construction component of the project"). Appellants allege that "[c]onstruction of the new dam and expanded reservoir, in a rural area far above the City of Boulder, would constitute the biggest and most expensive construction project in the history of Boulder County." *Id*. at 69-70.

Second, the Petition emphasizes the alleged environmental impacts from Dam construction. Appellants allege that the impacts from dam construction include:

- "using explosives and mining to extract as much as 1.6 million tons (approximately 1 million cubic yards) of rock for construction of the new dam at an on-site quarry," Pet.App. 70-71;
- "building and operating an industrial facility (i.e., an on-site concrete plant)," *id*. at 71;
- "engaging in around-the-clock construction activities for at least four years," *id*.; and
- "creating constant safety and health hazards from heavy truck traffic, associated dust, and air and noise pollution," *id*.

Appellants rely on these same alleged impacts to support their Article III standing. For example, they allege that "[h]undreds of residents living in close proximity to Gross Dam participate in The Environmental Group and would be directly affected by the proposed construction activities, noise, truck traffic, dust, and emissions." Pet.App. 76; *id*. at 75.

Third, the Petition challenges the NEPA analysis for the *entire* Moffat Project, not for a discrete, Corps-specific issue. Seeking to reframe their case on appeal, Appellants now contend that their original Petition "challenged actions and analyses by the Corps under the CWA and NEPA pertaining to matters exclusively within the Corps' jurisdiction." Opening Brief 23. They also claim that "[u]nder NEPA, Appellants 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." *Id*. (citing Pet.App. 59-63). It is unclear what Appellants mean by "uniquely within the Corps' authority" under NEPA; NEPA is a statute that nearly all federal agencies implement. And the sole example Appellants give—Denver Water's water demand projection—is not uniquely within the Corps' authority.

Appellants' characterization of the Petition is also incorrect. The Petition challenges many parts of the NEPA analysis directly tied to FERC's role in the Moffat Project—authorizing Denver Water to raise the height of the Dam and expand the size of the Reservoir. Pet.App. 96-109, 113-15, 118-20, 126-30. For example, the Petition alleges that the Corps failed to fully calculate the Project's costs, which are largely driven by the construction costs to raise the height of the Dam. *Id*. at 118.

Fourth, the Petition challenges the Corps' 404(b)(1) Guidelines analysis on similar grounds to its NEPA challenge. Although Appellants are correct that the 404(b)(1) Guidelines analysis is a substantive CWA requirement, here that analysis is connected to the NEPA analysis for this Project. Opening Brief 7-8. The Petition shows that the two analyses are closely related, even overlapping. To illustrate, the Petition alleges that the Moffat Project is "much more expensive than stated" in the Final EIS, "thereby skewing the *practicability and alternatives*

analyses undertaken by the Corps, which eliminated many alternatives on the basis of cost as compared to the project." Pet.App. 108 (emphasis added). Likewise, Appellants allege that by "failing to accurately present the full costs of the Moffat Project in the FEIS and ROD, . . . the Corps violated the CWA." Pet.App. 130.

Fifth, the Petition challenges the Service's ESA actions, including the 2016 Biological Opinion and the Service's 2020 letter withdrawing the Biological Opinion. Pet.App. 130-34. The Biological Opinion studied how increased diversions of water to Gross Reservoir might affect the green lineage cutthroat trout. Pet.App. 112-13. And the Petition fails to note that shortly after the Corps requested to reinitiate consultation with the Service in 2019, FERC requested to join the consultation for the project. Supp.App. 163-66.

Finally, all of the Petition's claims invoke the APA's cause of action. But the APA "actually favors appellate court review" because it "directs parties to pursue first any 'special statutory review proceeding relevant to the subject matter in a court specified by statute,' *before* attempting to invoke a district court's general subject matter jurisdiction." *Skinner*, 931 F.2d at 588 n.8 (quoting 5 U.S.C. § 703) (emphasis added).

Appellants do not *once* cite their Supplemental Petition in their Argument. Opening Brief 29-58. Nor do they offer any express argument why their Petition does *not* raise issues inhering in the controversy over FERC's order. It does.

2. Abundant evidence confirms that the claims raise issues inhering in the controversy.

Standing alone, the Petition's allegations show that Appellants' claims raise issues inhering in the controversy over FERC's order. But when addressing jurisdiction, the parties and the district court also properly looked beyond the Petition to evidence in the Corps' and Service's records and in FERC's license amendment proceeding. This evidence reinforces the interrelated nature of the agencies' analyses and actions. Pet.App. 142-43.

First consider the claim for NEPA violations. Although the Supplemental Petition challenges both the ROD and EIS as violating NEPA, on appeal Appellants say little about the substance of these documents. Opening Brief 23, 34. Yet the EIS analyzes the potential environmental impacts of raising the Dam and expanding the Reservoir—decisions at the core of FERC's authority. Supp.App. 51-61, 69-78; *id*. at 119 ("The Final EIS reviewed the effects of enlarging the Moffat Collection System and amending the license for Gross Reservoir Project."). All five action alternatives that the Corps evaluated in the EIS included raising Gross Dam and expanding Gross Reservoir. Supp.App. 76; Pet.App. 150-54 (Corps' notice of availability for the draft EIS). Indeed, it is hard to imagine a logical way to neatly divide the NEPA analysis between the Corps' 404 Permit and FERC's License Amendment. The analysis for both actions goes hand-in-hand.

Underscoring this point, FERC relied on the EIS and ROD for its decision. *See Custer County*, 256 F.3d at 1027 (relying on *NPCA* to extend the FAA's direct review provision to another agency's EIS "incorporated into the FAA's final decision"). As FERC explained, "this series of documents"—the EIS, ROD, and FERC's draft and final Supplemental Environmental Assessment—"provides a complete record of analysis for Denver Water's proposals to expand the Moffat Collection System and amend the license for the Gross Reservoir Hydroelectric Project." Supp.App. 127; *id*. at 132.

Next weigh the claim for CWA violations. Appellants contend that the Corps' 404 Permit is disconnected from FERC's license for the Gross Reservoir Hydroelectric Project. They assert that "neither the [Federal Power Act] nor FERC's license triggered the Corps' obligation to grant or deny a Section 404 Permit"; they note that 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"; and they urge that the "Corps' Section 404 findings challenged here are practically and legally meaningful in the absence of FERC's license." Opening Brief 43-44. None of these points accurately capture *City of Tacoma*'s inhering-in-the-controversy standard.

What is more, this 404 Permit lacked utility absent FERC's order. *Cf.* Opening Brief 44. Denver Water needed the 404 Permit for two reasons, both tied directly to FERC's License Amendment. First, construction to raise the Dam's height would cause temporary impacts to wetlands. Supp.App. 63. Second, expanding Gross Reservoir's capacity would inundate wetlands, causing permanent loss of wetlands. Supp.App. 62-63. And this is precisely what the 404 Permit authorized Denver Water to do—to impact 5.78 acres of Waters of the U.S., causing some permanent impacts to wetlands and some temporary impacts to wetlands, "associated with the enlargement of Gross Dam and Reservoir." Pet.App. 206. In other words, this particular 404 Permit was meaningful only if FERC authorized expansion of Gross Reservoir and raising of Gross Dam.

In addition, the NEPA and CWA analyses overlap because the Corps used the EIS to comply with the CWA Section 404(b)(1) Guidelines. Supp.App. 52 ("This EIS has also been formulated to address the information requirements of the Section 404(b)(1) Guidelines (40 CFR 230)."); Supp.App. 66-67; Pet.App. 164, 171-72, 178. The Corps integrated the alternatives analysis under NEPA and the 404(b)(1) Guidelines. Pet.App. 155. And the Corps conducted a combined alternative screening process with FERC's review and input. *Id*.

Finally, the claim for ESA violations also raises issues inhering in the controversy. The Corps consulted extensively with the Service under Section 7 of

the ESA, and part of that consultation included analyzing the effects of the action before FERC. Supp.App. 130-31. For this reason and to comply with its ESA obligations, FERC requested in 2019 to join the Section 7 consultation initiated by the Corps, a consultation the Service determined was not required because green lineage cutthroat trout are not members of a listed threatened or endangered species. Supp.App. 171. And FERC relied on the Service's expert ESA conclusions and biological opinions when issuing the License Amendment. Supp.App. 180-82. *See Maine Council*, 858 F.3d at 691-94 (biological opinion that inhered in the controversy over FERC's orders was subject to exclusive review under Section 313(b)).

3. The regulatory submissions from Appellants and Amicus Boulder County also support this conclusion.

Appellants contend they were caught off guard by the agencies' handling of the analyses and approvals for the Moffat Project. Opening Brief 16-24. But they present an incomplete account of the regulatory process. A more complete review of that process, including the submissions by Appellants and Amicus Curiae Boulder County, reinforces the close relationship between the Corps' analyses and action and FERC's proceedings.

Appellants present a timeline of "key dates" that omits *twelve years* of relevant activity by the Corps and FERC, from 2003 to 2016. Opening Brief 16. During that decade-plus gap in Appellants' account, the Corps and FERC

collaborated closely on the environmental analysis for the Moffat Project. Pet.App. 165-66; Supp.App. 1-13. From 2004 to 2008, Denver Water proposed concrete plans to the Corps and FERC to integrate the agencies' regulatory processes and NEPA analyses "with the least amount of duplicative effort." Supp.App. 10. In March 2008, the Corps endorsed this proposal. Supp.App. 13. Then Denver Water informed the public about this plan. Supp.App. 14-25. As Denver Water explained, "most of the analysis for an enlargement of Gross Reservoir will be covered in the Corps' Draft EIS." Supp. App. 15.

And the Corps continued to communicate this plan to the public. For example, in 2010, the Corps issued the public notice of availability for the draft EIS and Section 404 permit application. Pet.App. 150-54. The notice explained that the proposed Moffat Project required enlarging Gross Reservoir and raising Gross Dam and that "FERC will review a license amendment application submitted by Denver Water to the FERC following the Corps' permit decision." Pet.App. 154; *id*. at 152-53.

In 2014, the Corps released the final EIS. Appellants pluck a sentence from the EIS's hundreds of pages: "Obtaining approvals from FERC is a separate regulatory process from the Corps' Section 404 review." Opening Brief 18 (quoting Pet.App. 156). But the very next sentence, which Appellants omit, again highlights the close relationship between the Corps' analyses and FERC's

decision: "Denver Water has indicated that its application to FERC to amend the hydropower license for the Gross Reservoir project *will reference sections of this Final EIS to provide environmental information required in the amendment process*." Pet.App. 156 (emphasis added). Well before FERC's intervention window closed on April 2, 2017, the public knew that the Corps and FERC were working cooperatively on the Moffat Project and that the Corps' environmental analysis would play an integral role in FERC's license amendment proceedings.

Confirming this understanding, on March 30, 2017, days before the intervention window closed, Appellant The Environmental Group submitted well over 100 pages of material to FERC, urging FERC to "concur" with its view that "requirements set forth by NEPA, CWA and the U.S. Army Corps of Engineers for project design and analysis have not been met." Supp.App. 99; *id*. at 102 ("We understand that FERC pays close attention to the NEPA and CWA regulations in reviewing applications."); *id*. at 98-104.[4]

Amicus Curiae Boulder County also grasped this close connection. In March 2010, the County sent a letter to *both* the Corps and to FERC raising concerns about *both* the draft EIS and the draft FERC license amendment

[4] In a March 27, 2017 letter to the Corps, Appellant Save the Colorado objected to the EIS based on information in Denver Water's license application to FERC. Supp.App. 95-97. Likewise, Appellants Save the Colorado and The Environmental Group submitted comments to FERC on the Supplemental EA raising issues that FERC found the Corps had addressed in the EIS. *Id*. at 134-61.

application. Supp.App. 26-50. As the County noted, to "fully evaluate the proposal's impacts, both the Draft documents must be considered together." *Id*. at 28.

Then in March 2017, Boulder County timely moved to intervene in FERC's license amendment proceedings. Supp.App. 80-85. When seeking intervention, Boulder County explained that it was submitting to FERC the same comments that it had submitted to the Corps on the EIS because "FERC is relying upon the Corps' EIS for its environmental review of Denver Water's Application." Supp.App. 81. After becoming an intervenor, in 2018, Boulder County submitted comments raising concerns about the Corps' NEPA analysis and urging FERC to find that "both the FEIS and the EA fail to meet the standards of [NEPA]." Supp.App. 105; *id*. at 105-10.

By contrast, Appellants sought late intervention in March 2018—a full year after Boulder County. Pet.App. 214-19. FERC denied intervention and affirmed that denial in a rehearing order. Appellants declined to seek judicial review of FERC's orders. *Cf. National Parks Conservation Ass'n v. FERC*, 6 F.4th 1044 (9th Cir. 2021) (reviewing FERC's denial of intervention). Instead, Appellants contend (Opening Brief 47-48) that in pursuing their district court case against the Corps and Service, they "reasonably relied" on FERC's statement in its rehearing order that "[t]his proceeding in no way shields the Corps from judicial review: the

record does not reflect whether Save the Colorado 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." Supp.App. 117. But FERC's cryptic statement—buried in a footnote on rehearing—does not alter Section 313(b)'s reach. "Determining federal court jurisdiction is exclusively the province of the courts regardless of what an agency may say." *Lindstrom v. United States*, 510 F.3d 1191, 1195 n.3 (10th Cir. 2007) (cleaned up).

Besides, in seeking late intervention, Appellants stressed the intermingled nature of the Corps' and FERC's NEPA analyses. Pet.App. 218 ("The FERC proceeding is relying on many aspects of the technical information in the Corps NEPA process including analyses in the DEIS, FEIS, and Record of Decision."). And FERC too remarked that "[i]t might be said that the EIS is part and parcel of the EA, which relied on the EIS." Supp.App. 115. Appellants' after-the-fact reliance on FERC's statement lacks merit, especially when Boulder County timely intervened in FERC's proceedings and Appellants chose not to seek judicial review of FERC's denial of intervention.

B. The claims are also an impermissible collateral attack on FERC's order.

Because Appellants' claims raise issues inhering in the controversy over FERC's order, they implicate Section 313(b) in three additional ways.

First, Appellants' claims are a collateral attack on FERC's order. In their Supplemental Petition, Appellants requested that the district court "set aside" the Corps' ROD, EIS, and 404 Permit, as well as the Fish and Wildlife Service's April 2020 letter. Pet.App. 135. But FERC relied on the EIS when approving the License Amendment. Supp.App. 178-79. And the Corps granted the 404 Permit to allow temporary wetlands impacts from construction of the Dam and permanent wetlands impacts from enlarging of the Reservoir. Pet.App. 206. Without the 404 Permit, Denver Water cannot raise the Dam, nor can it expand the Reservoir. Likewise, without FERC's License Amendment, the 404 Permit has no practical utility to Denver Water. Pet.App. 156. As hard as Appellants try to separate them, their challenge to the EIS, the ROD, and the 404 Permit collaterally challenges FERC's order. *See Otwell v. Alabama Power Co.*, 747 F.3d 1275, 1281-83 (11th Cir. 2014) (rejecting plaintiff's suit against FERC licensee as a collateral attack that contravened *City of Tacoma*).

Second, Appellants' interpretation of Section 313(b) would sanction bifurcated judicial review in circumstances like the ones here. If Amicus Curiae Boulder County, which timely intervened in FERC's proceedings, had exhausted its rights in those proceedings, it could have petitioned for review of FERC's order. Then Boulder County could have challenged the EIS and ROD directly in the court of appeals while Appellants challenged the same EIS and ROD in district court.

Those courts could reach *conflicting* results—one upholding the EIS and ROD, one setting it aside. In addition, Section 313(b) authorizes review in the regional circuit *or* the D.C. Circuit. Thus, if Appellants had their way, ultimately *two courts of appeals* could review the same EIS and ROD and reach clashing results. Appellants fail to acknowledge that their reading of Section 313(b) allows for bifurcation—a result disfavored by Congress and the courts. *NPCA*, 998 F.2d at 1529; *Williams Natural Gas*, 890 F.2d at 262.

Third, Congress enacts exclusive review requirements to increase the speed, efficiency, and consistency of judicial review. *Carpenter*, 13 F.3d at 316. By filing their claims in district court after FERC denied intervention, Appellants seek to evade the congressional purposes in Section 313(b).

III. If public policy is relevant, it does not support Appellants' position.

Claiming that this appeal has "enormous public policy implications," Appellants urge this Court to reverse the district court based on four public policy considerations. Opening Brief 48-58. "Policy considerations, however, are relevant only when a statute is ambiguous," and Appellants have "not shown or even argued that [Section 313(b)] is ambiguous." *Sunshine Haven Nursing Operations, LLC v. U.S. Department of Health & Human Services*, 742 F.3d 1239, 1250 (10th Cir. 2014). In fact, the Supreme Court determined that Section 313(b) is "written in simple words of plain meaning," leaving "no room to doubt

congressional purpose and intent." *City of Tacoma*, 357 U.S. at 335-36. In any event, Appellants' warning that this Court's affirmance would cause "significant adverse consequences for litigants, courts, FERC, and environmental protection" rings hollow. Opening Brief 48.

First, dismissing Appellants' suit does not contravene the "strong presumption favoring judicial review of administrative action." Opening Brief 49 (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015)). If Appellants had timely intervened in FERC's proceedings and exhausted their objections, they could have obtained judicial review under Section 313(b).

Appellants invoke the APA's finality requirement in 5 U.S.C. § 704 and *Darby v. Cisneros*, 509 U.S. 137, 154 (1993), which held that courts may not impose exhaustion requirements as a "rule of judicial administration." Opening Brief 49. But Section 313(b) contains an express exhaustion requirement; when the provision applies, exhaustion is mandated by Congress.

Appellants also conflate finality under the APA with subject matter jurisdiction (which the APA does not create). Opening Brief 49. The 404 Permit and the ROD were final when the Corps issued them. But for APA claims like those asserted by Appellants, the "form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . . ." 5 U.S.C. § 703.

Accusing the Corps of being "silent about exhaustion in its permit and ROD," Opening Brief 50, Appellants characterize the Corps' position here as a "textbook example of an impermissible post hoc rationalization that this Court must reject." *Id*. at 50-51 (quoting *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988)). But like FERC, the Corps' views about federal court jurisdiction are not controlling. This Court is the sole arbiter of that question. *See Lindstrom*, 510 F.3d at 1195 n.3. Appellants also question how the district court "properly exercised jurisdiction over this case for nearly two years until FERC issued its license." Opening Brief 51. Could the district court have dismissed the suit earlier? Yes. *See Bywater Neighborhood Ass'n v. Tricario*, 879 F.2d 165, 167-69 (5th Cir. 1989) (dismissing suit preemptively *before* agency issued order subject to direct review statute). Still, the timing aligns with *Williams Natural Gas*, in which this Court held that judicial review under Section 717r(b) of the Natural Gas Act "is exclusive in the courts of appeals *once the FERC certificate issues*." 890 F.2d at 262 (emphasis added).

Second, Appellants claim to face a Catch-22 because the Corps issued the ROD and 404 Permit after the window for intervention in FERC's proceeding had closed. Opening Brief 52-53. But well before FERC's intervention window opened in 2017, the following had occurred: By 2008, the Corps and Denver Water had informed the public about the coordinated timing and plans for the agencies'

decisions; by 2010, Denver Water had circulated for public input a draft application for a FERC license amendment that relied on the Corps' environmental analysis; and by 2014, the Corps had issued the final EIS for the Moffat Project. *See* Argument Point II.A.3. Based on this information, Boulder County timely intervened in 2017 to raise with FERC issues that Appellants now seek to litigate in district court. Appellants compare (Opening Brief 53) their situation to *Snoqualmie Valley*, 683 F.3d at 1159, but that case only highlights the procedural difference. In *Snoqualmie*, the court noted that the plaintiff's claims "could not have been raised in the challenge to the FERC license amendment because the Corps had not yet" issued the nationwide permit verification. *Id*. at 1159. Not so here.

Another timing issue cuts against Appellants. Section 313(b)'s 60-day window to petition for review is an unmistakable signal that Congress intended judicial review of FERC licensing decisions to proceed swiftly. *See Harrison v. PPG Industries*, 446 U.S. 578, 593 (1980) ("The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal."). But if Section 313(b) does not apply to Appellants' claims, then they are governed by the default 6-year limitations period in 28 U.S.C. § 2401(a). Under Appellants' position, they could

delay seeking judicial review of the 404 Permit, the ROD, and the EIS until 2023, years after FERC issued the License Amendment in 2020.[5]

Third, Appellants assert that affirmance would "exponentially expand the scope of FERC proceedings." Opening Brief 56. This assertion appears to flow from Appellants' mistaken view that if the 404 Permit for the Moffat Project is subject to Section 313(b), then this Court will have "designate[d]" FERC to be the "arbiter of other technical statutory processes that routinely operate in parallel to the [Federal Power Act], such as the Clean Air Act." *Id*. at 55. This view misreads *City of Tacoma*, downplays the tight connection between the Corps' and FERC's analyses and actions for the Moffat Project, and overlooks the broad thrust of Appellants' claims. *See* Argument Point II.B.

Not *all* actions by *all* federal agencies that relate to a hydropower project will raise issues inhering in the controversy over FERC's orders. Many likely will not. Indeed, not all CWA Section 404 permits related to a hydropower project will necessarily raise issues inhering in the controversy over FERC's orders. This appeal does not require the Court to adopt the sweeping rule that Appellants fear, nor to decide precisely which agency actions or issues fall outside the scope of Section 313(b).

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[5] As it is, Appellants filed their district court action more than a year after the Corps issued the 404 Permit and after they were denied late intervention in FERC's proceedings. Opening Brief 16-17.

Equally unfounded is Appellants' professed fear about this Court "deputizing FERC to resolve disputes regarding highly specialized matters." Opening Brief 56. This Court dismissed a similar concern in *NPCA*—that applying the direct review provision that covered the FAA's orders to a BLM decision would "lessen the importance" of BLM and the policies of the statute that it implemented "by treating them as subsidiary to the FAA." 998 F.2d at 1529. Exhaustion under Section 313(b) does not appoint FERC as a superagency to judge issues outside its expertise. Rather, exhaustion merely requires that the issue be presented to FERC.

To be sure, FERC does not administer the CWA. But that does not mean that it cannot consider a CWA issue raised in a rehearing request. This approach is eminently workable during judicial review, as the D.C. Circuit recently showed in *Shafer & Freeman Lakes Environmental Conservation Corp. v. FERC*, 992 F.3d 1071 (D.C. Cir. 2021). Under Section 313(b), the court directly reviewed a biological opinion issued by the Service and separately reviewed FERC's reliance on the biological opinion in granting an amended license. *Id*. at 1087-96.

Fourth, Appellants speculate that affirmance "*could* upset settled law by placing CWA decisions, including State-issued Section 401 [water quality] certifications, squarely before FERC for substantive adjudication prior to litigation." Opening Brief 58 (emphasis added). This speculation lacks merit. As

Appellants admit, this result would run contrary to settled law in several circuits holding that review of a State's CWA Section 401 certification is a state law issue to be litigated in state court. Brief 56-58. Still, Appellants fail to acknowledge that the courts of appeals have carved out a role for FERC in addressing Section 401 certification issues. *See, e.g.*, *Keating v. FERC*, 927 F.2d 616, 621-25 (D.C. Cir. 1991) (remanding to FERC to consider CWA Section 401(a)(3) issue). This Court need not disrupt settled law on Section 401 certifications to conclude that Appellants' claims meet *City of Tacoma*'s inhering-in-the-controversy standard.

CONCLUSION

For all these reasons, the district court's judgment dismissing this case for lack of jurisdiction should be affirmed.

Respectfully submitted,

s/ *Justin D. Heminger*

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STATEMENT REGARDING ORAL ARGUMENT

Though deferring to the Court's judgment on the matter, the U.S. Army Corps of Engineers and the Department of the Interior believe that oral argument would be useful to the Court because the question presented is a recurring issue of statutory construction that affects the Corps and Interior in multiple circuits.

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 12,993 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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

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

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

s/ *Justin D. Heminger*
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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2021, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to all counsel of record in this case. I further certify that all parties to this case are registered to receive ECF filings in this matter.

s/ *Justin D. Heminger*
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ADDENDUM

Administrative Procedure Act
5 U.S.C. § 703 — Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Administrative Procedure Act
5 U.S.C. § 704 — Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Natural Gas Act
15 U.S.C. § 717r — Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission orde*r*

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company 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, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The

finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general
The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay
The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action
If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action
For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review
The Court shall set any action brought under this subsection for expedited consideration.

Federal Power Act
16 U.S.C. § 825*l* — Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission 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, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The

finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.