IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03258-MSK

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

Petitioners,

v.

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

Respondents,

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

Respondent-Intervenor.

RESPONDENT-INTERVENOR'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1)

Jessica R. Brody
Daniel J. Arnold
Nicholas A. DiMascio
DENVER WATER
1600 West 12th Avenue
Denver, CO 80204-3412
(303) 628-6460
Jessica.brody@denverwater.org
Daniel.arnold@denverwater.org
Nick.dimascio@denverwater.org

David Y. Chung
Amanda Shafer Berman
Elizabeth Boucher Dawson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
dchung@crowell.com
aberman@crowell.com
edawson@crowell.com

Attorneys for Respondent-Intervenor, the City and County of Denver, acting by and through its Board of Water Commissioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

Other Authorities

Respondent-Intervenor, the City and County of Denver, acting by and through its Board of Water Commissioners ("Denver Water"), respectfully moves to dismiss this matter pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Pursuant to Local Rule 7.1, Denver Water's counsel conferred with counsel for all parties to this case. Respondents' position is reflected in their own motion to dismiss for lack of jurisdiction. Petitioners will oppose.

Because the motion asserts that the Court lacks subject matter jurisdiction, and because the Court can resolve this motion as a matter of law based on the claims as set forth in the Supplemental Petition for Review[1] and the Federal Energy Regulatory Commission's ("FERC") July 16, 2020 Order, of which the Court can take judicial notice, this motion should not be converted to a motion for summary judgment. Denver Water references only those matters outside the pleadings that are part of the publicly-available FERC docket or the administrative record lodged with this Court, and does so only to aid the Court in understanding the background of this litigation.

INTRODUCTION

More than 60 years ago, Denver Water created Gross Reservoir and Dam on federal land specifically set aside for hydroelectric power production under a presidential proclamation issued by President Taft. Since then, Denver Water has operated the dam and reservoir as part of the Gross Reservoir Hydroelectric Project under a license issued by FERC pursuant to the Federal Power Act ("FPA").

Enlarging Gross Reservoir is the cornerstone of the Moffat Collection System Project

[1] Though Petitioners originally filed their Petition for Review on December 19, 2018, all references to Petitioners' claims are to the Supplemental Petition for Review of Agency Action filed August 14, 2020 (ECF 45-1) ("Supp. Pet."), which is now the operative petition (*see* ECF 46) (referenced hereafter in text as "Petition").

("Project"), designed to secure the water supply of more than 1.4 million people, generate additional clean, renewable energy, and improve state water quality. Without FERC's authorization, however, Denver Water would not be able to raise the dam, enlarge the reservoir, or modify the hydropower facilities. Continued hydropower production at Gross Reservoir is a non-negotiable aspect of the Project, since the reservoir's footprint includes federal land reserved for hydropower production purposes. Denver Water accordingly applied to FERC for, and recently received, an amendment to its hydropower license authorizing, *inter alia*, modification of Gross Dam and enlargement of Gross Reservoir.

Petitioners seek to halt the Project through a collateral attack on FERC's authorization of the Project. Supp. Pet. at 1. Yet they did not become parties to FERC's licensing process, even though FERC is the agency with the ultimate authority to authorize changes to this FPA-regulated hydroelectric project. Petitioners instead seek to bypass the FERC process and challenge, in this Court, U.S. Army Corps of Engineers ("Corps") and U.S. Fish and Wildlife Service ("FWS") actions that FERC participated in and relied upon when making its decision to amend the license. These include FWS's Endangered Species Act ("ESA") consultation decision, the Corps' National Environmental Policy Act ("NEPA") analysis, and the Corps' issuance of a Clean Water Act ("CWA") Section 404 Individual Permit ("404 Permit").

Petitioners' attempt to obtain review in this Court of those actions, which were steps on the path to FERC's decision to amend the license, must fail. As detailed below, the FPA grants the U.S. courts of appeals exclusive jurisdiction to review all issues subsumed within FERC's licensing decisions, including any issue that FERC could have entertained. Here, FERC indisputably relied on the Corps' NEPA analysis and CWA Section 404 alternatives analysis, as

well as FWS's ESA consultation decisions, in determining whether to amend Denver Water's license to permit it to modify Gross Dam and expand Gross Reservoir. The Petition before this Court thus raises issues submitted to FERC, which FERC expressly made part of its record, and which had no independent utility until FERC issued its order authorizing the Project. Consequently, were this Court to grant Petitioners' requested relief, the Court's order would affect not only the challenged actions, but also would have cascading effects on FERC's Order and process, even though FERC's action is not subject to this Court's review.

In other words, the challenged actions are inextricably intertwined with, and are integral elements of, FERC's proceeding and decision to amend the license. Without FERC's authorization of the Project, they would have no practical effect because the Project could not and would not go forward; indeed, had FERC denied Denver Water's application, Petitioners' claims would be moot, because the Project would cease to exist. Under the FPA, jurisdiction to review those actions thus rests with the courts of appeals, not the district courts. This Court's consideration of the claims presented in the Petition would threaten the very inefficiency and potential for duplicative judicial review that Congress sought to prevent by enacting the FPA's exclusive review provision. This Court therefore lacks jurisdiction and must dismiss the Petition.

STATUTORY AND REGULATORY BACKGROUND

I. Federal Power Act

The FPA is a "complete scheme of national regulation [to] . . . promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152, 180 (1946). The FPA delegates to FERC authority to issue licenses for the construction and operation of hydroelectric project works, including dams

and reservoirs. 16 U.S.C. § 797. A FERC license is required before an entity may construct, operate, or maintain any "dams, water conduits, reservoirs … or other project works … in any … bodies of water over which Congress has jurisdiction." *Id.* § 797(e). FERC's authority in considering and issuing a license is comprehensive, and it may "require the modification of any project" in virtually any respect, including:

> improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes ….

Id. § 803(a)(1). Though FERC must consider recommendations of "Federal and State agencies exercising administration over … relevant resources" in the project area, *id.* § 803(a)(2)(B), the ultimate decision—including any modifications to a project in response to these recommendations—rests with FERC.

The FPA provides that jurisdiction "to affirm, modify, or set aside" FERC orders "in whole or in part" lies exclusively with the United States courts of appeals. 16 U.S.C. § 825*l*(b). To seek relief in the courts of appeals, a "party" to a FERC proceeding that is "aggrieved by an order issued by [FERC] in a proceeding" must, within 30 days of FERC's order, apply to FERC for a rehearing or reconsideration. 16 U.S.C. § 825*l*(a), (b). A rehearing request is a mandatory, statutory prerequisite to judicial review. *Id.*; *see also Cal. Trout v. FERC*, 572 F.3d 1003, 1017 (9th Cir. 2009) (explaining "a non-party to the Commission's proceedings may not challenge the Commission's final determination in any court"). Once the rehearing process is complete, judicial review "shall be exclusive" in the courts of appeals and is limited to issues "urged before [FERC] in the application for rehearing." 16 U.S.C. § 825*l*(b).

II. Federal Environmental Laws Applicable to Hydroelectric Projects

Though the FPA vests FERC with the authority to review all aspects of a hydroelectric project, such projects often must comply with other statutory obligations. Indeed, depending on the type and scale of the project, the full suite of environmental laws may be brought to bear, including NEPA, the ESA, and the CWA, as well as other federal laws.

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment," or an environmental assessment ("EA") to determine whether to prepare an EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9(a)(1). An EIS describes a "range of alternatives" and explains how the agency decision complies with environmental laws. 40 C.F.R. § 1502.2. NEPA imposes only "procedural … requirements" and "requires no substantive result." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1166 (10th Cir. 2012).

The ESA, administered by FWS for terrestrial and freshwater organisms, *see* 50 C.F.R. § 402.01(b), requires "[e]ach Federal agency," in consultation with FWS, to "insure" that any action "authorized, funded, or carried out by such agency … is not likely to jeopardize" the continued existence of any species listed pursuant to the statute as endangered or threatened. 16 U.S.C. § 1536(a)(2). If a proposed action "may affect" listed species, the agency enters "formal consultation" with FWS. 50 C.F.R. §§ 402.13, 402.14(a)-(b). Formal consultation ends with FWS's biological opinion ("BiOp") on whether "the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species." 50 C.F.R. § 402.14(g)(4). If the action will cause "incidental take" of individual listed species, FWS issues

an incidental take statement ("ITS"). 16 U.S.C. § 1536(b)(4). Any "take" complying with the ITS does not violate the ESA. *Id*. §§ 1536(o)(2), 1538(a)(1)(B), 1539(a).

Congress enacted the CWA to restore and maintain the integrity of the Nation's waters. 33 U.S.C. § 1251(a). The FPA and CWA converge where, as here, a FERC licensee must discharge fill material into navigable waters to change FPA-licensed project features. *See Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 244 (3d Cir. 2018). The Corps is responsible for issuing CWA section 404 permits for such discharges. 33 U.S.C. §§ 1344, 1362(7). It may do so only after the entity seeking the permit secures a state-issued Water Quality Certification, pursuant to CWA section 401, confirming that a given facility will comply with applicable requirements, including federal discharge limitations and state water quality standards. 33 U.S.C. § 1341(a)(1), (d).

FACTUAL BACKGROUND

I. Denver Water and Its Water Supply System

Gross Dam and Reservoir are features of the Gross Reservoir Hydroelectric Project, which Denver Water has owned and operated as an FPA licensee since it built the dam and reservoir in the 1950s. *See City & Cty. of Denver, Colo.*, 10 F.P.C. 766 (1951) (FPA license authorizing construction, operation, and maintenance of a major project, reservoir 22 and Project No. 2035). Gross Reservoir occupies land "reserved for power purposes," a designation that originally prevented the City of Denver from acquiring the land outright, and instead mandated that it apply to FERC for a license. *Id.* at 768; *see also City and Cty. of Denver, Colo.*, 94 FERC ¶ 61,313, at 62,153-54 (2001). The original design for Gross Dam contemplated multiple phases of construction, so that it could be expanded to meet future water needs. Denver Water finished

the first phase of construction on Gross Dam in 1955, and, as licensed by FERC, operates a 7,598-kW hydroelectric facility, 340-foot dam, and the 418-acre Gross Reservoir. *City and Cty. of Denver, Colo.*, 172 FERC ¶ 61,063 at P 3 (2020); Declaration of James Lochhead ("Lochhead Decl.") (ECF 8) ¶ 6.

Gross Reservoir also serves as an integral part of Denver Water's water system, which has provided drinking water to the people of Denver and neighboring communities since 1918 and presently serves more than 1.4 million people. Lochhead Decl. ¶¶ 2, 3.[2] This water system consists of two geographically distinct and separate water collection and treatment systems, a North System and a South System, operated in coordination with each other. *Id.* ¶ 4. The North System, also called the "Moffat Collection System," diverts water from the Williams Fork and Fraser Rivers and conveys it through the Moffat Tunnel to South Boulder Creek. Moffat Collection System Project Final Environmental Impact Statement ("FEIS"), Ch. 1, Purpose and Need, AR123774, at AR123778, AR123782. Gross Reservoir stores that water, along with native flows entering South Boulder Creek and smaller tributaries, and releases water for delivery to the Moffat Water Treatment Plant and communities to Denver's north and west. *See* 172 FERC ¶ 61,063 at P 4-5.

II. The Moffat Project

Ninety percent of the Denver Water system's total water storage capacity and 80% of its entire supply depend on the near-perfect, "unimpeded operation of [the] South System." FEIS at AR123779, AR123788, AR123804. This imbalance between the North and South Systems and storage constraints in the North System leave the overall system vulnerable to disasters and

[2] Denver Water has also supplied non-potable recycled water since 2004. Lochhead Decl. ¶ 3.

extreme events that could disrupt or restrict use of the South System. *See id*.[3] These constraints also diminish operational flexibility needed to meet customer demands under a variety of conditions. *Id*. at AR123779, AR123803, AR123804. In addition, because Denver Water has no physical means of supplying water from its South System to its North System, its raw water customers (including Arvada and the North Table Mountain Water and Sanitation District) are vulnerable if a shortage occurs in the North System. Lochhead Decl. 8 ¶ 7; FEIS at AR123781, AR123803. In fact, in a single dry year, the North System risks running out of water, as existing water demands exceed its available supplies under drought conditions. FEIS at AR123779, AR123803, AR123804.[4]

The Project aims to address these related issues by expanding the Gross Reservoir's current storage volume of 41,811 acre-feet ("AF") to 119,000 AF by increasing the height of Gross Dam from 340 to 471 feet. 172 FERC ¶ 61,063 at PP 3, 9; FEIS at AR123781-82. Additional storage will be filled only in average and above-average runoff years and will be reserved for use during droughts or system emergencies. FEIS at AR123782. The completed Project will provide an average of 18,000 AF/year of water during a four-year drought, *id.*, increase hydropower generation by 16.5%, and add a 5,000 AF Environmental Pool for the

---

[3] For example, after the Buffalo Creek (1996) and Hayman (2002) fires burned forests surrounding Denver Water's South Platte watershed, Denver Water discontinued water delivery to its southern treatment plants and ceased South System reservoir operations to avoid maintenance problems associated with large amounts of debris in the reservoirs, and to avoid taste and odor problems. Denver Water had to utilize the North System to meet the needs of a significant percentage of Denver Water's service area. Lochhead Decl. ¶ 11. The Hayman fire also coincided with a drought that jeopardized Denver Water's supply. *Id*. ¶ 12.

[4] In the drought of 2002, for instance, Denver Water implemented a host of extreme measures to avoid a shortfall in the North System. Lochhead Decl. ¶ 12; FEIS at AR123779, AR123788, AR123803.

Cities of Boulder and Lafayette to store water for use in enhancing South Boulder Creek aquatic habitat, *id.*; 172 FERC ¶ 61,063 at P 9.

III. The FERC Gross Reservoir Hydroelectric Project License Amendment

Denver Water was *required* to obtain a hydropower license amendment for the Project from FERC. This process was not optional; FERC's approval would have been required even if Denver Water had not sought to increase hydropower production because the Project stands on land reserved for hydropower production, and the Project necessarily alters facilities and conditions within the FERC-designated project boundary. *See* 94 FERC ¶ 61,313, at 61,153; 10 F.P.C. at 768. Put simply, without FERC's review and approval, Gross Dam and Reservoir could not exist, and the Project could not go forward at all.

On July 16, 2020, FERC issued an Order granting Denver Water an amendment to its FPA license for the Gross Reservoir Hydroelectric Project, extending the license term by ten years, and requiring Denver Water to begin construction on the raised dam within two years. 172 FERC ¶ 61,063 at P 1. The Order approved increasing "the project's annual [electricity] generation by approximately 4.4 gigawatt-hours." *Id.* at P 9. FERC's Order also authorized Denver Water to undertake additional construction activities including relocating an onsite quarry, upgrading hydropower project facilities, and modifying project operations. The Order amended the list of project works included in the license, amended certain of the license articles, and required Denver Water to undertake a host of environmental mitigation measures. *E.g.*, *id.* at PP 65, 73. FERC's Division of Dam Safety and Inspections must approve Denver Water's plans and specifications before construction commences. *Id.* at PP 71-72. To determine whether it could approve the project, and whether any modifications to Denver Water's proposed action

were required, FERC both performed its own environmental analysis and participated in, reviewed, and incorporated environmental analyses prepared by the Corps and FWS.

A. FERC's Environmental Review

The FPA requires FERC to evaluate virtually every aspect of a licensed project, including "power development purposes, … purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality." *Id.* at P 61; *see* 16 U.S.C. §§ 797(e), 803(a)(1). FERC's independent review thus incorporated analyses prepared by other governmental bodies with authority over certain aspects of the Project. These analyses include, but are not limited to, the Corps' 404 Permit for the necessary dredge-and-fill activities in navigable waters related to dam construction, and related NEPA and ESA analyses (172 FERC ¶ 61,063 at PP 17-19, 27-32); the State of Colorado's CWA 401 Water Quality Certification (*id.* at PP 24-26); and the U.S. Forest Service's ("USFS") consultation with FERC under 16 U.S.C. § 797(e), required because the Project's boundary include land within the Roosevelt National Forest (*id.* at PP 40-43).[5]

B. The Corps' 404 Permit NEPA & ESA Analysis

Increasing the height of Gross Dam will entail the discharge of material into approximately six acres of waters of the United States (0.68% of the reservoir's finished surface area). FEIS Executive Summary, AR123696, at AR123700. To undertake that work, Denver Water required—and FERC accordingly had to confirm that Denver Water had properly obtained—a CWA section 404 permit from the Corps. 172 FERC ¶ 61,063 at P 17 & n.15.

[5] Because only Corps and FWS actions are at issue in the Petition, this motion does not discuss the State and USFS proceedings in detail.

In accordance with NEPA, the Corps prepared an EIS for the proposed permit. As Gross Reservoir is a component of the Gross Reservoir Hydroelectric Project, FERC was designated a "cooperating agency" in preparing the Draft and Final EIS. FEIS at AR123701; 40 C.F.R. § 1501.6.[6] The NEPA process spanned more than 14 years, during which time the Corps and FERC reviewed the effects of enlarging the Moffat Collection System and amending Denver Water's FPA license. *See* 172 FERC ¶ 61,063 at PP 17-18; FEIS at AR123700. The Corps issued its Final EIS in April 2014; its Record of Decision ("ROD") in July 2017; and the 404 Permit on September 8, 2017. 172 FERC ¶ 61,063 at P 17.

In addition, the Corps and FERC consulted with FWS under the ESA to ensure that the Project would not likely jeopardize ESA-listed species or adversely modify critical habitat. 172 FERC ¶ 61,063 at PP 27-28, 32 & n.31; Corps Request for Re-Initiation of Formal Consultation (Aug, 14, 2012), USFWS_000030-31, USFWS_000053-54. Only two species were potentially implicated: the Preble's meadow jumping mouse and the greenback cutthroat trout. 172 FERC ¶

---

[6] Before Denver Water had selected the Project as the best way to address its needs for increased reliability and operational flexibility, additional water supply, and protection from vulnerabilities, Denver Water knew that, at a minimum, whatever project it developed likely would implicate jurisdictional waters of the United States. As such, it began the NEPA process with the Corps first. 68 Fed. Reg. 54,432 (Sept. 17, 2003). Because several alternatives involved expanding the FERC-licensed Gross Reservoir, FERC and the Corps entered into a Cooperating Agency Agreement to "ensure [FERC's] NEPA and other regulatory obligations are met, should an enlargement of Gross Reservoir, a currently FERC-licensed facility, emerge as an element of the proposed action by Denver Water. Moffat Collection System Project, Environmental Impact Statement, Cooperating Agency Agreement between U.S. Army Corps of Engineers, the lead Federal agency and Federal Energy Regulatory Commission, a cooperating agency (Oct. 21, 2003), AR176758; *see also* FEIS at AR123778. Thereafter, FERC and the Corps determined that having FERC cooperate in the Corps' EIS process would "allow for the most comprehensive approach with the least amount of duplicative effort." Letter from Denver Water to FERC & Corps re: How to combine the Moffat Project EIS with the FERC license amendment process at 1 (Mar. 5, 2008), *available at* https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11612556.

61,063 at PP 29-30. FWS concurred with the Corps' conclusion that the Project was not likely to adversely affect the Preble's meadow jumping mouse. *Id.* at P 29. With respect to the greenback cutthroat trout, FWS originally prepared a Biological Opinion and Incidental Take Statement for impacts resulting from the Project's diversions from four streams previously thought to contain the species. *Id.* at PP 28, 32. However, on April 17, 2020, FWS withdrew that Biological Opinion and Incidental Take Statement because it determined those four streams actually contain green-lineage cutthroat trout, a distinct species not listed under the ESA. *Id.* at P 32.[7]

C. FERC's Supplemental EA Under NEPA

Because when the Corps completed its NEPA analysis "not all aspects of Denver Water's plans for enlarging Gross Reservoir had been finalized," 172 FERC ¶ 61,063 at P 19, FERC prepared a Supplemental EA that tiered off the Corps' 2014 EIS. FERC explained that its Supplemental EA—together with the Corps' Draft and Final EIS and ROD—provide "a complete record of analysis of the environmental effects of Denver Water's proposal to amend the license for the Gross Reservoir Project." *Id.*; *see also* FERC, Final Supplemental Environmental Assessment for Amendment of Hydropower License ("Supplemental EA"), FERC Docket No. P-2035-099 at 6 (Feb. 2019).[8]

In the Supplemental EA, FERC evaluated effects of quarry operations and other construction elements, and proposed modifications to recreational facilities, decisions for which

---

[7] Though these actions post-date Petitioners original Petition, Petitioners' Supplemental Petition adds new ESA claims challenging the withdrawal of the Biological Opinion. Supp. Pet. ¶¶ 163-67.

[8] *Available at* https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15159679.

had not been made when the Corps finalized its EIS. 172 FERC ¶ 61,063 at PP 50, 56.[9] FERC also analyzed mandatory conditions stipulated by the USFS under 16 U.S.C. § 797(e) and actions required through FERC's statutory responsibilities, including those that reduced air and water quality and impacts, effects on terrestrial and recreational resources, transportation and public safety, and visual resources. *See id.* at PP 50-52, 55-56, 61-63. FERC also considered if such activities would change ESA "determinations regarding … the greenback cutthroat trout" and concluded they would not; FWS concurred. *Id*. at 38.

Based on those analyses, FERC's Final Supplemental EA concluded that:

> Denver Water's amendment application would not cause environmental effects beyond those identified in the 2014 Final EIS and would, in fact, reduce the level of some effects through implementation of Denver Water's proposed mitigation plans[,] … measures required by the Forest Service's 4(e) conditions and by the Colorado DHPE's water quality certification; and staff-recommended measures…

172 FERC ¶ 61,063 at P 55. FERC staff issued a Finding of No Significant Impact and recommended approving Denver Water's license amendment application. Supplemental EA at 97, 105-06. As explained above, FERC issued the amended license on July 17, 2020.

IV. Petitioners' Participation in the FERC Proceedings and Before this Court

On February 1, 2017, FERC issued public notice of Denver Water's application to amend its FERC license, which set a 60-day period during which comments, motions to intervene, protests, recommendations, terms and conditions, and fishway prescriptions could be filed. 172 FERC ¶ 61,063 at P 20; *see also* 82 Fed. Reg. 9566, 9567 (Feb. 7, 2017). It set another 45-day period for the filing of replies to comments. *See* 82 Fed. Reg. at 9567. Several entities, including

[9] In compliance with NEPA, the Corps reviewed Project modifications made by Denver Water after the Final EIS, including the relocated quarry designs, in its ROD. Moffat Collection System Project Record of Decision, AR000008, at AR000020.

federal, state, and local agencies, organizations, and individuals responded to the notice, and USFS and Boulder County intervened. 172 FERC ¶ 61,063 at P 21. Petitioners did not.

Almost a year after the April 2017 deadline, however, Petitioner Save the Colorado ("STC") moved to intervene out-of-time. *See* PD000955, at PD001109. STC also submitted comments regarding FERC's review, in which STC recognized that "the Gross Reservoir Hydroelectric Project … is a component of the overall Moffat Collection System Project," and asserted that FERC was relying on the same analyses that the Petition seeks to challenge. *Id*. at PD001109, PD001136. In fact, STC insisted that FERC's reliance on these actions meant it "must suspend its licensing procedure until the requirements … under NEPA and other federal laws are met." *Id.* at PD001136.

FERC denied the motion, concluding that STC "provides no explanation as to why it was unable to intervene in a timely manner" and that STC "cannot 'sleep on its rights' and then seek untimely intervention." Notice Denying Intervention, FERC Docket No. P-2035-099 at 1-2 (Aug. 1, 2018) (citation omitted).[10] STC sought rehearing, repeatedly asserting that FERC's Supplemental EA "was an extension of the Corps' original EIS process," and that FERC had "now blocked [STC]'s ability to challenge the environmental findings related to the project under NEPA." Request for Rehearing of Order Denying Intervention, FERC Docket No. P-2035-104 at 2, 5 (Aug. 31, 2018);[11] *see id.* at 6 (arguing FERC's NEPA review was "part and parcel of" the Corps' Final EIS). FERC denied the petition. 172 FERC ¶ 61,063 at P 20 n.24. STC chose not to appeal. *See Cal. Trout*, 572 F.3d at 1013 n.7 (explaining equitable exception to 16 U.S.C. § 825*l*'s preclusion of judicial review for sole purposes of challenging non-party status).

[10] *Available at* https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14991206.

Instead, Petitioners filed this action in December 2018. Petitioners seek to set aside the 404 Permit and the related Corps and FWS actions and "enjoin[] the Corps and [FWS] from taking any further actions in furtherance of this [P]roject[.]" Supp. Pet. Prayer for Relief. Petitioners allege that the agencies violated NEPA, the CWA, the ESA, and the APA. *Id*. ¶ 7. They contend the Court has jurisdiction under the broadly applicable laws for civil actions against the U.S. and federal question jurisdiction, and general review provisions applicable to their claims. *Id*. ¶¶ 8, 11.

STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction, possessing only those powers specifically granted to them by either the U.S. Constitution or Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). 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). All matters are presumed to lie outside the limited jurisdiction of the federal courts until the plaintiff establishes that subject matter jurisdiction is proper. *Kokkonen*, 511 U.S. at 376-378.

ARGUMENT

The FPA expressly vests exclusive jurisdiction in the courts of appeals to review FERC decisions under Part I of the FPA, including everything comprising the record before FERC and every issue germane to FERC's decision. The plain language of the statute, congressional intent, and case law interpreting not only the FPA but also other exclusive-jurisdiction provisions all point to the same conclusion: Petitioners must bring any challenge to any aspect of FERC's Order approving the Project—including FERC's reliance on the Corps' EIS and CWA 404

---

[11] *Available at* https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15012621.

analysis, as well as FWS's ESA analysis and consultation decision—in the courts of appeals. No amount of artful pleading can skirt this jurisdictional restriction. The challenged Corps and FWS actions, along with FERC's own analysis, form the "complete record of analysis" before FERC, and without FERC's approval, those actions have no independent utility. 172 FERC ¶ 61,063 at P 19. Accordingly, this Court lacks jurisdiction over and must dismiss this Petition for review.

I. THE FPA'S EXCLUSIVE-JURISDICTION PROVISION PROHIBITS PIECEMEAL LITIGATION.

The text of the FPA compels all challenges related to FERC hydropower licensing actions—including the actions challenged here—to be filed in the U.S. courts of appeals. The Supreme Court recognized this long ago, and numerous federal district courts have accordingly dismissed challenges to decisions by agencies other than FERC that, as here, form part of a project that must ultimately be approved by FERC. Petitioners can make no serious argument that their Petition is so exceptional as to warrant deviation from this clear precedent.

A. Congress Sought to Consolidate All Challenges to All Aspects of FERC Orders in One Proceeding.

Congress gave the U.S. courts of appeals "exclusive" jurisdiction to "affirm, modify, or set aside" a FERC order issued under Part I of the FPA. 16 U.S.C. § 825*l*(b). In so doing, Congress sought to prohibit the very type of parallel proceeding Petitioners bring here by requiring *all* aspects of a FERC decision, including its coordination with other agencies and reliance on their work product, to be reviewed in one action, before one court of appeals. The FPA's "simple words of plain meaning [leave] no room to doubt the congressional purpose and intent" give the courts of appeals "exclusive jurisdiction" over "all issues inhering in" FERC licensing decisions. *City of Tacoma v. Taxpayers of Tacoma ("Taxpayers")*, 357 U.S. 320, 335-

336 (1958); *accord*, *Me. Council of the Atl. Salmon Fed. v. Nat'l Marine Fisheries Serv.*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J., sitting by designation) (quoting *Taxpayers*, 357 U.S. at 336).

Accordingly, the FPA "preclude[s] *de novo* litigation between the parties" of "all issues" that "could have … been raised before FERC." *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 262-64 (10th Cir. 1989);[12] *Cal. Save Our Streams v. Yeutter ("Cal. SOS")*, 887 F.2d 908, 910 (9th Cir. 1989). Such challenges amount to "impermissible collateral attacks" on FERC's licensing process. *Taxpayers*, 357 U.S. at 336, 341. As the Tenth Circuit explained, a court would be "hard pressed to formulate a doctrine with a more expansive scope." *Williams*, 890 F.2d at 262.

This expansive doctrine has commonsense roots. The "policy behind having a special review procedure in the first place … disfavors bifurcating jurisdiction over various substantive grounds between district court and the court of appeals [because of the] likelihood of duplication and inconsistency." *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979). Moreover, "[w]hen the Congress require[s] that courts of appeals exercise exclusive jurisdiction" over petitions to review agency actions, it is "to insure speedy resolution of the validity of" that action. *Envtl. Def. Fund, Inc. v. EPA*, 485 F.2d 780, 783 (D.C. Cir. 1973). If courts allowed a petition "to be litigated in several proceedings," that "policy would be defeated." *Id.*

---

[12] *Williams* arose under the Natural Gas Act; the "FPA … is a statutory scheme recognized as 'substantially identical' to the [Natural Gas Act] and subject to 'interchangeabl[e] precedent.'" *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 197 n.8 (3d Cir. 2018) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 n.7 (1981)).

That Congress intended "speedy resolution" of challenges to FPA actions through exclusive appellate-court review is even more evident when considering that Congress specified that "the licensee shall commence the construction of the project works … not more than two years from" the date of the license. 16 U.S.C. § 806. This statutorily mandated two-year deadline to commence construction is entirely inconsistent with permitting Petitioners to collaterally attack the Corps' and FWS's actions in this Court (followed by a likely trip to the court of appeals), while overlapping challenges to FERC's decision to amend the license proceed on a separate track before the court of appeals. Congress did not intend licensed hydropower projects to endure such protracted and duplicative review. Rather, Congress intended streamlined judicial review that would produce a final judgment before the expiration of the two-year deadline to commence construction.

B. Case Law Applying the FPA's and Other Statutes' Exclusive Jurisdiction Provisions Uniformly Disfavors Collateral Attacks, Regardless of the Reason.

While the FPA does not preclude application of other federal laws, including NEPA, the ESA, and CWA, it establishes a "*separate and exclusive procedure* that governs review of [FERC's] licensing decisions." *City of Tacoma v. Nat'l Marine Fisheries Serv.*, 383 F. Supp. 2d 89, 92 (D.D.C. 2005) (citing 16 U.S.C. § 825*l*(b)) (emphasis added); *see Skokomish Indian Tribe v. United States*, 332 F.3d 551, 558 (9th Cir. 2003). The "specific jurisdictional provisions of the FPA which expressly govern review of disputes concerning the licensing of hydroelectric projects control over the general and widely applicable procedures that regulate … other statutory challenges." *Cal. SOS*, 887 F.2d at 911-12; *see also Williams*, 890 F.2d at 262 (rejecting notion that review under the Natural Gas Act could be bifurcated based on subject

matter).[13] As such, any challenge to compliance with environmental statutes applicable to a FERC-licensed project, like the ESA, NEPA, and CWA, still must be heard in the forum prescribed by the FPA: the U.S. courts of appeals. 16 U.S.C. § 825*l*(b).

In fact, at least one court has addressed the very situation presented here: a challenge to an ESA decision subsidiary to a FERC hydropower licensing order. In *City of Tacoma*, a D.C. district court ruled it lacked jurisdiction to hear a challenge to an ESA decision required as part of a FERC licensing proceeding, noting that the "final BiOp has no apparent significance whatever when separated from the FERC licensing order." 383 F. Supp. 2d at 92 (rejecting argument that suit sought to "enforce the [National Marine Fisheries Service's] independent affirmative duties").

Similarly, where ESA compliance was a required component of a pesticide registration under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), another statute with a similar exclusive-jurisdiction provision, the Ninth Circuit ruled that a challenge to ESA compliance must be heard in the forum identified in FIFRA, the more-specific statute. *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1089 (9th Cir. 2017). The Ninth Circuit explained that, since ESA consultation "informs the validity of the EPA's determination whether to reregister a pesticide," a challenge to ESA compliance "inherently challenge[s] the validity of the EPA's final registration and reregistration orders." *Id*. In other words, the two actions are

---

[13] *See Nat'l Parks and Conservation Ass'n v. Fed. Aviation Admin.*, 998 F.2d 1523, 1527-28 (10th Cir. 1993) ("when Congress has vested exclusive jurisdiction over … review in the Courts of Appeals, NEPA does not provide independent grounds for district court jurisdiction") (internal quotation omitted).

"inextricably intertwined." *Id.*; *see also Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 177 (D.C. Cir. 2017) (reaching the exact same conclusion regarding a different FIFRA registration).

Challenges to NEPA compliance are no different. When actions of the Federal Communications Commission and the Federal Aviation Administration ("FAA") were challenged under NEPA, the D.C. Circuit found that the courts of appeals had exclusive jurisdiction over those claims under the Communications Act and the Federal Aviation Act because the underlying actions of both agencies were subject to those Acts' exclusive-jurisdiction provisions. *City of Rochester*, 603 F.2d at 935. In other words, a NEPA claim could only be brought in the context of a challenge under the Communications Act and Federal Aviation Act in the court of appeals. And just as ESA challenges to FIFRA decisions must be brought in the courts of appeals, so too with NEPA challenges. *Envtl. Def. Fund, Inc. v. EPA*, 485 F.2d 780, 783 (D.C. Cir. 1973) (holding "all issues pertaining to the validity of" the FIFRA decision "including questions pertaining to NEPA [] must be resolved solely in this court"). The FPA's exclusive-jurisdiction provision, like those in FIFRA, the Communications Act, and the Federal Aviation Act, leaves no room for collateral attacks in district court, regardless of the statutory duty at issue.[14]

II. PETITIONERS' ATTEMPT TO AVOID THE FPA'S EXCLUSIVE JURISDICTION PROVISION BY SUING THE CORPS AND FWS IN THE DISTRICT COURT MUST FAIL.

Because the issues raised in the Petition are inescapably intertwined with FERC's licensing process, the FPA bars this action and the Court should dismiss the Petition for lack of

[14] Indeed, this doctrine even reaches attempted district court suits sounding in "tort for fraud and deceit" *against private parties* that hold FERC permits. *Halifax Cty., Va. v. Lever*, 718 F.2d 649, 650-52 (4th Cir. 1983).

subject matter jurisdiction. *Taxpayers*, 357 U.S. at 335-336. Petitioners cannot avoid that result simply by suing the Corps and the FWS in the district court, rather than challenging the actions taken by the Corps and FWS before FERC, and then in the court of appeals.

A. Petitioners Cannot Avoid Appellate Jurisdiction by Suing the Corps and FWS.

Petitioners cannot evade the FPA's exclusive-review provision simply by ignoring FERC's central role in the approval of this Project. As the Ninth Circuit observed, "we do not believe that the jurisdictional remedy prescribed by Congress hangs on the ingenuity of the complaint." *Cal. SOS*, 887 F.2d at 912. *City of Tacoma* and *Cal. SOS*, which both ruled that the FPA barred district court review of other agency's actions, illustrate the point.

In *City of Tacoma*, the City sought to challenge in district court a National Marine Fisheries Service ("NMFS") BiOp issued in connection with a FERC order. 383 F. Supp. 2d at 90. The City argued that the FPA's review provisions were "irrelevant," because it sued NMFS, not FERC, and its claims arose under the ESA and APA, not the FPA. *Id*. at 92.[15] The court rejected this "carefully craft[ed]" attempt to "avoid directly implicating the FPA," as "it is clear that the suit [was] a thinly veiled collateral attack on the FERC licensing process. Indeed, plaintiff's challenge to the … final BiOp has no apparent significance whatever when separated from the FERC licensing order." *Id*. The court confirmed the FPA's "specific provisions …

[15] That ESA consultations regarding the Project were conducted contemporaneously with the CWA 404 process, and both preceded FERC's decision, does not alter the analysis. FERC participated alongside the Corps in those ESA consultations. USFWS_000031-32, 000053-54; 172 FERC ¶ 61,063 at P 32 & n.31. As with ESA challenges, only the courts of appeals have jurisdiction to hear challenges to the CWA-related decisions attendant a FERC decision, even when those decisions are made by states. *See generally Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 246 (3d Cir. 2018) (exerting jurisdiction over FERC's certificate issuance and state CWA 404 permit and 401 water quality certification).

preempt the general procedures for ESA and APA claims," *id*., and explained that "exclusive appellate review … was established to promote efficiency by eliminating redundancy and inconsistency," *id*. at 93.

That holding followed *California SOS*, where the Ninth Circuit rejected a similar district court challenge to a USFS action related to a FERC-licensed facility under NEPA and the American Indian Religious Freedom Act. 887 F.2d 908. The Ninth Circuit disagreed that appellants were only seeking review of USFS's actions and held that the FPA barred the district-court action. First, "the specific jurisdictional provisions of the FPA … control[led] over the general and widely applicable procedures that regulate NEPA … and other statutory challenges." *Id*. at 911-12. The Ninth Circuit also held that because the USFS actions had "no significance outside the licensing process," the "practical effect of the action in district court is an assault on an important ingredient of the FERC license." *Id.* at 912. Third, the court reasoned that, as a practical matter, district court review of USFS's actions would "result in substantial disruption of the statutorily mandated licensing procedure," as a license applicant would have to "f[i]ght … through the administrative proceedings," only to "then have to grind through the district court and, almost certainly, through the appeal …." *Id*. Noting that "[t]he point of creating a special review procedure … is to avoid duplication and inconsistency," the court found that appellants' approach "would resurrect the very problems that Congress sought to eliminate." *Id*. Congress, it concluded, would not "involuntarily create a glaring loophole that would undermine the efficacy of the expedited process it adopted." *Id*.

The Tenth Circuit adopted the reasoning of *Cal. SOS* in *National Parks Conservation Association v. Federal Aviation Administration*, 998 F.2d 1523 (10th Cir. 1993). The plaintiffs in

that case sought Tenth Circuit review of an FAA order approving construction, operation, and funding of an airport to be located on Bureau of Land Management ("BLM") land, but tried to challenge BLM's actions approving an amendment to its land management plan for the airport in district court under the APA and general federal question jurisdiction. *Id.* at 1526. While the Tenth Circuit recognized that review of BLM decisions "generally rests in the district courts," it held appellate jurisdiction was proper because BLM's actions "facilitate the actions of the FAA," which must be challenged in the courts of appeals. *Id*. at 1528.

The reasoning of *City of Tacoma, California SOS, and National Parks* applies equally here. Petitioners cannot escape the expansive reach of the FPA's exclusive-jurisdiction provision by challenging the Corps' 404 Permit, NEPA analysis, and FWS's ESA consultation divorced from FERC's Order. Those agency actions are necessary "ingredient[s]"[16] of the FERC Order—the cornerstone of any FERC-licensed hydropower project. FERC is the agency with the ultimate authority to approve or disapprove this Project, particularly since Gross Reservoir occupies and affects federal lands withdrawn for power purposes and therefore must include hydropower facilities. "FERC retains authority to require the modification of the project and its plans and specifications, to accomplish the [FPA's] outlined goals." *Coal. for Fair and Equitable Regulation of Docks on Lake of the Ozarks v. FERC*, 297 F.3d 771, 779 (8th Cir. 2002). Petitioners seem to recognize this, having themselves characterized FERC's own environmental review (the Supplemental EA) as having "effectively reopened and extended the NEPA review process." Request for Rehearing at 5. And yet, before this Court they claim that *the Corps and FWS* "authoriz[ed]" "the tallest dam," and "largest construction project." Supp. Pet. at 1. But

[16] *California SOS*, 887 F.2d at 912.

when it comes to federal hydropower projects like this, FERC has the final say. 16 U.S.C. § 797(e).

Without FERC's approval of Denver Water's license amendment application, Petitioners' challenges to the 404 Permit would be moot, *see* Supplemental EA at 24 (confirming Project cannot proceed without FERC authorization), the challenged actions would have no real-world impact, and Petitioners' alleged injuries could not exist, *see* Supp. Pet. at ¶¶ 1, 4. Absent FERC's approval, Denver Water would have "abandon[ed]" the Project. Supplemental EA at 24; *see also id.* at 97 (lack of FERC approval "would prevent Denver Water from moving forward with expansion of the Moffat Collection System"). The practical effect of the Petition—which challenges actions contingent on a FERC order and seeks to vacate pieces of FERC's indivisible environmental review—is therefore an assault on the FERC Order itself. *See Cal. SOS,* 887 F.2d at 912; *see also Ctr. for Biological Diversity*, 861 F.3d at 187 (rejecting district court jurisdiction over ESA claim that was a "means to a broader end—a challenge to the validity of the [FIFRA] order itself"). Indeed, the Petition implicates FERC's authority because the requested relief, if granted, could frustrate or prevent Denver Water from complying with FERC requirements, like timely commencement of construction as set forth in FERC's amendment Order. Such a "glaring loophole [] would undermine the efficacy of the expedited process [Congress] adopted." *Cal. SOS*, 887 F.2d at 912.

The Court should follow the well-established principle of applying the more specific legislation where two jurisdictional statutes provide different avenues for judicial review, and accordingly hold that the "specific jurisdictional provisions of the FPA which expressly govern review of disputes concerning the licensing of hydroelectric projects" like Gross Dam and

Reservoir "preempt" the "more general remedies" of other environmental and administrative statutes. *Cal. SOS*, 887 F.2d at 911-12 (internal quotation marks and citation omitted). The Petition challenges agency actions that "facilitate" FERC's license amendment process and the very activities the FERC order authorizes. *See Nat'l Parks*, 998 F.2d at 1528. FERC used the Corps' NEPA analysis to "ensure [FERC's] NEPA and other regulatory obligations are met." Cooperating Agency Agreement, AR176758. Along with the Corps' Draft EIS and ROD, FERC's Final Supplemental EA "together" comprised FERC's "complete record" of environmental review for the Project. 172 FERC ¶ 61,063 at P 19. Consequently, an order by this Court setting aside the challenged actions also would affect FERC's Order and process, undermining the FPA provision granting the courts of appeals exclusive jurisdiction to review the validity of FERC's decisions. 16 U.S.C. § 825*l*(b).

Petitioner STC recognized as much before FERC. *See* Request for Rehearing at 2–7; PD000955 at PD001138 (asserting FERC "relie[d] on" the Final EIS "for the majority of the environmental review required of its licensing process"). Indeed, Petitioner STC raised the same allegations in comments it filed with FERC as it does here, *id.* at PD001109, which FERC was required to consider, *see* Request for Rehearing at 8; 172 FERC ¶ 61,063 at P 23 (explaining that FERC fully considered "[t]he … comments … filed in this proceeding"). Construction requiring the Corps-issued 404 Permit will occur within FERC's project boundary, and FERC considered the effects of those activities in its NEPA review. *See* 172 FERC ¶ 61,063 at P 19 & n.18. FERC also relied upon the Corps' ESA consultation, which included the effects of the action before FERC, *see id.* at P 31 n.31, and received FWS's concurrence that additional Project activities considered by FERC would not change the outcome of that consultation, *id.* at P 29. STC also

plainly recognized the degree to which the FERC and Corps actions are bound together when it insisted to FERC that its reliance on the allegedly faulty Corps and FWS analyses meant FERC "must suspend its licensing procedure" indefinitely. *See* PD000955 at PD001136.

Petitioners' district-court lawsuit could also result in "inconsistency, duplication, and delay." *Nat'l Parks*, 998 F.2d at 1529. FERC has confirmed that the issues raised by parties before FERC, which could ultimately be challenged in the courts of appeals, substantially overlap with those raised in the Petition, which Petitioners purport to challenge here. FERC expressly found that "[m]any of the comments" on the proposed license amendment "focused on issues already covered in the 2014 Final EIS …." Supplemental EA at 25-26. Petitioner STC's submission to FERC, which is substantially reiterated in the Petition, underscores that point.[17] As the Tenth Circuit recognized, "[i]t makes no sense to permit the parties to chart their own route and thus allow piecemeal and unending litigation to ensue." *Williams*, 890 F.2d at 264. Petitioners—aware of the ongoing FERC process—nevertheless filed the Petition as a "preemptive strike" against an anticipated FERC order authorizing the Project. *See id*. Petitioners' motives here are as transparent as the plaintiff's in *Williams*, where the court determined that "[i]t ma[de] little sense for [a] state court action to have been filed unless

[17] *E.g., compare generally* Supp. Pet. at ¶¶ 1, 2, with STC Comments on FERC Supplemental EA (Apr. 9, 2018), in PD000955, at PD001112-13 (characterizing Project); Supp. Pet. at ¶¶ 116-119, with PD001110-14, 23, 27 (alleging need for a supplemental EIS); Supp. Pet. at ¶¶ 4-7, 94, with PD001112-14, 23, 26-27 (discussing impacts allegedly not adequately addressed in Corps' Final EIS); Supp. Pet. at ¶ 107, with PD001118 (alleging reliance of "stale" data); Supp. Pet. at ¶¶ 80, 143, with PD001114, 22-24 (quarry); Supp. Pet. at ¶¶ 5, 79-80, 135, 142-43, with PD001114, 23-25 (climate change); Supp. Pet. at ¶¶ 4, 80, 91, 93, 143, with PD001126-27 (trees); Supp. Pet. at ¶ 6, with PD001126-27 (recreation); Supp. Pet. at ¶ 150, with PD001127-31 (mitigation).

[plaintiff] at the time of filing knew or had reason to believe that [defendant] would be awarded the requisite" FERC approval. *Id*.

Regardless, the Petition challenges actions that cannot be disentangled from FERC's licensing process. It is therefore foreclosed by the FPA. *Taxpayers*, 357 U.S. at 336, 341; *Williams*, 890 F.2d at 261. Petitioners' claims must be reviewed, if at all, along with the Order—in the court of appeals.

B. Petitioners' Waiver of The Right to Participate in the FERC Proceedings Cannot Justify Departing from the Statute and Precedent to Provide Them a Second Bite at the Apple.

Petitioners may argue that, should this Court dismiss the Petition, they will be left without a forum for their claims. *See* 16 U.S.C. § 825*l*(a), (b) (barring non-parties to a FERC proceeding from challenging FERC's decision in court). But equitable or prudential considerations cannot confer subject matter jurisdiction upon a federal court. If Petitioners' failure to timely intervene in the FERC proceedings means they lose the ability to obtain judicial review in the court of appeals, that is a problem of their own making. That is not a compelling reason to ignore Congress's command that review of all components of FERC's decision must proceed in that forum. *See Cal. Trout v. FERC*, 572 F.3d at 1017 (rejecting claim that losing benefits of intervention, including the ability to challenge FERC's issuance of an EA under NEPA, was "good cause" to grant untimely intervention); *cf. Am. Bird Conservancy v. Fed. Commc'ns Comm'n*, 545 F.3d 1190, 1195 (9th Cir. 2008) (dismissing concern regarding inconsistencies between prerequisites to file suit under ESA and exclusive-jurisdiction provision of Communications Act as insufficient to warrant "ignor[ing] Congress' carefully crafted system of judicial review").

While the Corps' and FWS' actions began prior to the initiation of FERC's licensing process, they were finalized during FERC's ongoing consideration of Denver Water's FPA application. FERC participated as a cooperating agency in the Corps' and FWS' processes due to the necessity of obtaining a hydropower license amendment for the Project, and FERC then relied upon the Corps' and FWS' analyses and decisions in the ultimate approval for the Project. Thus, Petitioners cannot claim ignorance of the FERC proceeding, or its relationship to the Corps and FWS actions; they could have timely intervened before FERC as parties and asserted their rights under the CWA, ESA, and NEPA, but they waited too long to seek intervention and thus lost that opportunity.

Indeed, courts have confirmed that FERC "may hear *any* claim raised before it—even potential violations of federal law." *Adorers*, 897 F.3d at 197 (emphasis added); *see also Cal. SOS*, 887 F.2d at 912 (confirming circuit court's ability to review entire FERC record, including actions of other agencies); *Atl. Salmon Fed.*, 858 F.3d at 693-94 (same). Had Petitioners timely sought to intervene in the FERC process, they could have raised these claims, and FERC would have been required to consider them, or risk having its own decision found arbitrary and capricious or unlawful. *See Adorers*, 897 F.3d at 197; *see also Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1320 (10th Cir. 2004) ("presentation of a ground of objection in an application for rehearing … is an indispensable prerequisite to … judicial review" (internal quotation omitted)). In turn, FERC may have "denied or modified the conditions" of Denver Water's amended license. *Adorers*, 897 F.3d at 197-98. If FERC failed to do so, "the reviewing court of appeals may have ruled in the [Petitioners'] favor." *Id*. Petitioners then would have, "at the very least, had the opportunity to seek the relief they so desire today." *Id*.

But whether or not Petitioners can participate, as parties or otherwise, in a court of appeals challenge to FERC's Order is an issue for the court of appeals to decide. What is both clear and dispositive here is that this Court is "without jurisdiction" to hear Petitioners' claims challenging agency actions that are prerequisites to, and have no effect independent of, FERC's decision to amend the license. *Adorers*, 897 F.3d at 197. As one court of appeals explained when considering the FPA's jurisdictional scope, allowing interested parties to "choos[e] not to participate in the [FERC] proceedings" and instead collaterally attack a FERC proceeding through district court litigation against other agencies "would do violence to Congress's deliberately crafted administrative scheme and would eviscerate § 825*l*(b)." *Otwell v. Ala. Power Co.*, 747 F.3d 1275, 1282-83 (11th Cir. 2014). This Court should not permit Petitioners to place Denver Water in the difficult position of potentially facing simultaneous, overlapping challenges to the Project in both this Court and the court of appeals—all while the two-year clock for Denver Water to begin construction under the FERC Order is ticking.

CONCLUSION

The FPA forecloses judicial review of the Petition, which is an impermissible attack on FERC's license amendment process and a FERC Order authorizing the Project. Denver Water therefore respectfully asks the Court to dismiss the Petition with prejudice.

DATED this 17th day of August, 2020

Respectfully submitted,

/s/ Amanda Shafer Berman

David Y. Chung
Amanda Shafer Berman
Elizabeth Boucher Dawson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Telephone: (202) 624-2500
dchung@crowell.com
aberman@crowell.com
edawson@crowell.com

Jessica R. Brody
Daniel J. Arnold
Nicholas A. DiMascio
DENVER WATER
1600 West 12th Avenue
Denver, CO 80204-3412
(303) 628-6460
(303) 628-6478
Jessica.brody@denverwater.org
Daniel.arnold@denverwater.org
Nick.dimascio@denverwater.org

Attorneys for Respondent-Intervenor, the City and County of Denver, acting by and through its Board of Water Commissioners

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users of the CM/ECF system.

Dated: August 17, 2020

Respectfully submitted,

s/ Amanda Shafer Berman
Amanda Shafer Berman