No. 21-1155
ORAL ARGUMENT REQUESTED

IN THE 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,

and

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

Intervenor-Appellee.

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

APPELLANTS' REPLY BRIEF

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GLOSSARY

BLM	Bureau of Land Management
CWA	Clean Water Act
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FWS	U.S. Fish and Wildlife Service
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
ROD	Record of Decision

INTRODUCTION

The Federal Power Act's ("FPA") exhaustion and judicial review provisions do not apply here because Petitioners are not, and have never claimed to be, "aggrieved by an order issued by" the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 825*l*. Rather, Petitioners consistently alleged harms caused by a permit under a different statute, Section 404 of the Clean Water Act ("CWA"), which was issued by a different agency, the U.S. Army Corps of Engineers ("Corps"). Likewise, Petitioners challenge the Corps' compliance with its legal obligations under the National Environmental Policy Act ("NEPA") in issuing a Record of Decision ("ROD"), and under the Endangered Species Act ("ESA") in adopting and relying on a biological opinion that the Corps (not FERC) solicited and obtained from the U.S. Fish and Wildlife Service ("FWS").

Yet, merely because FERC had to issue a separate approval to Denver Water—for a single, narrow component (i.e., Gross Reservoir expansion) of a much larger water supply system permitted by the Corps—Federal Respondents and Denver Water ("Respondents" collectively) now assert that the FPA governs exhaustion and judicial review of the Corps' compliance with the CWA, NEPA, and the ESA, even though the CWA contains no exhaustion requirement and such claims ordinarily must be brought in district court. Respondents contend that the

FPA required Petitioners to exhaust their claims against the Corps by presenting those issues to FERC, which for decades has disclaimed statutory authority to address Section 404 matters and redirected such issues to the Corps. Likewise, Respondents maintain that the FPA required Petitioners to seek review of the Corps' actions in this Court, even though challenges to the Corps' CWA permits must generally be brought in district court, appellate courts are courts of limited jurisdiction, and the Corps' decisions at issue are not relevant to FERC's legal compliance in issuing a license under the FPA.

Nothing in the FPA or precedent construing it suggests that Congress intended the FPA's exhaustion and judicial review provisions to broadly encompass non-FERC agency decisions arising outside the FPA, unless such decisions are essential ingredients of *FERC's* legal compliance in issuing a license. The only limited examples of decisions by other agencies that courts have held are essential ingredients of a FERC license are FWS's biological opinions relied on by FERC to satisfy its own ESA obligations, and the Forest Service's decisions and its associated process for developing and issuing conditions that the FPA requires FERC to solicit and incorporate as enforceable license conditions. Logically, these agency decisions go to the heart of *FERC's* legal compliance in issuing a license under the FPA, and thus inhere in the FERC licensing controversy. In contrast,

Section 404 permits never inhere in a licensing controversy because they are not essential ingredients of FERC's legal compliance in issuing a license; indeed, FERC has no legal authority (or institutional competence) to administer Section 404 because those duties belong to the Corps.

Although Respondents acknowledge that the FPA's exhaustion and judicial review provisions apply only to agency decisions that inhere in a FERC licensing controversy, they propose differing legal "tests" that cannot be reconciled with the FPA or precedent. Denver Water proposes an inflexible test in which *every* agency decision relating in any way to a FERC-licensed facility inheres in the controversy, "regardless of the statute under which [a challenge to the agency decision] was brought, or the agency it was brought against." Int.Br.27.[1] In contrast, Federal Respondents assert that the test is whether two agency decisions are "related enough," Fed.Br.30, a test that lacks any coherent standard for courts and the public to ascertain when a non-FERC decision triggers the FPA's exhaustion and judicial review provisions. Indeed, Federal Respondents illustrate the confusion their test would create—and simultaneously undermine Denver Water's test—by

[1] Petitioners refer to their Appendix as "Pet.App."; their Supplemental Appendix as "Pet.Supp.App."; and Federal Respondents' Appendix as "Fed.App." Likewise, Petitioners refer to their Opening Brief as "Pet.Br."; Federal Respondents' Answering Brief as "Fed.Br."; and Intervenors' Answering Brief as "Int.Br."

asserting, without providing any examples, that "not all CWA Section 404 permits related to a hydropower project will necessarily raise issues inhering in the controversy over FERC's orders." Fed.Br.56.

The Court must reject Respondents' tests. They flout the FPA, caselaw, and FERC's longstanding interpretation of the statute. Moreover, Respondents' tests relegate the CWA as secondary to the FPA by treating the Corps' Section 404 permit as subordinate to FERC's license, although courts and FERC have uniformly recognized that the CWA is not subservient to the FPA, and that a Section 404 permit is not a prerequisite to FERC issuing a license under the FPA. Finally, Respondents brush aside the serious policy implications and the harsh consequences for Petitioners if this Court upends the status quo by holding, for the first time ever, that the FPA requires Section 404 permit challenges to be exhausted before FERC and then pursued in courts of appeal—even though FERC, which administers the FPA, reached the opposite conclusion here and Petitioners diligently complied with FERC's instructions as to the proper course for challenging the Corps' Section 404 permit and associated legal compliance.

ARGUMENT

I. INDISPUTABLE FACTS ESTABLISH THAT THE CORPS' PERMIT DOES NOT INHERE IN FERC'S LICENSING CONTROVERSY

Whether a Section 404 permit (or any agency decision) inheres in a FERC licensing controversy turns on a straightforward question—i.e., whether the decision relates to *FERC's* legal compliance before it may issue a license under the FPA, such that judicial relief against that decision would directly bar the licensee from exercising its license rights. Where, instead, the agency approval is a freestanding obligation that the *applicant* (not FERC) must obtain separate from a FERC license, that agency decision plainly does not inhere in FERC's licensing controversy. Before returning to the caselaw that firmly establishes this longstanding test, Petitioners highlight several indisputable facts that bear on this appeal and demonstrate the distinct nature of the agency decisions at issue.

First, Respondents cannot dispute FERC's repeated conclusion that Section 404 permits are *not* prerequisites to FERC issuing a license under the FPA, and thus that Section 404 places no constraints on FERC or its ability to issue a license. *See* Pet.Br.12-13 (citing decisions). Accordingly, as FERC itself stressed, the Corps' CWA process operates independently from FERC's licensing process—even if the agencies integrate parts of their separate processes for administrative

convenience—and judicial relief against a Section 404 permit does not constrain a licensee's exercise of rights under FERC's legally distinct license. *See Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1159-60 (9th Cir. 2012) (holding that CWA and NEPA relief against a Section 404 permit does not "attack the validity of FERC's license" and thus does not "restrain the licensing procedures authorized by FERC" even though "such remedies would interfere with activities specifically authorized by the FERC license").

Second, not only did the Corps' and FERC's separate regulatory approvals derive from distinct statutory obligations, but the actions, impacts, and alternatives analyzed by each agency to comply with their respective legal duties were *not* co-extensive. As explained, the Corps evaluated the impacts of and alternatives to Denver Water's massive water supply project spread across several counties; FERC, in contrast, analyzed only the expansion of a single reservoir in Boulder County. *See* Pet.Br.17. Thus, as Denver Water noted, the reservoir expansion over which the Corps and FERC have dual authority is only "one component of the water supply project . . . being analyzed and permitted by the [Corps] under a Section 404 Permit"; as a result, "the Corps' EIS will analyze the impacts of Denver Water's water supply project" whereas "the scope of analysis for FERC's license amendment decision *is narrower.*" Pet.Supp.App.5 (emphasis added); *see*

also City & Cty. of Denver, 172 FERC ¶ 61,063, 61,609 (2020) (FERC noting that the Corps-analyzed water supply project "includes facilities outside the [FERC] project boundary and features not within [FERC's] unit of development"). That the Corps analyzed and approved activities broader than FERC did establishes that the Corps' permit has significant legal and practical utility apart from FERC's license.

Third, although Respondents misleadingly suggest the agencies' statutorily distinct analyses in the EIS overlapped, *see* Fed.Br.41, Petitioners' *claims* pertain to issues exclusively within the Corps' authority under the CWA. Indeed, all of Petitioners' claims under the CWA and NEPA relate directly to issues that Congress charged the Corps—and only the Corps—to evaluate and resolve.

These include the Corps' duties to independently determine the purpose and need of the action (here, by independently verifying the applicant's water demand projections for the broader water supply project), *see* 33 C.F.R. § 325 App'x B(9)(b)(4) ("the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project"); to determine whether "there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem," 40 C.F.R. § 230.10(a); and to determine the proper measure of "cost[s]" in making practicability findings, *id.* § 230.10(a)(2). It is these obligations *on the Corps*—which the Corps applied in the EIS to the broader water

supply project it was analyzing, rather than the narrower project under FERC's consideration, *see* Pet.App.170-71 (describing the Corps' legal duties distinct from FERC)—that frame Petitioners' claims seeking to vacate *the Corps'* ROD and Section 404 permit but not FERC's license. *See* Pet.App.126- 30, ¶¶ 132-51 (challenging the Corps' compliance with these duties under the CWA and NEPA).[2]

Indeed, FERC expressly restricted its cooperation in the Corps' EIS. Whereas the Corps' EIS analyzed the larger water supply project, FERC cooperated only in the analysis of a single component that falls under the FPA's jurisdiction. *See* Fed.App.2 (limiting FERC's participation in the Corps' EIS process to "assist[ing] in the preparation of sections of the Draft and Final EISs *relating to FERC jurisdiction and process*" and "developing responses to comments *specific to FERC jurisdiction and process* received on the Draft EIS" (emphases added)). Nowhere did FERC suggest that its limited role in the EIS process would address the Corps' obligations under Section 404, let alone supplant the Corps' distinct duties that form the basis for Petitioners' CWA and NEPA

[2] The CWA imposes technical duties on the Corps that are distinct from the more generic obligations required by NEPA. *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1186-87 (10th Cir. 2002) ("NEPA only requires that [a]gencies '[r]igorously explore and objectively evaluate all reasonable alternatives,'" whereas the "CWA prevents the [Corps] from issuing a § 404(b) permit if there is a less damaging practicable alternative.").

claims. Accordingly, Petitioners' claims do not attack *any* aspect of the EIS "relating to FERC jurisdiction and process" or FERC's license relying upon those aspects of the EIS; thus, relief against the Corps' ROD or Section 404 permit for CWA or NEPA compliance would not enjoin or require any action by FERC.

Likewise, FERC took no part in the ESA consultation between FWS and the Corps that resulted in the 2016 biological opinion Petitioners initially challenged, *see* Pet.App.64-66, ¶¶ 137-48, and the withdrawal of which they still challenge, *see* Pet.App.130-34, ¶¶ 148-68. That biological opinion analyzed the effects of the much larger Corps-analyzed water supply project on green lineage cutthroat trout, which did *not* involve FERC because that species "occurs on the West Slope and is not within the boundary or vicinity of the [FERC-analyzed reservoir expansion]." Pet.Supp.App.2. Hence, only the Corps' action will impact this protected species.

In fact, FERC long ago determined that the FPA limits FERC's jurisdiction to the FERC-licensed Gross Reservoir; thus, FERC has no authority to address the broader impacts of, and alternatives to, the Corps-analyzed water supply project. *See City & Cty. of Denver*, 94 FERC ¶ 61,313, 62,158 (2001)) ("[T]he features of Denver's municipal water supply system upstream of Gross Reservoir are not part of the [FERC] project's unit of development and therefore will not be placed under the license"). Thus, as with their CWA and NEPA claims, Petitioners' ESA

claims—which challenge the Corps' and FWS's ESA compliance in connection with the Corps' issuance of a Section 404 permit and the impacts of *the Corps'* decision many miles removed from Gross Reservoir—fall far outside of FERC's jurisdiction under the FPA, which stops at the Gross Reservoir boundary.

Fourth, although Petitioners view the timing as irrelevant because Section 404 permits do not inhere in FERC licensing controversies as a matter of law, Respondents ignore that none of Petitioners' claims had accrued when FERC's intervention window closed on April 2, 2017. *See* 82 Fed. Reg. 9,566 (Feb. 7, 2017). At that crucial juncture, the Corps had *not* issued a ROD culminating its NEPA process. And it had *not* issued a Section 404 permit culminating its CWA process or adopting and relying on FWS's biological opinion for the Corps' ESA compliance. Despite Respondents' hindsight bluster about what Petitioners should have done, the lack of adverse final agency actions at the time FERC's intervention window closed undermines any argument that these claims are subject to the FPA's exhaustion and judicial review provisions. *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993) ("[T]he exhaustion requirement generally refers to administrative and judicial procedures by which an injured party *may seek review* of *an adverse decision* and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." (emphasis added) (quotation marks and citations omitted)).

For these reasons, the statutorily independent and factually distinct decisions by the Corps and FWS, stemming from CWA obligations Congress imposed exclusively on the Corps, do not implicate FERC's separate legal compliance in issuing Denver Water a license under the FPA and thus plainly do not inhere in the FERC licensing controversy.[3]

II. AS A MATTER OF LAW, SECTION 404 PERMITS ARE NOT FERC ORDERS OR ESSENTIAL INGREDIENTS OF FERC'S LEGAL COMPLIANCE, THUS FALLING OUTSIDE THE FPA'S REACH

In their brief, Petitioners cited the FPA, extensive precedent, and FERC's longstanding position to show that Section 404 permits neither pertain to FERC's legal compliance in issuing licenses nor restrain FERC's licensing procedures under the FPA. Accordingly, Section 404 permits—as independent, freestanding requirements on applicants (not FERC)—do not inhere in FERC licensing controversies because they are not essential ingredients of, or even components incorporated expressly into, a FERC license. Pet.Br.30-48.

[3] The Court can easily dispense with Denver Water's cursory contention that Petitioners waived their NEPA and ESA claims. *See* Int.Br.28-29. Not only did Petitioners repeatedly discuss the Corps' compliance with NEPA and the ESA, *see* Pet.Br.2-4, 19, 23-24, 34, 48, 52, 58, but a party does not "waive" claims unless it fails to raise them at the merits stage—which has not yet occurred in this case because it is at the preliminary motion to dismiss stage.

Disregarding that Congress expressly restricted exhaustion and direct review in the FPA to "order[s] issued by *the Commission*," 16 U.S.C. § 825*l* (emphasis added), Denver Water contends that *every* agency decision in any way relating to a FERC-licensed facility inheres in a FERC licensing controversy, "regardless of the statute under which [a challenge to the agency decision] was brought, or the agency it was brought against." Int.Br.27. The government proposes a less rigid, but less clear, test where the relevant question is whether two agency decisions are "related enough," such that the direct review provision governing one decision should apply to the other that is not ordinarily subject to direct review. Fed.Br.30. Setting aside the incompatibility of these tests and the subjective nature of Federal Respondents' test—which are sufficient grounds to repudiate both tests—the Court must reject these tests because they defy the plain language of the FPA, caselaw demarcating the limits of what inheres in a controversy for direct review purposes, and FERC's longstanding construction of the FPA as its bears on this appeal.

A. Respondents' Tests, if Adopted, Would Dramatically and Impermissibly Rewrite the FPA

Respondents ignore the central principle that "[c]ourts of appeal are courts of limited jurisdiction; and save for excepted instances, they have jurisdiction to review only final decisions of the district courts." *Kanatser v. Chrysler Corp.*, 195

F.2d 104, 105 (10th Cir. 1952). "Initial review occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007). It is beyond legitimate dispute that Congress did not in the FPA authorize exhaustion and direct review of *any* agency decisions except for FERC licensing orders and their essential—i.e., legally necessary—components. Section 404 permits are not, and never will be, essential components of FERC licenses.[4]

Congress could not have been clearer in deliberately restricting the FPA's exhaustion and direct review provisions to "an order issued by *the Commission*," 16 U.S.C. § 825*l* (emphasis added). Indeed, when creating the "inhering the controversy" standard, the Supreme Court limited its application to "all objections to *the [FERC] order*, *to the license* it directs to be issued, and to the legal competence of the licensee to execute *its terms*." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (emphases added). As a result, courts have uniformly recognized that the "inhering in the controversy" standard "must be read" to encompass "all other modes of judicial review *of the order*" subject to

[4] Respondents assert that the Court should review the district court's factual findings for clear error. *See* Fed.Br.38; Int.Br.22. But this appeal does not turn on factfinding by the district court; rather, it hinges on whether a Section 404 permit is an essential ingredient of a FERC license (and it is not).

direct review rather than freestanding agency decisions that are wholly collateral to (i.e., not legally necessary components of) the decision subject to direct review. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187-88 (2d Cir. 2001) (Sotomayor, J.). Hence, because Congress expressly limited the FPA's reach to FERC orders, an agency decision inheres in a FERC licensing controversy only where it is an "important ingredient of the FERC license" and thus judicial relief against that decision would directly "restrain the licensing procedures authorized by FERC." *Cal. Save Our Streams Council v. Yeutter*, 887 F.2d 908, 911-12 (9th Cir. 1989).

Section 404 permits will never satisfy this standard; they are not components of a FERC license nor would judicial relief against them restrain FERC's licensing procedures. *See Snoqualmie Valley*, 683 F.3d at 1159-60 (relief against a Section 404 permit does not "attack the validity of FERC's license" and thus does not "restrain the licensing procedures authorized by FERC" even though "such remedies would interfere with activities specifically authorized by the FERC license"); *see also* Pet.Br.11-13 (citing FERC's repeated finding that an applicant has an "independent obligation" to obtain a Section 404 permit because "issuance of a permit under section 404 is not a prerequisite to receiving a [FERC] license").

In sharp contrast to Section 404 permits, courts have held that two narrow types of agency decisions *are* essential ingredients of FERC licenses—i.e., they go

to the heart of *FERC's* compliance with federal law before FERC may issue a license—and thus fall within the FPA's exhaustion and direct review provisions.

First, "Section 4(e) of [FPA] requires FERC to solicit and accept conditions promulgated by the agency responsible for the protection and utilization of the land"; "[u]nder the FPA, FERC is required to accept, without modification, reasonable restrictions imposed by the [relevant] Secretary." *Yeutter*, 887 F.2d at 910. Hence, because Congress mandated that FERC may not lawfully issue a license without including these restrictions as enforceable components of it, Congress dictated that these decisions are "important ingredient[s] of the FERC license." *Id.* In turn, judicial relief against such decisions and the land management agency's associated process for developing those conditions—which are mandatory and enforceable components of FERC's own license—would directly "restrain the licensing procedures authorized by FERC." *Id.* at 912.

Second, courts have held that other agency decisions indispensable to FERC's legal compliance before issuing a license—such as biological opinions issued to FERC to satisfy *FERC's* ESA obligations—inhere in the FERC licensing controversy. For example, the First Circuit applied the FPA's direct review provision to two biological opinions issued to FERC, where "FERC was required to obtain biological opinions" for its proposed action "setting forth measures to

minimize the take and providing a safe harbor for those (including FERC and its employees)" to avoid FERC violating the ESA. *Council of Atl. Salmon Fed'n v. Nat'l Marine Fisheries Serv.*, 858 F.3d 690, 692-93 (1st Cir. 2017) (Souter, J.); *see also* Pet.Br.40 n.10 (listing analogous cases). There, FERC could not lawfully issue a license without first obtaining those biological opinions and expressly incorporating their terms and conditions into the license itself. Thus, these cases are consistent with Petitioners' test—grounded in the FPA's plain language and decades of precedent—that the FPA's direct review provision does not apply to agency decisions other than FERC orders and their legally essential components.[5]

If Congress intended the outcome that Respondents advocate, it could easily have required direct review of "order[s] or action[s] of a Federal agency (other than [FERC]) . . . acting pursuant to Federal law," as it did in the Natural Gas Act ("NGA"). 15 U.S.C. § 717r(d)(1). But Congress did not do so in the FPA. This Court must honor the FPA's plain terms and Congress's clear intent; Congress "does not alter a regulatory scheme's fundamental details in vague terms or

[5] Once again, the 2016 biological opinion challenged below did *not* involve FERC because the green lineage cutthroat trout does not exist within FERC's project boundary. Rather, FWS issued the biological opinion *to the Corps* and did not impose any terms, conditions, or other constraints on FERC's procedures as a non-party to the biological opinion. *See supra* at 9 (citing Pet.Supp.App.2).

ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Congress's deafening silence as to agency decisions other than FERC orders dooms Respondents' overly expansive tests and is dispositive to this appeal.

Accordingly, Respondents' tests—both of which would subject agency decisions other than FERC orders and their necessary ingredients to direct review under the FPA—flout the statute's plain language and fail as a matter of law.

B. Pertinent Caselaw Forecloses Respondents' Other Arguments for Fundamentally Rewriting the FPA

Highlighting that Petitioners' test is the only plausible reading of the FPA, Respondents cannot point to a *single* example where a court has held that a Section 404 permit or a comparable agency decision arising outside the FPA (or any other statute with a direct review provision) inheres in the relevant controversy where the agency decision is not a legally necessary component of the decision Congress subjected to direct review. This conspicuous omission, despite decades of cases addressing the "inhering in the controversy" standard, and hundreds of instances in which Section 404 permits and FERC licenses have operated in parallel, reinforces that Respondents' tests are wholesale and improper rewrites of the FPA in a manner not intended by Congress.

1. The Supreme Court Has Never Endorsed Respondents' Extreme Position

Respondents rely heavily on Supreme Court precedent in arguing that a direct review provision limited to one agency's order should encompass another agency's decision arising under a different statutory scheme. Not only has the Supreme Court *never* endorsed such a counter-textual approach to statutory interpretation, but its legal precedents emphatically reject this position.

As explained, the Supreme Court expressly limited its holding in *City of Tacoma* to objections to a FERC order, a FERC license, and the licensee's execution of the license terms. *See* 357 U.S. at 336. Indeed, that reading is necessary because Congress itself so limited the FPA's exhaustion and direct review provisions. It is beyond dispute that Petitioners do not attack FERC's order, its license, or Denver Water's competence to execute FERC's license; rather, Petitioners attack the Corps' legally independent permit. Nor would judicial relief ordering the Corps to comply with the CWA, NEPA, or the ESA restrain FERC's licensing procedures or require anything of FERC at all. In any event, Respondents ignore that *City of Tacoma* involved a situation in which the State of Washington collaterally attacked in state court an explicit finding made by FERC's predecessor pursuant to the FPA. *See id.* at 337 (discussing "the findings required by the

[FPA]" at the heart of the dispute). Here, in contrast, Petitioners do not contest *any* findings made by FERC under the FPA, but rather challenge substantive findings made by *other* agencies under laws *other than the FPA*.

The Supreme Court's recent decision in *PennEast* also undermines Respondents' position. *See* Pet.Br.36, 42. Although the government now asserts that it "makes sense" that sovereign immunity defenses to condemnation proceedings under the NGA must be pursued in district court, Fed.Br.25, this contradicts the position the government took (and lost) in *PennEast*. There, as here, the government relied heavily on *City of Tacoma* in arguing that direct review was required because a sovereign immunity defense, if sustained, would *indirectly* restrain the licensee's ability to execute the terms of its certificate because the licensee could not condemn property necessary to effectuate its FERC certificate. *See* Brief of the United States as Amicus Curiae Supporting Petitioner at 12-15, *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021) (No. 19-1039), 2021 WL 930156 at *13-15.

Over the government's vigorous objection, the Supreme Court held that there was no "collateral attack on the FERC order" because "New Jersey does not seek to modify FERC's order," even though New Jersey's successful defense would indirectly prevent the licensee from executing its rights under the certificate.

PennEast, 141 S. Ct. at 2254. That is also true here—because *City of Tacoma* only requires direct review of claims "arguing that a licensee could not exercise the rights granted to it by the license itself," *id.*, Petitioners' claims do not require direct review because they have nothing to do with FERC's license or Denver Water's competence to exercise its rights under that license.

Accordingly, *PennEast* slams the door shut on Respondents' assertion that a challenge to the Corps' permit is a collateral attack on FERC's license merely because judicial relief might *indirectly* impact Denver Water's ability to effectuate its FERC license. *See* Int.Br.25 (noting that relief against the Corps might mean that "the Project could not then proceed as licensed by FERC"). The Supreme Court made clear that relief *indirectly* affecting a licensee's rights is not sufficiently intertwined to inhere in a FERC licensing controversy. *See PennEast*, 141 S. Ct. at 2254. In the absence of a direct challenge to FERC's license or its essential components, the FPA's direct review provision does not apply. *Id.*[6]

[6] *PennEast* also refutes the argument that the FPA required direct review because the Corps' permit "lacked utility absent FERC's order." Fed.Br.45 The condemnation proceedings in *PennEast* (and defenses to condemnation) lacked any utility absent a FERC certificate approving development, and yet the Court held that this was not an improper collateral attack on FERC's order. Regardless, here, the Corps' Section 404 permit has immense utility aside from FERC's license by, *inter alia*, determining under the CWA the least damaging practicable alternative

Although *PennEast* conclusively affirms, as controlling authority, that the possibility of an indirect effect on a licensee's ability to exercise its license rights is not sufficient to inhere in a FERC licensing controversy, the Ninth Circuit persuasively reached the same outcome in the precise context of a Section 404 permit. That court flatly rejected the arguments made here by Respondents, holding that CWA or NEPA challenges against the Corps do not "attack the validity of FERC's license" even where "such remedies would interfere with activities specifically authorized by the FERC license." *Snoqualmie Valley*, 683 F.3d at 1159-60. Thus, this Court may not sustain Respondents' position because it is both foreclosed by binding authority and would create an unnecessary and insupportable circuit split.

The Supreme Court's ruling in *FCC v. ITT World Communications, Inc.*—cited by Respondents—also supports Petitioners' position. There, the Court dismissed a district court claim seeking "to enjoin action that is the outcome of the agency's order" because "[t]he appropriate procedure for obtaining judicial review of the agency's disposition of these issues was appeal to the Court of Appeals as provided by statute." 466 U.S. 463, 468 (1984). However, in contrast to the Corps'

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for the larger water supply needs of Denver Water's north system (only one component of which is the FERC-licensed Gross Reservoir). *See supra* at 6-10.

Section 404 decisions under the CWA that Congress chose not to subject to direct review, the challenged action in *FCC* was the denial of a rulemaking petition that Congress explicitly subjected to direct review. *Id.* As a result, just as a FERC order and its indispensable components are subject to direct review under the FPA, the Court held that the order subject to direct review could only be brought in the courts of appeal. *Id.* The Court did not suggest—as Respondents imply—that courts can expand direct review provisions to *other* agencies' decisions arising under different laws that Congress did not subject to direct review. *See* Fed.Br.23.

Moreover, although Respondents failed to address it, Petitioners explained that the Supreme Court has repeatedly "upheld district court jurisdiction over claims considered wholly collateral to a statute's [direct] review provision[] and outside the agency's expertise." *Thunder Basin Coal. Co. v. Reich*, 510 U.S. 200, 212-13 (1994). This Court would be hard-pressed to identify a situation that better fits the Supreme Court's test for district court jurisdiction—claims challenging the Corps' technical findings under Section 404 that have nothing to do with FERC's legal compliance under the FPA (and thus are wholly collateral to it), where FERC has for decades disavowed *any* statutory authority or expertise to address Section 404 matters that Congress assigned exclusively to the Corps. *See* Pet.Br.11-13.

In short, rather than supporting Respondents' position, the Supreme Court's decisions forcefully refute the ability of courts to override Congress's intent by enlarging direct review provisions beyond their plain language to cover agency decisions that Congress itself did not subject to direct review.

2. This Court's Decisions Do Not Support Respondents

Respondents fare no better under this Court's precedents. For example, although Respondents point to *Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255 (10th Cir. 1989), that case did not even involve decisions by non-FERC agencies arising under other laws. Yet, *Williams* vindicates Petitioners' position, because the claim this Court subjected to direct review challenged FERC's explicit finding that the NGA authorized FERC to issue the certificate—a finding FERC must make, as part of its own legal compliance, before issuing a certificate. *Williams*, 890 F.2d at 258 (explaining that a party to FERC's proceeding "contested FERC's jurisdiction to regulate the proposed pipeline" and that FERC rejected these "jurisdictional contentions" by finding "that the facilities proposed by Williams were within its jurisdiction and therefore subject to . . . the NGA"). This Court correctly found that a separate state court lawsuit "ultimately challenges FERC's determination of its own jurisdiction" under the NGA, and thus "the proceedings in the state court that resulted in the order enjoining Williams'

exercise of rights granted in the FERC certificate constituted an impermissible collateral attack on a FERC order." *Id.* at 263-64. *Williams* merely establishes that Petitioners would have to pursue direct review if they were challenging *FERC's* authority to issue Denver Water a license (which they are not).

This Court's decision in *National Parks Conservation Ass'n v. FAA ("NPCA")*, 998 F.2d 1523 (10th Cir. 1993), also undermines Respondents' position. There, the Court found that a decision by the Bureau of Land Management ("BLM") was subject to the Federal Aviation Act's direct review provision because BLM's "decision-making process was initiated *by the provisions of the FAA Act*," 998 F.2d at 1528 (emphasis added)—i.e., a statute that requires direct review of all decisions arising under that law. Moreover, because the Court found that "the actions of the BLM were taken to facilitate the actions of the FAA, [this] places the BLM's actions under our jurisdiction" because BLM's decision is "an important ingredient of" the FAA's decision. *Id.* at 1528-29 (citations omitted). Neither of these integral conditions exists here—the Corps' issuance of a permit was initiated by the CWA (not the FPA), and the purpose of Section 404 permits is not to facilitate actions by FERC but rather to comply with the Corps' legal duties Congress imposed in the CWA (for actions often not involving FERC).

Respondents' citation to *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001), is misplaced. There, no party raised any question regarding direct review of the Air National Guard's proposal, *id.* at 1027, which the FAA later modified and approved. *See id.* at 1029 (citing 64 Fed. Reg. 54,721 (Oct. 7, 1999)). Yet, the Court noted that *NPCA* supports "extending our review to the ANG's decision," *id.*, likely because the substantive challenge in *Custer County* focused on explicit statutory findings *the FAA* made under the FAA Act—which requires direct review of the FAA's findings and its legal compliance in issuing those findings—but the petitioners did *not* challenge any substantive findings made by the Air National Guard. *See Custer Cty.*, 256 F.3d at 1031-32 ("Petitioners claim the FAA violated the Federal Aviation Act by failing to determine whether the Initiative is necessary in the interest of national defense."); *see also id.* at 1031 n.7 (listing the myriad FAA findings the plaintiffs disputed). That is a far cry from this case, which challenges the Corps' substantive findings under Section 404 of the CWA (and its legal compliance in issuing those findings) that Congress has neither subjected to direct review nor granted FERC any authority to modify.

Notably, the only courts that *have* directly confronted the question raised in this appeal under the FAA Act have agreed with Petitioners. *See Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015) ("declin[ing] to accept the government's invitation to

expand the inescapable-intertwinement doctrine so as to find that [a] claim against [one agency] is pulled within the ambit of the exclusive-review statute that applies to [another agency]"); *Merritt*, 245 F.3d at 187-89 (holding that "the mere overlap of evidence and testimony adduced in the two proceedings . . . [is] insufficient to preclude the district court from hearing a given claim" merely because another agency's decision is subject to direct review).

Indeed, crucially, as the Sixth Circuit held, subjecting an agency decision to direct review that Congress itself did not "would be inconsistent with existing law but also would run the risk of inadvertently expanding the number and range of agency orders that might fall under exclusive-jurisdiction provisions that Congress did not intend to sweep so broadly." *Mokdad*. 804 F.3d at 814.

3. The Out-of-Circuit Cases Cited by Respondents Do Not Condone Direct Review of Agency Decisions Congress Has Not Itself Subjected to Direct Review

Finding no support in controlling authority, Respondents cite several out-of-circuit cases. However, they do not hold, let alone suggest, that agency decisions other than those explicitly identified by Congress (and their indispensable components) inhere in a controversy subject to direct review.

For example, *Otwell v. Alabama Power Co.*, 747 F.3d 1275 (11th Cir. 2014), actually supports Petitioners. There, the Eleventh Circuit required direct review of

claims brought against a licensee seeking to directly restrain its exercise of rights granted by its FERC license. *Id.* at 1281-83. In addition, those claims challenged explicit findings by FERC that the FPA required it to render "in the exercise of its institutional expertise" prior to issuing the license; thus, the court correctly held that these claims related to FERC's legal compliance are subject to direct review as part of "FERC's final decision." *Id.*

Likewise, in *City of Rochester v. Bond*, Congress had explicitly subjected *both* of the substantive orders challenged by the petitioners to direct review under pertinent law. 603 F.2d 927, 932 (D.C. Cir. 1979). Thus, the court correctly held—consistent with Petitioners' view here—that the agencies' orders and their associated legal compliance under NEPA were subject to direct review.

Similarly, the Ninth and D.C. Circuits respectively held that challenges to necessary components of the Environmental Protection Agency's ("EPA") legal compliance in issuing decisions under the Federal Insecticide Fungicide and Rodenticide Act—a law subjecting EPA decisions to direct review—must be brought in courts of appeal. *See Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1089 (9th Cir. 2017) (dismissing claim related to EPA's compliance with the ESA in issuing a pesticide registration subject to direct review); *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 177 (D.C. Cir. 2017) (same). Nowhere did either

court imply that direct review would be proper for agency decisions arising under other laws that are not related to EPA's legal compliance in issuing the specific decisions Congress subjected to direct review.

At bottom, Respondents *wish* that the FPA mandated direct review of the Corps' decisions because it would allow them to evade judicial review here. However, without any statutory or caselaw support for this position, Respondents must take their grievances to Congress. *See Byers v. C.I.R.*, 740 F.3d 668, 677 (D.C. Cir. 2014) (If an agency "believes that compliance with the statute as written" would be "undesirable," "then it must take its concerns to Congress.").

C. Respondents' Tests Are Incompatible with FERC's Longstanding Construction of the FPA

The FPA is not ambiguous; Congress undeniably limited exhaustion and direct review to "order[s] issued by the Commission," 16 U.S.C. § 825*l*. However, to the extent there is any ambiguity, Respondents do not dispute that for decades FERC has made explicit findings in formal proceedings that Section 404 permits are not prerequisites to FERC's issuance of licenses, that FERC lacks authority over Section 404 matters that Congress exclusively assigned to the Corps, and that Section 404 permits are independent obligations on applicants (not FERC) that are not challenged or resolved in FERC proceedings. *See* Pet.Br.11-13. Consistent

with decades of FPA policy and practice, FERC found that its proceeding for Denver Water's license "*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*." *City & Cty. of Denver*, 165 FERC ¶ 61,120, 61,484 n.26 (2018) (emphases added).[7]

Respondents dismiss FERC's finding that judicial review against the Corps' decision does not require exhaustion under the FPA, asserting that the finding is "cryptic," merely condoned district court litigation against the Corps "*while FERC's proceeding was ongoing*," and is irrelevant because only courts may decide federal court jurisdiction. Int.Br.51 (emphasis added); *see* also Fed.Br.50; These arguments fail.

To begin with, there is nothing cryptic about FERC's unequivocal finding that a party need not exhaust remedies in FERC's licensing proceeding in order to seek judicial review of the Corps' legally distinct decisions arising under the

[7] FERC's licensing order ultimately confirmed that FERC "did not address" the Corps' CWA findings challenged in this lawsuit, including "the need for Denver Water's proposed expansion of the Moffat Collection System, or environmental issues associated with the expansion of the Moffatt Collection System that do not pertain directly to the FERC license for the Gross Reservoir Hydroelectric Project." *City & Cty. of Denver*, 172 FERC ¶ 61,063, at 61,611 n.25.

CWA. Nor is there any logical way to construe FERC's unambiguous finding as condoning litigation against the Corps only until FERC issues a license; there is no mention of timing *at all* in FERC's finding.

And while Respondents focus on the fact that courts determine federal court jurisdiction—i.e., whether direct review is required—FERC's finding focused instead on whether the FPA requires parties to exhaust administrative remedies *before FERC*, which *is* exclusively within FERC's authority. *See, e.g.*, *Evans v. United States*, 433 F. Supp. 2d 17, 22 (D.D.C. 2006) (deferring to "the agency's interpretation of the [statutory] exhaustion requirement" as "reasonable" to address any ambiguity). Thus, the Court must defer to FERC's eminently reasonable construction of the FPA's exhaustion provision, especially because it is consistent with decades of analogous findings by FERC in other proceedings. *See* Pet.Br.11-13; *see also N. Carolina v. FERC*, 913 F.3d 148, 150 (D.C. Cir. 2019) ("The Court owes deference to FERC's interpretation of the [FPA] since it is the agency charged with administering that statute.").

Although FERC's longstanding interpretation of the FPA (including in this proceeding) is dispositive, Petitioners point out the highly unusual situation before the Court. Despite FERC's repeated findings, as the agency that administers the FPA, that Section 404 permits are not essential to FERC's legal compliance in

issuing a license and that matters related to such permits need not be raised in FERC's proceedings, *other* agencies (the Corps and FWS) now assert in litigation that FERC misconstrues the FPA. This unprecedented effort to reinterpret another agency's authorizing statute—and to do so in a way that directly conflicts with FERC's longstanding construction of the statute (and the law's plain terms)—must be forcefully rejected. *See, e.g.*, *Ardestani v. INS*, 502 U.S. 129, 148 (1991) (noting that "courts do not owe deference to an agency's interpretation [and application] of statutes outside its particular expertise and special charge to administer").

Accordingly, as the agency Congress charged with administering the FPA, FERC's repeated findings in this and other proceedings that Section 404 permits are under the exclusive jurisdiction of the Corps and need not be exhausted through FERC's FPA process are fatal to Respondents' position.

D. Respondents' Proposed Tests Flout Well-Established Legal Principles

Even if Respondents' position were not flatly contradicted by the FPA's plain terms, relevant authority, and FERC's statutory interpretation and findings, Respondents' proposed tests for ascertaining when agency decisions inhere in a controversy subject to direct review would run afoul of well-established legal principles and basic tenets of administrative law.

First, by grafting the FPA's exhaustion and direct review provisions onto the Corps' issuance of Section 404 permits, Respondents' tests would relegate the CWA as subservient to the FPA. However, courts have categorically rejected every effort to subvert the CWA in this manner. This is because FERC's "exclusive jurisdiction" over hydropower projects "simply denote[s] that it was to be the highest unit in a vertical line with respect to decisions *in the areas specified [by the FPA], including licensure*; it ha[s] nothing to do with a relationship of FERC to other federal bodies on a horizontal line," and thus does not "preclude the [Corps] from exerting [its] powers over the Nation's navigable waters" under Section 404. *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 48 (D.C. Cir. 1987); *see also Scenic Hudson Pres. Conf. v. Calloway*, 370 F. Supp. 162, 168-72 (S.D.N.Y. 1973) (holding that the FPA does not constrain the Corps' authority to issue CWA permits); *aff'd*, 499 F.2d 127 (2d Cir. 1974). Because Respondents' tests preclude the Corps from exerting its powers under the CWA to issue immediately operative Section 404 permits, and instead give FERC the power to adjudicate CWA matters and effectuate a Section 404 permit only when FERC completes its FPA proceeding, these tests impermissibly elevate the FPA over the CWA.

By the same token, Respondents' tests fail because they are predicated on the erroneous assumption that the Corps' and FERC's decisions were part of a

"unified federal process to determine whether the Project should proceed." Int.Br.2. This is false. Although the agencies integrated portions of their legally distinct processes for convenience, the fact remains that Denver Water had to obtain two *separate* approvals from the Corps and FERC. Regardless of what FERC ultimately decided in its licensing controversy under the FPA (i.e., whether to amend Denver Water's license), the Corps had an independent statutory duty to resolve its own CWA controversy under Section 404 by determining what constitutes the least damaging practicable alternative for supplying water to Denver Water's north system. As to *that* decision, Congress long ago decided (and FERC has long recognized) that FERC has no legal authority or role to play. *See Monongahela*, 809 F.2d at 51-52 (holding that FERC does "not subject its license applicants to a review under substantive standards comparable to those established pursuant to Section 404(b)(1)" and that FERC's proceedings are not "equivalent to the rigorous study demanded of the Corps" under the CWA).[8]

Second, Respondents contend that their tests are proper because exhaustion and direct review of Section 404 permits are essential to serve judicial economy

[8] Congress did not authorize FERC to take *any* action under Section 404. *See* Pet.Br.11-13. Thus, Denver Water's assertion that FERC "expanded upon the Corps' CWA alternatives analysis in its proceedings," Int.Br.38, is inaccurate.

and avoid bifurcated litigation. *See* Fed.Br.51-52; Int.Br.60. But this skips over the threshold question—i.e., what did Congress subject to direct review in the FPA? The answer: FERC orders. Hence, no matter how many times they say it, Respondents are wrong in asserting that the FPA's provisions encompass legally distinct Section 404 permitting decisions. Thus, as this Court held when rejecting identical arguments in favor of appellate jurisdiction "to prevent duplicative litigation," "[p]ublic policy considerations of judicial economy cannot be relied upon to expand our jurisdiction in the absence of express Congressional authority." *Mineral Res. Int'l v. U.S. Health & Human Servs.*, 53 F.3d 305, 310 (10th Cir. 1995). Congress has spoken; this Court must abide by the words of the statute.

Likewise, the government's complaint that, absent application of the FPA's direct review provision, the default six-year statute of limitations would delay Section 404 challenges, *see* Fed.Br.55-56, is built upon the same error of disregarding Congress's deliberate design in the FPA and the CWA. Indeed, even in the NGA where Congress required direct review of non-FERC decisions, the default (and more lenient) statute of limitations nevertheless applies. *See Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 267-68 (4th Cir. 2018). In any event, Petitioners *did* timely pursue their challenge to the Corps' decision years *before* FERC issued a license, in order to avoid a situation late in the relevant limitations

period where meaningful relief against the Corps may no longer exist. If the Corps dislikes the statute of limitations imposed by law, its recourse lies with Congress.

Third, Denver Water's test fails on its face, because it would irrationally transform *every* agency decision relating in any way to a FERC-licensed facility into "order[s] issued by the Commission," 16 U.S.C. § 825*l*, "regardless of the statute under which that claim was brought, or the agency it was brought against." Int.Br.27. This illogical and insupportable test is so far removed from any grounding in statute or caselaw—and in outright conflict with the Supreme Court's decision in *PennEast* and the Ninth Circuit's decision in *Snoqualmie Valley*—that no further response is warranted.

For their part, Federal Respondents directly undermine Denver Water's test, asserting that "not all CWA Section 404 permits related to a hydropower project will necessarily raise issues inhering in the controversy over FERC's orders." Fed.Br.56. Instead, the government proposes a more nebulous test that requires exhaustion and direct review under the FPA when an agency action that is not itself subject to direct review is "related enough" to one that is. Fed.Br.30. However, this test supplies no coherent standard for courts or the public to ascertain which agency decisions inhere in controversies subject to direct review,

let alone identifies the government's view as to a threshold for what constitutes a sufficient relationship to warrant direct review.

Whatever the motivation for the government's hedging, its amorphous test flouts the well-established principle that "[j]urisdictional rules should be clear" and not "produce[] a vague and obscure boundary that would result in both needless litigation and uncalled-for dismissal." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015) (quotation marks and citations omitted). The Supreme Court has criticized "related to" legal standards for precisely this reason; "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Labor Standards Enf. v. Dillingham Const. Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). Simply put, the government's test not only lacks any legal foundation, but it also places an arbitrarily subjective and impossible burden on the public to guess whether an agency decision ordinarily not subject to direct review might later be found "related enough" to require direct review once it is too late.[9]

[9] Making exhaustion and direct review of an agency decision contingent on whether a court might retroactively conclude that it is "related enough" to a FERC license lacks any intelligible guidance for stakeholders. This unpredictability is illustrated here by FERC assuring Petitioners that they could challenge the Corps' Section 404 permit without intervening in FERC's licensing proceeding—which

In sum, neither Denver Water's inflexible test nor Federal Respondents' impractical, subjective "related to" test passes legal or logical muster.

III. PUBLIC POLICY STRONGLY SUPPORTS REVERSAL OF THE RULING BELOW

In their opening brief, Petitioners raised several important public policy arguments in favor of reversal. *See* Pet.Br.48-58. Respondents assert that these arguments have been waived or are irrelevant.

Petitioners did not waive policy arguments that became pertinent only once the district court ruled, as the first court to do so, that Section 404 permits are subject to the FPA's exhaustion and direct review provisions. Nor do Respondents provide any sound basis for the Court to ignore the "very important" policy issues it instructs parties to address in precedential appeals of this kind. *Practitioners' Guide to the U.S. Court of Appeals for the Tenth Circuit* at 44 (Jan. 2021).

The responses to Petitioners' policy arguments are not persuasive. For example, the Corps never notified the public in its ROD or Section 404 permit that those decisions required exhaustion—an essential condition if litigants must exhaust remedies prior to judicial review—thereby turning this process "into a trap

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Petitioners relied upon—only to have the Corps later take a different position in litigation once it was too late to seek recourse from FERC or this Court.

for unwary litigants" in direct tension with Supreme Court precedent. *Darby*, 509 U.S. at 147. Exacerbating that trap, the Corps remained silent on this issue *for three years* after it issued its ROD and permit, only asserting its litigating position once no further opportunity existed to seek review of FERC's license, thereby imposing harsh consequences on litigants whom the Corps failed to notify of any exhaustion requirement. Respondents assert that the Corps' silence does not matter because courts determine jurisdiction, *see* Fed.Br.54; this disregards that agencies cannot shirk *their* duty to supply notice of any exhaustion requirements in their final decisions. *See M.G. v. N.Y. City Dep't of Educ.*, 15 F. Supp. 3d 296, 303 (S.D.N.Y. 2014) (excusing exhaustion requirement where an "agency failed to notify [parties] of their due process rights and thereby deprived [them] of the opportunity to take advantage of the safeguards offered by the statute").

Moreover, Petitioners explained that affirmance would dramatically expand the breadth of FERC proceedings beyond anything contemplated in the FPA, by requiring exhaustion and adjudication before FERC of Section 404 matters and many other issues arising under statutes that confer zero authority to FERC. *See* Pet.Br.54-56. Respondents acknowledge that "FERC does not administer the CWA," but assert that this "does not mean that it cannot consider a CWA issue raised in a rehearing request." Fed.Br.57.

However, the problem with Respondents' position is not just that FERC does not "believe[] itself competent to review a Section 404 permit decision," Int.Br.49; rather, FERC has for decades correctly recognized that it lacks any *legal authority* whatsoever to address Section 404 matters, and has thus redirected all such matters *to the Corps*. *See, e.g.*, *Cogeneration, Inc.*, 77 FERC ¶ 61,185, 61,724 (1996) ("To the extent that parties believe that the Corps' permit should have required . . . other [terms and conditions], they should have raised those matters with the Corps" because FERC "ha[s] no authority either to amend the Corps' permit or to determine whether the terms of that permit have been met"; "[t]hose matters lie solely with the Corps."). Hence, as FERC has repeatedly determined, litigants need not raise Section 404 matters to FERC because Congress decided those issues must instead be resolved by the Corps.[10]

Finally, affirmance would have implications beyond significantly expanding the scope of the FPA's direct review provision to agency decisions Congress did not explicitly enumerate. It would also sanction the substantial expansion of many

[10] FERC may not exercise statutory authority that it lacks where Congress instead delegated that statutory authority to *other* agencies. *See, e.g.*, *Am. Rivers v. FERC*, 201 F.3d 1186, 1206 (9th Cir. 1999) ("This argument strikes a familiar chord, for it has been rejected by every court that has considered the supposed tension between the Commission's role in the FPA relicensing process and various statutory delegations of authority to outside agencies.").

other direct review provisions that Congress explicitly limited to one agency's orders arising under the relevant law, thereby enlarging numerous provisions to encompass legally independent agency decisions that Congress itself did not subject to direct review. Opening the door for courts to rewrite laws in this manner would constitute an impermissible assault on separation of powers by stripping Congress of its legislative function, and would "inadvertently expand[] the number and range of agency orders that might fall under exclusive-jurisdiction provisions that Congress did not intend to sweep so broadly." *Mokdad*. 804 F.3d at 814.

CONCLUSION

This appeal has enormous consequences for the application of the FPA's exhaustion and direct review provisions, and more broadly for myriad statutes containing similar provisions. Petitioners respectfully request that the Court reverse the ruling below as required by the FPA and controlling authority, and remand this matter to the district court for merits resolution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type and volume limitations of Fed. R. App. P. 32(a)(7) and this Court's December 13, 2021 Order. The brief contains 8,977 words.

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I, William S. Eubanks II, hereby certify that on January 13, 2022, I served copies of Petitioners-Appellants' Opening Brief on all counsel of record in this case by way of electronic mail (ECF filing), and I further certify that all parties to this case are registered to receive ECF filings in this matter.

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