IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-3258-CMA

SAVE THE COLORADO, a Colorado nonprofit corporation;
THE ENVIRONMENTAL GROUP, a Colorado nonprofit corporation;
WILDEARTH GUARDIANS, a nonprofit corporation;
LIVING RIVERS, a nonprofit corporation;
WATERKEEPER ALLIANCE, INC., a nonprofit corporation; and
SIERRA CLUB, a nonprofit corporation.

Petitioners,

v.

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

Respondents.

PETITIONERS' OPPOSITION TO FEDERAL RESPONDENTS' MOTION TO DISMISS (ECF 49) AND RESPONDENT-INTERVENOR'S MOTION TO DISMISS (ECF 47)[1]

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[1] Pursuant to CMA Civ. Practice Standard 10.1(d)(1), Petitioners are entitled to file an opposition of up to 15 pages in response to each motion to dismiss. For the Court's convenience, and to avoid duplication, Petitioners are filing a single, consolidated opposition to both motions in compliance with the combined page limit.

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[2] The regulations implementing NEPA were amended in July 2020. *See* 85 Fed. Reg. 43,304 (July 16, 2020). Because the actions challenged in this suit were undertaken prior to that date, Petitioners cite to the prior iteration of the regulations.

LIST OF ACRONYMS

BLM	Bureau of Land Management
CWA	Clean Water Act
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FAA	Federal Aviation Administration
FERC	Federal Energy Regulatory Commission
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FPA	Federal Power Act
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
STC	Save the Colorado

INTRODUCTION

In their motions to dismiss, Federal Respondents and Respondent-Intervenor Denver Water ("Respondents," collectively) ask this Court to take the unprecedented action of dismissing challenges to decisions by the U.S. Army Corps of Engineers ("Corps") and the U.S. Fish and Wildlife Service ("Service") that are neither triggered by nor intended to facilitate a separate licensing decision under the Federal Power Act ("FPA") by the Federal Energy Regulatory Commission ("FERC") in connection with the Moffat Collection System Project ("Project"). In reality, the Corps' decisionmaking process concerning whether to issue a Section 404 permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1344, is the touchstone for determining the proper venue for judicial review of the Corps' actions because the Corps' threshold analysis determines whether FERC has any licensing role at all in this Project. Thus, the Corps' CWA decision is the "but for" cause that triggered FERC's license, and that license has no independent utility in the absence of the Corps' issuance of a CWA permit (and its selection of this Project alternative). The converse is not true. This is why FERC—the agency that administers the FPA—formally determined that its actions, including an order foreclosing the ability to seek judicial review of FERC's license, do not shield from judicial review the Corps' and Service's separate, independent actions.

Given the complete lack of legal or factual support, the Court should soundly reject Respondents' arguments. However, in light of the especially tenuous foundation for those arguments, Petitioners feel compelled to emphasize the extremely troubling nature of the underlying briefing in which Respondents have, to their advantage, mischaracterized Petitioners' claims, distorted the factual record, failed to address

adverse rulings and facts, and concealed the fact that district courts routinely review analogous CWA permitting decisions by the Corps where FERC must issue a license incidental to a CWA permit. Such tactics should not be condoned.[3]

BACKGROUND

Petitioners' Supplemental Petition for Review contains detailed background information. *See* ECF 45-1 at ¶¶ 35-130. Petitioners provide a brief overview below.

I. Statutory and Regulatory Background

A. The Clean Water Act

"Congress enacted the [CWA] with the comprehensive objective of restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." *U.S. v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir. 2006) (quotation marks and citation omitted). To that end, the CWA prohibits the discharge of dredged or fill material (pollutants) into waters of the United States unless authorized by a Corps permit issued under Section 404. *See* 33 U.S.C. §§ 1311(a), 1344. The Corps has adopted regulations, called the "public interest" factors, to implement its permitting authority. 33 C.F.R. §§ 320.1-320.4. "Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of . . . [t]he benefits which reasonably may be expected to accrue . . . balanced against [an action's] reasonably foreseeable detriments." *Id.* § 320.4(a)(1). "The decision whether to authorize a

[3] Petitioners do not take lightly the obligations imposed by Fed. R. Civ. Pro. 11 and this Court's Civil Practice Standards. Since 2019, Petitioners and Respondents have engaged in numerous discussions and exchanged multiple emails regarding the jurisdictional issues raised by Respondents' motions to dismiss. Through those discussions, Petitioners have attempted to dissuade Respondents from burdening the Court with these baseless motions. Those requests fell on deaf ears.

proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process." *Id.* § 320.4(a)(1).

The Environmental Protection Agency ("EPA") has also promulgated regulations, called the "404(b)(1) Guidelines," for Section 404 permits. 33 U.S.C. § 1344(b)(1); 40 C.F.R. Part 230. These regulations create a presumption that, where an activity "does not require . . . siting within" waters protected by the CWA "to fulfill its basic purpose," and thus "is not 'water dependent,'" practicable alternatives that do not require such a discharge "are presumed to be available, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3). These regulations also prohibit the Corps from granting a permit if there is "a practicable alternative" that would have "less adverse impact." 40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i). Practicable alternatives are those that are "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2).

The Corps reviews all proposed permits under both the Corps' public interest factors and EPA's 404(b)(1) Guidelines. 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 320.2(f). A permit must be denied if it is contrary to the public interest or does not comport with the Section 404(b)(1) Guidelines. 33 C.F.R. §§ 320.4, 323.6; 40 C.F.R. §§ 230.10, 230.12.

B. The National Environmental Policy Act

Congress enacted the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, to "encourage productive and enjoyable harmony between man and his environment" and to promote government efforts "that will prevent or eliminate damage to the environment." *Id.* § 4321.To accomplish its underlying goals, NEPA requires federal agencies to prepare a "detailed statement"—i.e., an Environmental Impact

Statement ("EIS")—for all "major federal actions significantly affecting the quality of the human environment." *Id.* § 4332(c). An EIS must describe (1) "the environmental impact of the proposed action," (2) "the adverse environmental effects which cannot be avoided," and (3) "alternatives to the proposed action." *Id.* § 4332(C)(i)-(iii).

NEPA's regulations explain that "[a] lead agency shall supervise the preparation of an [EIS] if more than one Federal agency . . . [i]s involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity." 40 C.F.R. § 1501.5(a)(2). "[T]he following factors (which are listed in order of descending importance) shall determine lead agency designation: (1) Magnitude of agency's involvement; (2) Project approval/disapproval authority; (3) Expertise concerning the action's environmental effects; (4) Duration of agency's involvement; (5) Sequence of agency's involvement." *Id.* § 1501.5(c). "The Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective." 33 C.F.R. Part 325 App. B § 9(b)(4).

C. The Endangered Species Act

Under the Endangered Species Act ("ESA"), each agency must "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). To satisfy this obligation, the action agency consults with the expert wildlife agency (here, the Service) on the likely effects of its proposed action. *Id*. Formal consultation culminates with the Service's biological opinion as to whether the proposed agency action is likely to jeopardize listed species. 50 C.F.R. §§ 402.13(c), 402.14(h). If the Service finds that a non-jeopardizing action is likely to result in "take," it then issues

an incidental take statement that includes terms and conditions to minimize the impact of incidental take. 16 U.S.C. § 1536(b)(4)(i), (ii), (iv); *id*. § 1532(19) (defining "take").

D. The Federal Power Act

The FPA authorizes FERC to issue and amend licenses pertaining to the construction, operation, and maintenance of dams, reservoirs, and related projects. *See* 16 U.S.C. § 797(e). Although courts of appeal are courts of limited jurisdiction, Congress required that challenges to FERC orders be pursued in the D.C. Circuit or the court of appeals where the licensee is located. *See* 16 U.S.C. § 825*l*(b). However, Congress expressly limited this provision to FERC orders. *See id.* ("Any party to a proceeding under this chapter *aggrieved by an order issued by [FERC] in such proceeding* may obtain a review *of such order*" in the court of appeals. (emphases added)).

In contrast to other laws conferring authority to FERC, Congress *declined* to expand the FPA's jurisdiction provision to include non-FERC actions that operate independently from FERC's licensing order. *Compare id.* (restricting jurisdictional provision in the FPA to challenges to "an order issued by [FERC]"), *with* 15 U.S.C. § 717r(b), (d)(1) (broadly requiring review in the court of appeals and conferring "exclusive jurisdiction" not only for "order[s] issued by [FERC]" under the Natural Gas Act ("NGA"), but also for "order[s] or action[s] of a Federal agency (other than [FERC]) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law").[4]

[4] Denver Water implies that the FPA and the NGA are identical. *See* ECF 48 at 17 n.12. However, as explained below, the jurisdictional provisions in those statutes are the exact *opposite* in their treatment of non-FERC actions. *See infra* at 16-18.

Consistent with the limited nature of the FPA's jurisdiction provision, the FPA only requires review in the court of appeals of non-FERC agency actions where such actions "inher[e] in" a FERC order, *City of Tacoma v. Taxpayers of Tacoma ("Taxpayers")*, 357 U.S. 320, 336 (1958)—i.e., where such actions are triggered by, and serve no independent function from, the FERC licensing decision. *See Inhere*, Webster's New Collegiate Dictionary (7th ed. 1967) (defining "inhere" as "to be inherent," or "involved in the constitution or essential character of something"). In all other cases, district courts have jurisdiction over challenges to non-FERC actions. *See* 5 U.S.C. §§ 702, 704.[5]

II. Relevant Factual Background

A. The Project and the Corps' Primacy

Denver Water seeks to raise Gross Dam and significantly expand Gross Reservoir, purportedly to address a perceived imbalance between Denver Water's North and South Systems. *See* ECF 48 at 7-9. If built, this will be the tallest dam in Colorado and the largest construction project in Boulder County history.

In 2003, to commence the federal review process for the Project, Denver Water applied for authorization from the Corps—not FERC—because "Denver Water knew that, at a minimum, whatever project it developed likely would implicate jurisdictional waters of the United States," thereby requiring a CWA Section 404 permit. ECF 48 at 11 n.6; *see also* ECF 49-1 at 7 (same). In sharp contrast, Denver Water did not even apply for a FERC license amendment until 2016—thirteen years later—once the Corps had

[5] Importantly, courts have clarified that the FPA does not displace the Corps' permitting authority under the CWA, and that where both agencies must act on a particular project, they have equal authority within their areas of expertise on a "horizontal" rather than "vertical line." *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 48 (D.C. Cir. 1987).

essentially finalized its CWA and NEPA review processes and selected therein a project design (i.e., alternative) that involved expanding the FERC-licensed Gross Reservoir. *See* 172 FERC ¶ 61,063, at 1. Denver Water delayed applying for a FERC license amendment because until the Corps determined the least damaging practicable alternative as required by the CWA, it was impossible to know whether such license would be necessary or whether FERC would play any role whatsoever in the Project. *See, e.g.*, AR176758 (clarifying that "FERC's involvement in the preparation of the EIS" would be limited to ensuring that FERC's "regulatory obligations are met, ***should*** *an enlargement of Gross Reservoir*, a currently FERC-licensed facility, *emerge as an element of the proposed action*" (emphases added)). Thus, whereas it was mandatory for the Corps to grant or deny a CWA permit for the Project in response to Denver Water's application, FERC's involvement and the necessity of a license amendment were entirely contingent on the Corps' threshold CWA determinations. *Id.*

Consistent with this dichotomy between the Corps' primary (and potentially exclusive) role in conferring federal authorization for the Project and FERC's contingent role incidental to the Corps' permitting decision, the Corps—not FERC—has at all times served as the lead agency for NEPA purposes. *See* ECF 49-1. Likewise, under the CWA, the Corps—and only the Corps—developed the basic project purpose and the overall project purpose; analyzed the practicability of alternatives; and ultimately selected the Project alternative to be permitted under Section 404. *See* AR30. Similarly, under the ESA, the Corps—not FERC—consulted with the Service in connection with several listed species, which resulted in the Service issuing three biological opinions to the Corps between 2013 and 2016. Those biological opinions imposed mandatory terms

and conditions *on the Corps*, while imposing no obligations on FERC as a non-party to the ESA consultations. *See* 172 FERC ¶ 61,063, at 9-10; AR596-705.[6]

B. The FERC Proceeding

Given Petitioners' serious concerns with the Corps' CWA, NEPA, and ESA compliance, Petitioners focused their attention on challenging the Corps' and the Service's actions after the Corps issued its CWA permit in July 2017. Because their grievances with the Project stemmed directly from the Corps' and the Service's actions, Petitioners did not intervene in the FERC proceeding during the applicable time period.

In 2018, FERC unexpectedly issued a "supplemental" Environmental Assessment ("EA") under NEPA, which appeared to potentially address parts of the Corps' legally deficient EIS that Petitioners were preparing to challenge in court. As a result, and out of an abundance of caution, Petitioner Save the Colorado ("STC") filed an out-of-time motion to intervene in the FERC proceeding to preserve its pre-existing claims against the Corps and the Service. *See* Mar. 26, 2018 Motion to Intervene Out of Time.[7] STC's concern was that FERC's supplemental EA purported to "finalize the Corps NEPA process which [STC] has been deeply engaged with." *Id.* at 5. FERC denied this request in a short notice. *See* Aug. 1, 2018 Intervention Denial.[8] STC timely filed a rehearing

[6] In December 2019, FERC belatedly sought to join the longstanding ESA consultation between the Corps and the Service related to the green lineage cutthroat trout. *See* 172 FERC ¶ 61,063, at 9-10. That action neither injected FERC into the other two ESA consultations for the Project, nor imposed any obligations on FERC due to the Service's termination of that consultation without issuing a new biological opinion.

[7] https://elibrary.ferc.gov/eLibrary/filelist?document_id=14652915

[8] https://elibrary.ferc.gov/eLibrary/filelist?document_id=14694460

application, explaining its concern that "the Corps will attempt to rely on [FERC's] [s]upplemental EA to defend the Corps' flawed Final EIS" in court. *See* Aug. 31, 2018 Rehearing Application at 9. STC also explained that "[l]ack of intervenor status thus also potentially compromises [STC's] ability to challenge the Corps' Final EIS." *Id.* at 9-10.[9]

FERC denied STC's rehearing application, but made two key findings. *See* 165 FERC ¶ 61,120 (Nov. 15, 2018). First, FERC explained that, rather than shoring up *the Corps*' analysis in the EIS, the supplemental EA only "addressed matters relevant to the proposal before [FERC] that were not addressed in the EIS." *Id.* at 5 n.17. Second, with respect to STC's concern that its lack of participation in the FERC proceeding could affect STC's ability to challenge the Corps' EIS and permit in court, FERC assured STC that its pre-existing claims remained unaffected by the FERC proceedings. Indeed, FERC described STC's concern that "if [STC] does not have standing against [FERC], the Corps will be able to evade its NEPA obligations," and conclusively determined that "*[t]his proceeding in no way shields the Corps from judicial review*: the record does not reflect whether [STC] sought judicial review of the Corps' actions, during which it could have raised any deficiencies it saw in the EIS, but *nothing in our proceeding prevented it from doing so*." *Id.* at 7 n.26 (emphases added).

STC relied on FERC's formal determination that the lack of intervention would in no way prevent it from filing suit against the Corps and the Service. In turn, following FERC's instructions, STC no longer pursued intervention or other relief in the FERC proceeding. Petitioners promptly filed suit in this Court in December 2018. *See* ECF 1.

[9] Because FERC's online docket does not contain a copy of STC's rehearing application, Petitioners attach it as an exhibit for the Court's convenience.

C. This Lawsuit

The Original Petition for Review challenged actions solely within the province of the Corps, as well as an ESA consultation triggered by the Corps' actions. For example, under the CWA, Petitioners challenged the Corps' analyses of the Project's purpose and need, the range of alternatives, and the practicability of alternatives, *see* ECF 1, ¶¶ 134-35 —any one of which, if sustained on the merits, would require the Corps on remand to conduct a thorough analysis and make new, threshold CWA determinations that do not involve FERC and that may obviate FERC's role in the Project entirely. Under NEPA, Petitioners challenged analyses and findings uniquely within the Corps' authority, such as the Corps' determination of the purpose and need for the Project, and the Corps' analysis and validation of Denver Water's water demand projections. *See id.*, ¶¶ 117-32. Under the ESA, Petitioners challenged actions and omissions by the Corps and the Service based on consultation occurring only between those agencies, which culminated in a June 17, 2016 biological opinion imposing terms and conditions on the Corps. *See id.*, ¶¶ 138-48. Because FERC neither took part in any of the specific analyses challenged by Petitioners nor has statutory authority or jurisdiction to do so, Petitioners did not name FERC as a respondent or seek any relief against FERC.

As explained in the Supplemental Petition for Review, the Court previously approved "a merits briefing schedule that would have ensured a fully briefed case for the Court to resolve by June 11, 2020." ECF 45-1, ¶ 120 (citing ECF 28 & 29). However, "[a]fter the litigation (and Denver Water's request for reinitiated consultation) had been pending for more than a year—and as the parties were on the verge of commencing merits briefing—on February 5, 2020, the parties notified the Court that the Service and

the Corps wished to reinitiate formal Section 7 consultation under the ESA." *Id.*, ¶ 121. On that basis, the parties agreed to stay this litigation. *See id.* (citing ECF 32). Then, on April 17, 2020, rather than issue a biological opinion as part of that consultation, the Service terminated consultation and withdrew the prior biological opinion. *See id.*, ¶ 122.

This action—during pending litigation—obligated Petitioners to submit an ESA notice letter at least sixty days prior to supplementing their Petition for Review, which Petitioners submitted on May 18, 2020. *See id.*, ¶ 129. On August 13, 2020, Petitioners filed a Supplemental Petition for Review. *See* ECF 45-1. The new pleading pursues the same challenges as the prior pleading, but also adds an additional set of ESA claims against the Corps and the Service related to those agencies' failure to properly reinitiate and complete ESA consultation during this litigation. *See id.*, ¶¶ 120-28. As with the original pleading, FERC is not a respondent nor is any relief sought against FERC.

Days after Petitioners filed their Supplemental Petition for Review, Respondents filed the pending motions to dismiss. Thus, after delaying merits resolution of Petitioners' claims for more than six months as a result of reinitiated consultation, Respondents now employ a new delay tactic of seeking to dismiss this case on jurisdictional grounds while Denver Water moves closer to Project construction. Yet, nowhere in their motions do Respondents explain why they waited until now to file their motions to dismiss a case that Petitioners filed in 2018. That omission is particularly notable since Respondents' arguments are no way dependent on the timing of FERC's license amendment. Rather, Respondents' position is that because FERC must act on Denver Water's license amendment request for this Project—a fact known to Respondents since 2016—the FPA confers exclusive jurisdiction over all agency actions relating to the Project. As such,

Respondents could have filed—but chose not to file—the pending motions long before now to avoid wasting the Court's and the parties' resources.

D. FERC's July 2020 License Amendment

On July 16, 2020, FERC issued a final order amending Denver Water's license. Although FERC's order has no bearing on Petitioners' ability to pursue this litigation—as FERC itself concluded—it is telling that FERC's order again reinforced that its EA would in no way displace, let alone address, the Corps' analyses challenged in the Supplemental Petition for Review. For example, FERC stated that its supplemental EA examined only "the effects of *the portions of the action that were before [FERC]*, to the extent that those effects were not addressed in the Final EIS." 172 FERC ¶ 61,063, at 7 (emphasis added). Importantly, FERC disavowed reopening or addressing any issues previously decided by the Corps in its CWA and NEPA processes:

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

Id. at 8 n.25 (emphases added). Thus, FERC left no doubt that its order and supplemental EA do not address, let alone endorse, the Corps' actions that are the subject of this litigation—e.g., the Corps' analysis of the purpose and need for the Project, the Corps' adoption of Denver Water's demand projections that are central to the Project's purpose and need as well as to the Corps' alternatives analysis, and the adequacy of related evaluations underlying the Corps' CWA permit and EIS.

None of the parties who intervened in the FERC proceeding filed an application requesting rehearing within thirty days of FERC's final order, which is a jurisdictional prerequisite to bringing suit against such an order. *See* 16 U.S.C. § 825*l*(a), (b). As such, there will be no appellate litigation concerning FERC's order.

E. The Pending Motions to Dismiss

On August 17, 2020, Federal Respondents and Denver Water filed separate, lengthy motions to dismiss for lack of jurisdiction, asserting that the FPA confers exclusive jurisdiction in the relevant court of appeals for Petitioners' claims against the Corps and the Service. *See* ECF 47; ECF 49. Remarkably, despite repeatedly citing FERC's final order in their briefs, Respondents deliberately fail to quote—or even cite to—the portion of FERC's order that is germane to the jurisdictional question, in which FERC made crystal clear that it was *not* revisiting or endorsing the Corps' final determinations within that agency's jurisdiction. *See supra* at 12. Likewise, while citing to FERC's denial of STC's intervention rehearing application, Denver Water fails to disclose—and Federal Respondents try to brush off in a footnote, *see* ECF 49-1 at 12 n.4—FERC's highly pertinent, indeed dispositive, finding that STC's lack of intervention would in no way prejudice its ability to sue the Corps and the Service. *See supra* at 9.

Respondents' questionable tactics do not end there. Rather than accurately describe the separate roles of the Corps and FERC—and, importantly, that FERC's involvement was entirely contingent on, and triggered by, the Corps' threshold analyses and determinations under the CWA—Respondents distort the factual record by erroneously characterizing the Corps' actions as "integral elements of FERC's licensing order," ECF 49-1 at 14; ECF 48 at 3 (same), and asserting that the Corps' actions "are

prerequisites to, and have no effect independent of, FERC's decision to amend the license." ECF 48 at 29. Compounding these errors, Respondents cite cases where FERC was the lead agency and its license decision under the FPA triggered all actions challenged in those lawsuits, and thus on their face plainly do not "address[] the very situation presented here," as Respondents suggest. ECF 48 at 19. At the same time, Respondents fail to point the Court to highly persuasive cases that do resemble this situation, which have uniformly allowed district courts to review the types of challenges Petitioners pursue in this case, despite the separate issuance of a FERC license.[10]

STANDARD OF REVIEW

At the motion to dismiss stage, a court must "presume[] all of plaintiff's factual allegations are true and construe[] them in the light most favorable to the plaintiff." *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). Whereas Congress conferred expansive jurisdiction to federal district courts over lawsuits including challenges to federal agency actions, *see* 28 U.S.C. § 1331 (mandating that "[t]he district courts shall have original jurisdiction of *all civil actions* arising under the Constitution, laws, or treaties of the United States" (emphasis added)), federal courts of appeal only have original jurisdiction where Congress explicitly confers it by statute. *See, e.g.*, *Kanatser v. Chrysler Corp.*, 195 F.2d

[10] Respondents also mistakenly characterize Petitioners' claims as challenges to actions in which FERC played a role. But, once again, FERC does not and cannot play any role whatsoever in the CWA Section 404 process that served as the primary agency action for this Project, and which determined whether FERC would have any involvement in this Project incidental to the Corps' permit. Nor did FERC play any role in the specific portions of the Corps' EIS challenged by Petitioners concerning demand projections and related matters within the Corps' jurisdiction, which FERC expressly refused to address in its supplemental EA. And, as explained, the ESA claims date back to a biological opinion between the Corps and the Service, which did not involve FERC or impose any binding terms or conditions on FERC (while doing so with respect to the Corps).

104, 105 (10th Cir. 1952) ("Courts of appeal are *courts of limited jurisdiction*; and save for excepted instances, they have jurisdiction to review *only final decisions of the district courts*." (emphases added)).

ARGUMENT

The plain language of the FPA forecloses the relief sought by Respondents. In contrast to statutes such as the NGA, Congress declined in the FPA to confer original jurisdiction to courts of appeal over non-FERC actions such as the Corps' issuance of a CWA permit that are not triggered by, and serve independent functions from, FERC's license. This outcome is underscored by the fact that FERC, as the expert agency in construing the FPA, determined that STC need not participate in the FERC proceeding—nor file suit against FERC—in order to seek judicial review against the Corps and the Service. Nor does longstanding precedent support Respondents' counter-textual argument under the FPA; rather, in analogous circumstances, courts have uniformly allowed challenges to the types of actions that form the basis of Petitioners' lawsuit. For these reasons, Respondents' arguments lack any legal or factual support, and this Court should reject Respondents' transparent effort to delay resolution of this case.

I. The FPA Does Not Confer Original Jurisdiction in Courts of Appeal over Petitioners' Claims, which Challenge Actions that Are Not Incidental to, Are Not Triggered by, and Have Independent Utility from FERC's License Order

A. *The Plain Language of the FPA Expressly Limits Original Jurisdiction in the Court of Appeals to FERC Orders*

It is a bedrock principle of constitutional law 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*, 195 F.2d at 105. Nothing in the text of the

FPA suggests—let alone mandates—that legally independent actions by non-FERC agencies are subject to exclusive jurisdiction in the court of appeals. Rather, as discussed below, Congress deliberately *restricted* the FPA's original jurisdiction provision to *FERC orders*, thereby foreclosing Respondents' argument that separate, distinct decisions by the Corps and the Service—which have independent utility from FERC's license order for this Project—must be pursued in the court of appeals.

When presented with a question of statutory interpretation, the Court's "task is to construe what Congress has enacted"; it must "begin, as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Congress could not have been clearer in the FPA: in deviating from the default rule that courts of appeal may only review final decisions by district courts, Congress limited original appellate jurisdiction to "a review of such order," meaning "an order issued by *the Commission* [i.e., FERC]." 16 U.S.C. § 825*l*(b). This provision does not mention actions by other federal agencies.

Thus, far from supporting their position, the plain language of the FPA forecloses Respondents' argument. The statute circumscribes original jurisdiction in the court of appeals to FERC orders (and actions triggered by such orders that have no other utility, such as an ESA consultation limited to a FERC license), which do not encompass the legally distinct agency actions challenged by Petitioners in this case. Indeed, the challenged decisions have independent utility from FERC's order and, in any event, are actions that triggered—i.e., served as the but for cause of—FERC's involvement in this Project, rather than the converse as Respondents wrongly imply. *See supra* at 6-8.

Although Denver Water erroneously attempts to graft the far more expansive provisions of the NGA onto the FPA, a comparison of those statutes establishes that

Congress could, but did not, draft the FPA to confer jurisdiction in the court of appeals for challenges to the types of actions in this case. In amending the NGA in 2005, Congress conferred "exclusive jurisdiction" not only for "order[s] issued by [FERC]" under the NGA—as in the FPA—but also for "order[s] or *action[s] of a Federal agency (other than [FERC])* or State administrative agency *acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law*." 15 U.S.C. § 717r(b), (d)(1) (emphases added). Accordingly, by excluding non-FERC actions from the FPA's original jurisdiction provision, while including such actions in the jurisdictional provisions in other statutes administered by FERC, Congress made crystal clear its intent in the FPA to limit original jurisdiction in the court of appeals to FERC orders. *See, e.g.*, *Duncan*, 533 U.S. at 173 (explaining that where Congress includes certain language in one part of a statute, but not in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (quotation marks and citation omitted)).[11]

Conspicuously, Respondents neither grapple with the inconvenient statutory language that precludes their requested relief, nor address Congress's deliberate exclusion of non-FERC actions from the FPA's original jurisdiction provision while including such actions in similar provisions of other FERC-administered statutes. While Respondents' desire to avoid the statute's plain terms is understandable, this Court may

[11] In its 2005 amendments to the NGA, Congress also mandated that for natural gas pipelines, FERC "shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with [NEPA]." 15 U.S.C. § 717n(b)(1). There is no similar mandate in the FPA, and, as here, *the Corps* routinely serves as the lead agency for projects that involve the FPA in some capacity.

not overlook or modify the statutory language, which in this instance is dispositive and compels rejection of the pending motions to dismiss. *See, e.g.*, *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (courts may not "read an absent word into the statute").[12]

B. Relevant Precedent Underscores that Petitioners' Challenges Are Not FERC Orders Subject to Appellate Jurisdiction

Respondents cite several cases that purportedly speak to the situation before the Court; however, their argument is built on a major factual misrepresentation concerning Petitioners' claims and the relationship between the agency actions challenged in this case and FERC's order. Thus, before addressing relevant precedent—which fully supports *Petitioners'* position—Petitioners will first summarize the key facts that bear on the application of pertinent authority in resolving the pending motions.

1. Respondents Have Mischaracterized Applicable Facts

Respondents repeatedly assert that the Corps' and the Service's actions challenged in this case are "integral elements of FERC's licensing order," ECF 49-1 at 14; ECF 48 at 3, and "are prerequisites to, and have no effect independent of, FERC's decision to amend the license." ECF 48 at 29. As explained above, however, these assertions are patently inaccurate for several reasons.

First, *the Corps*—not FERC—at all times served as the lead agency for this Project's federal decisionmaking process, which has legal consequences set forth in NEPA's implementing regulations. *See* 40 C.F.R. § 1501.5(c) (explaining that the lead agency designation is based on factors including the "[m]agnitude of the agency's

[12] The Supreme Court refused to expand an exclusive jurisdiction provision in the CWA, noting that courts must "give effect to Congress' express inclusions and exclusions, not disregard them." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631-34 (2018).

involvement"; its "[p]roject approval/disapproval authority"; and relevant "[e]xpertise concerning the action's environmental effects"). Simply put, both the Corps and FERC recognized that the Corps must serve as the lead agency here in light of the Corps' obvious primacy in the federal decisionmaking process for this Project. *See* AR176758.

Second, FERC made abundantly clear in its final order that the actions challenged in this case—e.g., threshold analyses and findings made by the Corps as part of the CWA Section 404 process, portions of the EIS related to water demand projections and other matters within the Corps' authority—would *not* be addressed or endorsed by FERC's supplemental EA and final order. *See* 172 FERC ¶ 61,063, at 8 n.25 (stating that "[t]he Supplemental EA *did not address* issues raised related to the Corps' Final EIS, the need for Denver Water's proposed expansion of the Moffat Collection System, or environmental issues associated with the expansion of the Moffatt Collection System *that do not pertain directly to the FERC license* for the Gross Reservoir Hydroelectric Project" (emphasis added)); *id.* at 7 (affirming that the supplemental EA examined only "the effects of *the portions of the action that were before [FERC]*, to the extent that those effects were not addressed in the Final EIS" (emphasis added)).

Third, and perhaps most important, the Corps' threshold analyses and findings under the CWA—e.g., the Corps' delineation of the Project's purpose, its water dependency determination, and its analysis and selection of the least damaging practicable alternative—served a central role in the decisionmaking process and, in fact, determined whether FERC would play any role in this Project. *See supra* at 7. In other words, had the Corps determined that the basic project purpose could be satisfied by a non-water dependent alternative, or had the Corps determined that the expansion of a

FERC-licensed dam is not the least damaging practicable option, FERC would have no involvement in this Project whatsoever. Therefore, as explained above, the Corps' threshold analyses and determinations serve a critical, independent function totally apart from the FERC license by setting the baseline purpose of the Project and the scope of practicable alternatives that could satisfy that purpose; this fact establishes that it is FERC's role and ultimate order that are entirely incidental to, and contingent upon, the Corps' threshold actions. Accordingly, it is FERC's order that has no independent utility distinct from the Corps' threshold actions (rather than the converse).[13]

By the same token, the Court must reject Denver Water's erroneous contention that the Corps' actions have no independent utility merely because "[w]ithout FERC's authorization of the Project, they would have no practical effect because the Project could not and would not go forward." ECF 48 at 3. This argument applies the wrong legal test for independent utility, and ignores the fact that large construction projects routinely require multiple federal and/or state permits. Once again, the Corps' threshold CWA determinations—which the Corps was *required* to make after receiving an application from Denver Water—have independent utility in identifying, in the first instance, the Project's purpose, the water dependency of the Project, and the least damaging practicable alternative that can satisfy the Project's purpose. Only *after* the Corps made

[13] Likewise, had the Corps issued a threshold determination deemed adverse by Denver Water—e.g., finding that there are less damaging alternatives to achieving the Project's purpose than expanding Gross Reservoir and raising Gross Dam—Denver Water would certainly be able to seek judicial review of that determination in district court. Logically, the fact that the Corps' determination came out differently—thereby requiring FERC to issue a license for this Project—cannot change the proper venue for judicial review of *the Corps'* threshold analysis and findings in the CWA permit and EIS, or the Service's consultation over the Corps' proposed action resulting from that threshold analysis.

these determinations could Denver Water have known what—if any—role FERC would play in the Project's approval process. Thus, whether FERC subsequently grants or denies a permit for the Project (if it plays any role at all), the Corps' independent threshold actions and findings have legal consequence as final agency actions that determine certain rights and obligations relative to the Project under the CWA.

Regardless of FERC's action on the license amendment, the Corps could modify its CWA permit at any time, and, indeed, the CWA flatly *forbids* selection of an option that involves FERC if the Corps determines (even belatedly) that such alternative is not the least damaging practicable option. *See* 40 C.F.R. § 230.10(a). Thus, that FERC's order was the last agency decision to issue for the Project cannot transform the Corps' important threshold decisions of legal consequence into mere components of the FERC order lacking independent utility, especially where FERC's order did not (and could not) address or endorse the Corps' separate analyses or findings in any way.

2. Relevant Authority Strongly Supports Petitioners' Position

Having now accurately characterized the situation before the Court, applying pertinent precedent is a much more straightforward exercise. Petitioners are not aware of a single case—nor have Respondents cited one—in which a court has held that challenges to actions by the Corps, in making threshold CWA findings and serving as the lead NEPA agency, must be pursued exclusively in the court of appeals merely because FERC must issue a license under the FPA triggered by the Corps' permit decision. Rather, in comparable circumstances, district courts have reviewed analogous claims, while courts of appeal have separately reviewed any challenges to FERC's orders.

For example, the D.C. Circuit addressed this situation in *North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997). There, the plaintiffs challenged a FERC order issued under the FPA for a municipal water supply pipeline in Lake Gaston. *Id.* at 1180-82. The D.C. Circuit explained, without concern, that the plaintiffs had challenged a Corps-issued Section 404 CWA permit in a separate lawsuit filed in the U.S. District Court for the Eastern District of North Carolina (resulting in two published rulings), as well as an appeal to the Fourth Circuit. *See id.* (citing *North Carolina v. Hudson,* 665 F. Supp. 428 (E.D.N.C.1987); *id.,* 731 F. Supp. 1261 (E.D.N.C.1990), *aff'd sub nom. Roanoke River Basin Ass'n v. Hudson,* 940 F.2d 58 (4th Cir.1991), *cert. denied,* 502 U.S. 1092 (1992)).

Despite the fact that these separate lawsuits were reviewed by three federal courts which must assure themselves of jurisdiction—including the D.C. Circuit, which handles the vast majority of FERC-related matters and is the expert federal court for such matters—none of the courts suggested, let alone held, that the plaintiffs' suit against the Corps was impermissible because it was filed in district court. To the contrary, when FERC argued that the plaintiffs had waived certain arguments against FERC's order by failing to raise them in the Corps' proceeding that "involved the same issues, parties, and discharge as are involved in the proceeding before FERC," the D.C. Circuit rejected the contention that issues raised (or not) in the Corps' proceeding and lawsuit could in any way preclude claims from being separately pursued against FERC under the FPA's judicial review provision. *Id.* at 1185.

Moreover, after the Eastern District of North Carolina upheld the Corps' analysis (but before the Fourth Circuit affirmed), the plaintiffs filed yet another lawsuit seeking to enjoin the City of Virginia Beach's pipeline construction pending issuance of FERC's

order. *See North Carolina v. Virginia Beach*, 951 F.2d 596, 600 (4th Cir. 1991). Once again, rather than questioning the district court's jurisdiction, the district court and then the Fourth Circuit proceeded to the merits. Critically, the Fourth Circuit held that "[o]f first importance is the fact that FERC has no licensing power or veto power over those parts of the pipeline that fall outside of Project 2009 (the hydropower facility at Lake Gaston)," and thus "[b]ecause FERC's responsibility is limited to overseeing only that portion of Virginia Beach's pipeline that directly affects Project 2009, *it follows that FERC's NEPA review in this case should have a preclusive effect only on that portion . . .*." *Id.* at 604 (emphasis added). Accordingly, consistent with Petitioners' position here and FERC's own acknowledgement in its final order, FERC's analysis and order do not (and cannot) veto or have any preclusive effect over the Corps' independent actions, and therefore the Corps' legally distinct actions are not encompassed by the FPA's original jurisdiction provision that applies only to FERC orders and actions triggered by such orders.

Similarly, the Ninth Circuit addressed—and rejected—the argument Respondents make here. In that case, as here, plaintiffs challenged first in the district court the Corps' CWA permit and NEPA compliance as arbitrary and capricious, separate from a prior challenge to a FERC order for the same project. *See Snoqualmie Valley Preserv. All. v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155, 1157-59 (9th Cir. 2012). On appeal, the project proponent asserted that the suit against the Corps "is an improper collateral attack against the FERC license," and that "a judgment against the Corps in this case would . . . restrain the licensing procedures authorized by FERC." *Id.* at 1159.

The court rejected this argument on two *independent* grounds: (1) the Corps' decision post-dated the challenge to FERC's order; and (2) while remedies imposed

against the Corps "would interfere with activities authorized by the FERC license," "it does not follow that this action is an improper collateral attack on the FERC license" because "the remedy would be an injunction against the Corps [to cure any CWA defects] and to perform a [legally compliant] NEPA analysis." *Id.* at 1159-60. As this second holding makes plain, Petitioners' claims that are functionally indistinguishable from the claims in *Snoqualmie* are neither an improper collateral attack on FERC's order nor do they implicate the FPA's original jurisdiction provision because, in fact, any remedy on the merits in this case will apply to the Corps and the Service—not FERC.[14]

In sharp contrast to robust precedent that rejects Respondents' position and establishes the judiciary's well-settled practice of allowing district court challenges to comparable actions by the Corps, none of the cases cited by Respondents stands for the proposition that the FPA—in its silence—somehow requires independent actions by the Corps and the Service to be pursued in courts of appeal. Respondents cite three cases arising in the FERC context: two under the FPA and one under the NGA. *See Taxpayers*, 357 U.S. 320 (1958); *Cal. Save Our Streams v. Yeutter ("Cal. SOS")*, 887 F.2d 908 (9th Cir. 1989); *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255 (10th Cir. 1989). Each of these cases is facially distinguishable: in those cases, FERC served as the lead agency for all federal decisionmaking purposes, and the types of non-FERC actions at issue were collateral actions that were triggered by, and had no independent function from, FERC's order.

[14] Remarkably, Denver Water fails to cite this highly pertinent case, and the government disingenuously cites only to the Ninth Circuit's first holding that is irrelevant to the facts here. *See* ECF No. 49-1 at 21-22. It is the Ninth Circuit's second holding—which is in no way contingent on the first—that governs the question presented here.

For example, in *Cal. SOS*, the Ninth Circuit held that "the practical effect of the action in district court [against the Forest Service] is an assault on an important ingredient of the FERC license," but only because the court found that "[t]he 4(e) conditions imposed by the Service *have no significance outside the licensing process*" due to the fact that these conditions—and, therefore, the Forest Service's role—is mandated *by the FPA* and is only triggered by a FERC license amendment process. 887 F.2d at 912; *see also* 16 U.S.C. § 797(e) (requiring, in the FPA, that FERC solicit and accept conditions promulgated by the agency responsible for administering land affected by a FERC license). That is a far cry from this case, in which the Corps' duty to make findings and issue a permit derives from the CWA (not the FPA), and, as described above, serves critical independent functions apart from the FERC order.

Likewise, in *Williams*, prior to the NGA's amendment in 2005 (before which the NGA and FPA contained similar jurisdictional provisions), the Tenth Circuit rejected a collateral attack which challenged "FERC's determination of its own jurisdiction" based on FERC's statutory interpretation of the NGA—an issue uniquely within FERC's province that was repeatedly addressed by FERC in its license proceeding and final order. *See* 890 F.2d at 263. In *Taxpayers*, the Supreme Court similarly rejected a collateral attack with respect to determinations *made by FERC* during its licensing proceeding, where the plaintiff raised issues within FERC's jurisdiction and FERC "rejected these contentions . . . and made all findings *required by the [FPA].*" 357 U.S. at 337 (emphasis added). Thus, in stark contrast to the Corps-specific matters here at issue, which FERC expressly disavowed addressing in its final order as outside FERC's authority and jurisdiction, the matters in *Williams* and *Taxpayers* were plainly subject to

original jurisdiction in the court of appeals because the FPA (and NGA) required that these issues be addressed by FERC (and only FERC) in its licensing orders. *Id.*

Against this backdrop, it is easy to understand the Supreme Court's statement that the FPA's original jurisdiction provision includes FERC orders and "all issues inhering in" such orders. *Taxpayers*, 357 U.S. at 336. Where the FPA requires FERC or another agency to act in a particular instance—i.e., that agency would not act but for a specific FERC license under the FPA—the original jurisdiction provision applies. However, where a different statute requires an agency to act distinct from any FERC license under the FPA—and that agency's action has legal significance and independent utility from any ultimate FERC order—such action does not "inher[e]" in the FERC order and must be brought in district court. *Id.* Indeed, the Supreme Court clarified this point by limiting the issues inhering in a FERC order "to all objections to the [FERC] order, to the [FERC] license it directs to be issued, and to the legal competence of the licensee to execute its terms." *Id.* Here, it is beyond legitimate dispute that Petitioners do *not* seek to challenge any aspect of FERC's order, its license, or Denver Water's competence to execute the license's terms—rather, Petitioners challenge specific findings and actions under the authority of separate agencies that FERC's order explicitly did not address or endorse. In sum, the cases cited by Respondents are inapposite.

Evidently recognizing the weakness of their position, Respondents reach far afield by citing cases in other contexts to argue that this suit belongs in the court of appeals. However, even a cursory review of those cases demonstrates that they suffer from the same fatal flaws identified above: namely, they involve actions triggered by, and lacking independent utility from, an agency decision requiring exclusive jurisdiction in the court

of appeals. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. Fed. Aviation Admin.*, 998 F.2d 1523, 1527-28 (10th Cir. 1993) (holding that the Bureau of Land Management's ("BLM") actions were subject to jurisdiction in the court of appeals by the Federal Aviation Administration ("FAA") Act because "[w]ithout the [FAA-approved] construction of the airport, BLM's actions would be meaningless," and noting that if "the actions of BLM were taken to facilitate the actions of the FAA" it would "place[] BLM's actions under our jurisdiction"); *City of Rochester*, 603 F.2d 927, 935 (D.C. Cir. 1979) (holding that NEPA challenges involving decision by the FAA and Federal Communications Commission must be pursued in the court of appeals where the governing statutes for those agencies required such a result); *Envtl. Def. Fund, Inc. v. EPA*, 485 F.2d 780, 783 (D.C. Cir. 1973) (holding that "all issues pertaining to the validity of" a FIFRA decision, including EPA's compliance with NEPA in issuing such a decision, must be resolved in the court of appeals because FIFRA, which governs only EPA, requires that result).[15]

C. FERC's Formal Adjudication of STC's Intervention Request Reinforces Petitioners' Position and the Plain Language of the FPA

Even if this were a close call (and it is not), further strong evidence in support of Petitioners' position may be found in the formal determination by FERC—the expert

[15] The ESA cases cited by Respondents also fail because they relate to biological opinions in which FERC was the sole action agency (rather than the Corps in this instance), or they challenge ESA consultations for an agency's action triggered by, and lacking independent utility, from a FERC license. *See Me. Council of the Atl. Salmon Fed.*, 858 F.3d 690, 693 (1st Cir. 2017) (rejecting district court challenge to biological opinion between FERC and NMFS); *City of Tacoma v. Nat'l Marine Fisheries Serv.*, 383 F. Supp. 2d 89, 92 (D.D.C. 2005) (same); *Idaho Rivers United v. Foss*, 373 F. Supp. 2d 1158, 1161 (D. Idaho 2005) (same); *cf. S.W. Ctr. for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1172 (D. Ariz. 1997) (dismissing ESA claims in the district court against FERC and the Forest Service, and stating that "the Forest Service's authority to act in relation to the ongoing operations" stems directly from FERC's license).

agency in construing the FPA—that its "*proceeding in no way shields the Corps from judicial review*" and further that "*nothing in our proceeding prevent[s] [STC] from [suing the Corps]*." 165 FERC ¶ 61,120, at 7 n.26 (emphases added).

It is axiomatic that FERC is entitled to deference for its interpretation of the FPA. *See, e.g.*, *North 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."). Thus, the fact that STC specifically raised its concern in FERC's proceeding that denial of intervention there could prejudice STC's ability to challenge the Corps' and the Services' actions—which, in formally adjudicating the intervention rehearing, FERC assured STC would not be the case—demonstrates FERC's view that the FPA plainly does not confer original jurisdiction over Petitioners' claims in the court of appeals. This Court must defer to that interpretation.

Denver Water entirely ignores this key FERC finding. The government mentions it in a footnote, but feigns confusion over FERC's finding. *See* ECF 49-1 at 12 n.4. However, the import of FERC's determination is clear—the FPA, in its silence, does not remotely subject actions such as those challenged here to the original jurisdiction provision of the FPA that by its terms applies only to "order[s] issued by [FERC]." 16 U.S.C. § 825*l*(b). Moreover, Petitioners reasonably relied on FERC's determination and followed FERC's explicit instructions by filing suit against the agencies whose decisions harm their interests. *Cf. Carter v. Smith Food King*, 765 F.2d 916, 924 (9th Cir. 1985) ("[W]hen a state agency charged with administering a particular statute determines that an individual has the right to sue under that statute and so informs him, the claimant may justifiably rely on the agency's representation, even if the state agency is in error."). If the

Court accepted Respondents' illogical position, there would be no forum—in this Court or the court of appeals—for Petitioners to resolve their grievances against the Corps and the Service since the deadline has expired to appeal the FERC order. Such an outcome would result in severe prejudice and manifest injustice.

At bottom, Respondents wish to transform the FPA's far more restrictive original jurisdiction provision into the broader provision contained in the NGA, but such relief lies with Congress, not this Court. *See, e.g.*, *Friends of the Earth v. EPA*, 446 F.3d 140, 142 (D.C. Cir. 2006) (stating that if statutory compliance would lead to "undesirable consequences," an agency must "take its concerns to Congress").

II. Respondents' Public Policy Arguments Are Unavailing

Lacking any foundation in statute or case law for their position, Respondents repeatedly raise the specter that allowing this case to proceed in this Court will result in piecemeal and duplicative litigation, inconsistent outcomes, and delay. This is not so.

Astonishingly, in advancing this argument, Respondents fail to point out that no party to the FERC proceeding filed an appeal of FERC's order to the Tenth Circuit or D.C. Circuit by the statutory deadline for doing so. Thus, as both a legal and practical matter, the FERC license order is final and unappealable. In turn, Respondents' contentions, which were greatly overblown in any event—because the challenged decisions and FERC's order are legally and factually distinct—ring especially hollow here because there is *zero* prospect of piecemeal, duplicative litigation or inconsistent rulings in multiple lawsuits because, in fact, there is (and will be) no other lawsuit.

In addition, to the extent that delay is a relevant factor, it is Respondents—not Petitioners—who are engaging in dilatory conduct in the face of looming construction

deadlines that will likely complicate the merits resolution of Petitioners' claims. Petitioners previously agreed to a temporary stay on the basis that the Service and the Corps planned to reinitiate ESA consultation culminating in a new biological opinion, *see* ECF 32. The facts are substantially different now because FERC has issued its final order and conditioned its approval upon certain construction deadlines. *See* ECF No. 48 at 18. Rather than force the Court and the parties to spend time addressing Respondents' futile motions to dismiss, that time would be far better spent briefing and resolving the merits of Petitioners' claims before Denver Water irreversibly damages the environment, thereby altering the equities involved when this Court considers merits remedies. In short, Petitioners' lawsuit is not the source of any delay.[16]

Accordingly, Respondents' public policy arguments lack any legal or logical basis given the absence of any appeal of FERC's order (among other reasons), and any delay resulting from this lawsuit stems from Respondents' own dilatory actions.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court reject the pending motions to dismiss and proceed to the merits phase of this case.

[16] Respondents have failed to explain why they waited so long to file these motions, which could have been filed any time after Petitioners filed suit in December 2018. Respondents have known *since 2016* that FERC must issue an order for this Project—a fact which, in Respondents' (mistaken) view, triggered the FPA's original jurisdiction provision. The only plausible explanation is that Respondents waited to file the motions until FERC conditioned its order upon construction deadlines so that Denver Water can rush to construct the Project while the motions are pending before the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ William S. Eubanks II
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