IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

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

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

Petitioners,

v.

LIEUTENANT GENERAL 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 Secretary of the Interior; and AURELIA SKIPWORTH, in her official capacity as Director of the U.S. Fish and Wildlife Service.

Federal Respondents,

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

Respondent-Intervenor.

FEDERAL RESPONDENTS' MEMORANDUM IN SUPPORT OF FEDERAL RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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Petitioners Save the Colorado, the Environmental Group, WildEarth Guardians, Living Rivers, Waterkeeper Alliance, Inc., and Sierra Club oppose the expansion of Gross Reservoir and Dam. In order to combat water supply shortages, Respondent-Intervenor Denver's Board of Water Commissioners (Denver Water) first requested authorization in 2009 from the U.S. Army Corps of Engineers (Corps) under the Clean Water Act (CWA). Then in 2016, Denver Water sought authorization from the Federal Energy Regulatory Commission (FERC) to raise the project's dam and enlarge the project's reservoir. After learning that it was too late to intervene in the FERC licensing proceedings, Petitioners filed suit in this Court challenging decisions issued by the Corps and the U.S. Fish and Wildlife Service (FWS) as part of the environmental analysis of the water development project that would include an enlargement of Gross Reservoir.

On September 8, 2017, the Corps issued Denver Water a CWA Section 404 Permit to allow for the discharge of fill material during the proposed construction work to increase Gross Dam's height. And on July 17, 2020, FERC approved Denver Water's application to amend its license to raise the project's dam and enlarge the project's reservoir. In doing so, FERC considered and relied upon the challenged Final Environmental Impact Statement (FEIS), ESA consultations between the Corps and FWS, and the Corps' Record of Decision (ROD). But the Federal Power Act (FPA), 16 U.S.C. § 825*l*(b), confers "exclusive" jurisdiction on the courts of appeals to review all claims, like those in the Supplemental Petition, that

raise issues inhering in a controversy over a FERC licensing decision. Petitioners cannot avoid the strict jurisdictional limits imposed by Congress in the FPA. If Petitioners are allowed to proceed with their lawsuit in this Court, it could affect the FERC licensing order and the ability of Denver Water to carry out the project authorized by FERC.

Accordingly, the Court should dismiss the Supplemental Petition for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), (c), (h)(3).

Statutory Background

A. The Federal Power Act

The FPA establishes "a complete scheme" for federal regulation and development of waterpower resources. *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 180 (1946); 16 U.S.C. § 791a *et seq*. A FERC license is required before any entity may build a hydroelectric project on, among other things, any navigable stream or on "any part of the public lands and reservations of the United States." 16 U.S.C. § 797(e). The FPA delegates to FERC authority to issue licenses for the construction and operation of hydroelectric project works, including dams and reservoirs in any of the bodies of water over which Congress has jurisdiction. *First Iowa*, 328 U.S. at 180; 16 U.S.C. § 797 *et seq*.

FERC's responsibilities under the FPA include issuing licenses for the construction of new projects and the continuation of existing projects, and overseeing all ongoing project operations, including dam safety inspection and

environmental monitoring. *See Coal. for Fair and Equitable Reg. of Docks on Lake of the Ozarks v. FERC*, 297 F.3d 771, 774-75 (8th Cir. 2002). FERC licenses can be amended, as here, upon application by the licensee. 16 U.S.C. § 799.

The FPA does not preclude application of the National Environmental Policy Act (NEPA), CWA, the Endangered Species Act (ESA), and the Administrative Procedure Act (APA), but it establishes a "separate and exclusive procedure" governing review of FERC licensing decisions and "all issues inhering in the controversy." *City of Tacoma v. NMFS*, 383 F. Supp. 2d 89, 92 (D.D.C. 2005); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). The exclusive review provision of the FPA provides that jurisdiction "to affirm, modify, or set aside in whole or in part" FERC orders lies exclusively with the courts of appeals. 16 U.S.C. § 825*l*(b).

The FPA authorizes FERC to establish rules governing its licensing proceedings, and to admit as a party in such proceedings any interested person whose participation may be in the public interest. 16 U.S.C. § 825g. Only a party to the licensing proceeding may seek judicial review of a FERC order. *Id*. § 825*l*(a). Any party to a proceeding who is dissatisfied with a FERC order must file a petition for rehearing within 30 days of the order. *Id*. If the rehearing application is denied, an aggrieved party may obtain a review of FERC's order in the D.C. Circuit or the court of appeals where the licensee is located or has its principal place of business. *Id*. § 825*l*(b).

B. National Environmental Policy Act

NEPA serves the dual purpose of informing agency decision makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to the public so that it "may also play a role in both the decision-making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA's intent is to focus the attention of agencies and the public on a proposed action so its consequences may be studied before implementation. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). To assist in meeting these goals, NEPA requires preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3. Where the environmental impacts of an action are less than significant, an agency may comply with NEPA through preparation of an environmental assessment (EA) and a finding of no significant impact. *See* 40 C.F.R. §§ 1501.3; 1501.4(c), (e); and 1508.9. Agency cooperation is emphasized in the NEPA process. Upon request of the lead agency, any other Federal agency, which has jurisdiction by law, shall be a cooperating agency. 40 C.F.R. § 1501.6.

C. Endangered Species Act

Under the ESA, each Federal agency is required to "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the

destruction or adverse modification of" a species' critical habitat. 16 U.S.C. § 1536(a)(2). To satisfy this obligation, the action agency consults with the expert wildlife agency (here, FWS) on the likely effects of its proposed actions. *Id.* Consultations can culminate with FWS's concurrence that the action is not likely to adversely affect ESA-listed species or a biological opinion as to whether the proposed agency action is likely to jeopardize the continued existence of listed species. 50 C.F.R. §§ 402.13(c), 402.14(h). If FWS finds that a non-jeopardizing action is likely to result in "take," it 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 Clean Water Act

The CWA Section 404 authorization is an independent requirement from the FERC licensing requirements under the FPA. *See Monongahela Power Co. v. Marsh*, 809 F.2d 41, 53 (D.C. Cir. 1987); *Public Utility Dist. No. 1 of Douglas Cnty v. Bonneville Power Admin.*, 947 F.2d 386, 394 (9th Cir. 1991). The CWA prohibits the discharge of pollutants, including dredged or fill material, into waters of the United States, unless done in compliance with one of its provisions. 33 U.S.C. § 1311(a). Section 404 authorizes the Corps to regulate discharges of dredged and fill material into waters of the United States through the issuance of permits. 33 U.S.C. § 1344(a).

Under the Section 404(b)(1) Guidelines, a Section 404 permit cannot issue "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge [of fill material] on the aquatic ecosystem." 40 C.F.R. § 230.10(d). The Corps issues individual Section 404 permits on a case-by-case basis after extensive site-specific documentation and review, opportunity for public hearing and submission of public comments, public interest review, and a formal determination. *See generally* 33 C.F.R. §§ 323, 325; 40 C.F.R. § 230; 40 C.F.R. § 230.10(a). The CWA does not itself provide for judicial review of the grant or denial of Section 404 permits. Rather, judicial review of final CWA Section 404 permit decisions is ordinarily available under the APA, unless "statutes preclude judicial review." 5 U.S.C. § 701(a)(1).

Factual Background

A. The Moffat Project

Denver Water owns and operates Gross Dam and Reservoir pursuant to a license issued by FERC. *See City and County of Denver, Colorado*, 94 FERC ¶ 61313 (2001). The Gross Dam and Reservoir (known as the North System or Moffat Collection System), is one of two areas in Denver Water's massive water collection and storage system for the City of Denver and the surrounding counties. Corps' ROD at 1, AR000016. Denver Water draws most of its current reservoir capacity from the other area (the South System). *Id.* Denver Water predicts that if it does not increase the capacity of the North System, it will face water supply

shortages as soon as 2022. *Id.* Thus, Denver Water proposed raising the height of Gross Dam by 131 feet, from 340 to 471 feet, increasing the Gross Reservoir's storage capacity (known as the Moffat Collection System Project or Moffat Project). Supplemental Pet. for Review of Agency Action (Supplemental Pet.) ¶ 2, ECF No. 45-1; Corps' ROD at 1, AR000016.

To build the project, Denver Water sought FERC's authorization of the project through an application to amend its current FERC license, but first applied to the Corps for a CWA Section 404 Permit to allow for the discharge of fill material during the proposed construction work to increase Gross Dam's height. *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 9 (2020); Corps' ROD, Attach. A, AR000061.

B. Agency environmental review and decisions

The Corps served as the lead agency for the project's EIS; FERC was a cooperating agency. Supplemental Pet. ¶ 69; Corps' ROD at 2, AR000017; *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 18 (2020). The challenged EIS evaluated the "direct, indirect, and cumulative effects of a water supply project called the Moffat Collection System Project." Moffat Collection System Project Final EIS (Moffat FEIS) at ch. 1, p. 1-1, AR123778; *see also* Moffat FEIS at ch. 5, p. 5-1, AR125216; FERC Final Supp. EA at 6. It also analyzed the broader effects of enlarging the Moffat water system including diverting water from the West Slope of

the Front Range to fill Gross Reservoir on the East Slope, as well as, the impacts from the placement of fill material. *Id.*

The Corps also consulted with FWS over listed terrestrial and aquatic species. Corps' ROD at 16, AR000031. For example, because streams from which Denver Water would divert project water contained green lineage cutthroat trout, the Corps consulted with FWS under ESA Section 7 on the effects of the Corps' issuance of the 404 Permit. *Id.*; FWS's Biological Opinion (Biological Opinion), AR007786-AR007858. In 2016, FWS issued the Biological Opinion that Petitioners initially challenged in this case, which concluded that the Corps' issuance of the 404 Permit for the project will not jeopardize the species' continued existence. Supplemental Pet. ¶ 102; Biological Opinion at 1, AR007786.[1]

The Corps concluded its NEPA process in 2017. The Corps issued its ROD on July 6, 2017, and issued a CWA Section 404 Permit on September 8, 2017, for the discharge of dredged or fill material into 5.78 acres of waters of the United States. Supplemental Pet. ¶¶ 107, 110; Corps' ROD, AR000050; Section 404 Permit.[2]

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[1] The Corps and FWS also consulted on effects to listed species associated with flow depletions on the Colorado and Platte Rivers and effects from a proposed environmental pool on listed species in the Platte River in Nebraska. *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 28-29 (2020).

[2] The Section 404 permit is available at http://grossreservoir.org/wp-content/uploads/2018/02/090817-Final-Compressed-404-Permit.pdf (last visited Aug. 16, 2020).

In February 2018 and February 2019, FERC issued NEPA documents (a Supplemental EA and Final Supplemental EA) focusing on the effects of an amendment of Denver Water's FERC license to the extent that they were not addressed in the FEIS. FERC Final Supp. EA; *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 19 (2020).[3] In doing so, FERC relied upon the FEIS and the Corps' ROD, stating that "[t]ogether, these documents provide a complete record of analysis for Denver Water's proposals to expand the Moffat Collection System and amend the [FERC] license." FERC Final Supp. EA at vi; *id.* at 6 (same). The Final Supplemental EA recommended approving Denver Water's license amendment finding that the approval would not cause effects to resources in the project area to exceed those identified in the FEIS and that implementation of environmental protection and mitigation plans would reduce some effects. *Id.* at vii.

On August 23, 2018, Petitioners submitted a notice letter expressing their intent to sue the Corps and FWS for ESA violations. Supplemental Pet. ¶ 111. The FWS responded to Petitioners by letter on October 26, 2018. Federal Respondents'

[3] As FERC explained, it issued its Supplemental EA because not all of Denver's Water's plans for enlarging Gross Reservoir had been finalized at that time the FEIS was produced. *Id.* Following the publication of the FEIS, the Corps also reviewed and considered additional information based on project design modification, comments received on the FEIS, dynamic temperature results, revised land acquisition data, and updates to sensitive species lists. Corps' ROD at 5-7, AR000020-AR000022.

Answer ¶ 110, ECF No. 22; PD000949- PD000950. On August 24, 2018, Petitioners sent a letter to the Corps requesting that the Corps complete supplemental NEPA work. Supplemental Pet. ¶ 116. The Corps responded to Petitioners by letter on October 26, 2018. Answer ¶ 113; PD000948.

On October 3, 2019, the Corps requested that FWS reinitiate ESA consultation for the green lineage cutthroat trout to consider additional information regarding entrainment monitoring in Denver Water's stream diversions in the Western Slope. Fed. Resp'ts' Notice Re: Completion of the Reinitiated Endangered Species Act Consultation (ESA Notice), ECF No. 37. FERC requested to join the ESA consultation. *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 31 (2020).

On April 17, 2020, the FWS concluded the reinitiated ESA consultation. ESA Notice. At that time, FWS issued a letter explaining that the subject of the challenged Biological Opinion—the green lineage cutthroat trout—are not members of any threatened or endangered species under the ESA. Letter from FWS to Corps and FERC, Apr. 17, 2020, ECF No. 37-1. Consequently, FWS withdrew the Biological Opinion and incidental take statement that was prepared for the project and denied the Corp's and FERC's requests to reinitiate consultation. *Id*. at 5.

On July 17, 2020, with certain revisions, FERC approved Denver Water's application to amend its license for the Gross Reservoir Project to raise the project's dam elevation and enlarge the project's reservoir. *City and County of Denver,*

Colorado, 172 FERC ¶ 61063, at P 74 (2020). FERC's licensing order also extended the license term as requested by Denver Water. *Id.* In doing so, FERC reiterated that the draft EIS, FEIS, Supplemental EA, and Final Supplemental EA, provided "a complete record of analysis of the environmental effects of Denver Water's proposal to amend the license for the Gross Reservoir Project." *Id.* at P 19. FERC also relied upon the Biological Opinions issued by FWS, *id.* at P 27-32, and explained that a Section 404 Permit was necessary for the project, *id.* at n.15.

C. Petitioners' failure to participate in the FERC process

On February 1, 2017, FERC issued a public notice of Denver Water's application, providing 60 days during which motions to intervene could be filed. FERC Final Supp. EA at 25. Federal, state, and local agencies, organizations, and individuals filed responses to the notice. *Id.* The U.S. Forest Service and Boulder County, Colorado intervened in the proceedings. *Id.* Petitioners did not.

Approximately a year later, on March 26, 2018, Petitioner Save the Colorado filed a motion to intervene out-of-time, which FERC denied. *City and County of Denver, Colorado*, 165 FERC ¶ 61120, at P 7, 9 (2018). It then sought rehearing, arguing that FERC's Supplemental EA is a continuation of the FEIS for the proposed Moffat project. *Id.* at P 10-11. But FERC concluded that Save the Colorado failed to explain why the public notice issued regarding the proposed FERC license amendment was insufficient to put Petitioner Save the Colorado on notice regarding its interests in the proceedings. *Id.* at P 18. FERC explained that

it "difficult to understand why Save the Colorado would have been surprised" by FERC's decision to rely on the FEIS, noting the Corps "studied numerous aspects of the proposed expansion of Gross Reservoir." *Id.* at n.24. So, FERC denied the petition for rehearing on the intervention denial. *Id.* at P 18-20.[4]

D. The current litigation

Three weeks after FERC denied the rehearing request, Petitioners filed this action against the Corps and FWS, alleging that the agencies violated NEPA, the ESA, the CWA, and the APA. Supplemental Pet. ¶¶ 7-8. They ask the Court to set aside the Moffat FEIS; Biological Opinion; the Corps' ROD and Section 404 Permit; the Corps' 2018 decision not to conduct any supplemental NEPA review; the 2018 and 2020 decisions of the FWS and Corps not to reinitiate ESA; FWS's April 2020 withdrawal letter and withdrawal of the Biological Opinion; the Corps' reliance on the Biological Opinion, FWS's April 2020 withdrawal letter, and withdrawal of the Biological Opinion; and to remand those matters to the Corps and FWS for further consideration. Supplemental Pet., Prayer for Relief. Petitioners also request that

[4] In its rehearing order, FERC states that its licensing proceeding "in no way shields the Corps from judicial review: the record does not reflect whether Save the Colorado sought judicial review of the Corps' actions, during which it could have raised any deficiencies it saw in the EIS, but nothing in our proceeding prevented it from doing so." *Id.* at n.26. But FERC's order does not explain the statement, nor does it address the exclusive jurisdiction provision of the FPA. FERC's footnote, of course, does not bind the Court. *See United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("[A] federal court always has jurisdiction to determine its own jurisdiction.").

the Court enjoin the Corps and FWS "from taking any further actions in furtherance of this project." *Id.*

After the conclusion of the reinitiated ESA consultation, the parties submitted a new Joint Case Management Plan. On August 13, 2020, Petitioners filed a Notice of Filing a Supplemental Petition for Review of Agency Action. ECF No. 45. That same day, the Court accepted the Supplemental Petition for filing. ECF No. 46. According to the Joint Case Management Plan, motions to dismiss are due within 30 days after the issuance of FERC's order approving the hydropower license amendment. Joint Case Management Plan, June 17, 2020, at 4-5, ECF No. 44.

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). All matters are presumed to lie outside the limited jurisdiction of federal courts until the plaintiff carries its burden of establishing that subject matter jurisdiction is proper. *Id.* at 376-78; *see also Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006); *Consumers Gas & Oil, Inc. v. Farmland Indus. Inc.*, 815 F. Supp. 1403, 1408 (D. Colo. 1992) (courts apply a rigorous standard of review when presented a motion to dismiss for lack of subject matter jurisdiction). If a court determines that it lacks subject matter jurisdiction to hear and decide a claim, the claim must be dismissed.

Fed. R. Civ. P. 12(b)(1), (c), (h)(3); *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974) (courts "must dismiss the cause *at any stage* of the proceeding when it becomes apparent that jurisdiction is lacking") (emphasis in original). The Court has wide discretion to consider affidavits or other evidence to resolve disputed jurisdictional facts. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

Argument

Because the FPA vests the courts of appeals with exclusive jurisdiction to review all claims raising issues inhering in the controversy over a FERC licensing order, the Supplemental Petition must be dismissed for lack of subject matter jurisdiction.

An examination of the Supplemental Petition shows that Petitioners are raising claims that inhere in the controversy over the FERC order. Petitioners challenge the authorization, construction, and operation of the water development project—it is FERC's order that permits Denver Water to take these actions. FERC cooperated with the Corps on the NEPA document challenged in the Supplemental Petition. Similarly, Petitioners seek review of ESA consultations between the Corps and FWS, the Corps' ROD, and the Section 404 Permit. FERC relied on much of this work by the Corps and FWS in approving the FERC license amendment for this hydroelectric project. In sum, Petitioners challenge agency actions that are intertwined with or are integral elements of FERC's licensing order. If the

Supplemental Petition is not dismissed, it may affect the FERC order and the jurisdiction of the courts of the appeals.

A. The FPA vests exclusive jurisdiction with the courts of appeals

This Court lacks subject matter jurisdiction over the Petitioners' claims, because the FPA's exclusive review scheme applies. The judicial review provision in the FPA "prescribe[s] the specific, complete and exclusive mode for judicial review of the Commission's orders." *Taxpayers*, 357 U.S. at 336. "The Supreme Court has made clear that the jurisdiction provided by [the FPA] is 'exclusive,' not only to review the terms of the specific FERC order, but over any issue 'inhering in the controversy.'" *Me. Council of the Atl. Salmon Fed. v. NMFS*, 858 F.3d 690, 693 (1st Cir. 2017) (quoting *Taxpayers*, 357 U.S. at 336). The FPA's exclusive review mechanism precludes "*de novo* litigation between the parties of all issues inhering in the controversy" and prohibits "all other modes of judicial review." *Taxpayers*, 357 U.S. at 336; *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 262 (10th Cir. 1989).

One would be "hard pressed to formulate a doctrine with a more expansive scope." *Williams Nat. Gas Co.*, 890 F.2d at 262. Consequently, litigants "cannot escape [the FPA's] strict judicial review provision by arguing that they are pursuing different claims and different relief than the parties before the FERC." *Otwell v. Ala. Power Co.*, 747 F.3d 1275, 1281-82 (11th Cir. 2014). The applicability of the FPA's judicial review provision does not "hang[] on the ingenuity of the complaint,"

Cal. Save Our Streams Council, Inc. v. Yeutter, 887 F.2d 908, 912 (9th Cir. 1989) (*Save Our Streams*), and cannot be avoided "through careful pleading." *Id*. at 911.

Petitioners attempt to avoid challenging FERC's licensing proceedings, but the FPA is not so easily evaded. As the Supreme Court has made clear, the FPA applies not only to claims directly challenging a FERC order, but to any claim that raises an issue "inhering in the controversy" over such an order. *Taxpayers*, 357 U.S. at 336. Because the Supplemental Petition raises such issues, the FPA provides the exclusive remedy, regardless of how Petitioners frame their pleading. *Save Our Streams*, at 887 F.2d at 910-913. The FPA bestows exclusive jurisdiction over Petitioners' claims upon the courts of appeals, so this Court must dismiss the Supplemental Petition in its entirety for lack of subject matter jurisdiction.

B. Because Petitioners are challenging issues inhering in the FERC licensing of the project, the exclusive jurisdiction provision of the FPA applies

Petitioners are challenging agency decisions that are bound up with the FERC amended license for this water development project. The FPA's judicial review provision vests the courts of appeals with exclusive jurisdiction over challenges to the Moffat FEIS, Biological Opinion, and the specific Corps' ROD and Section 404 Permit here, and related agency decisions. Accordingly, the FPA bars judicial review of the Supplemental Petition in this Court.

First, the Supplemental Petition confirms the close relationship between FERC's licensing order and the agency decisions contested here. Although the

Supplemental Petition attempts to skirt around referencing FERC, the Petitioners challenge the "authorizat[ion]" and "construction and operation" of the "Moffat Project," which they say, "would constitute the tallest dam in the history of Colorado." Supplemental Pet. ¶ 1. FERC's order authorizes Denver Water to undertake the Moffat Project—raising the height of the Gross Dam and boosting the Gross Reservoir's water storage capacity. *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at 24-25 (2020). The FEIS, the Corps' ROD, and the ESA consultations between the Corps and FWS, which are directly challenged by Petitioners, are intertwined with FERC's consideration and authorization of the Moffat Project. Indeed, even the Supplemental Petition acknowledges that FERC is a cooperating agency on the Moffat FEIS and describes FERC as "the Corps' sister agency and a cooperating agency on this project." Supplemental Pet. ¶ 116; *id*. ¶ 69.

Second, the Moffat FEIS and related NEPA decisions should be subject to direct review in the courts of appeals during any judicial review of FERC's order. The NEPA analysis in the Moffat FEIS covered the entire Moffat Project except certain effects of portions of the action that were before FERC. For example, the Proposed Action that the agencies analyzed (identified as Denver Water's preferred Alternative 1a) in the FEIS was to expand the existing Gross Reservoir and to raise Gross Dam. *See*, *e.g.*, Moffat FEIS, ch. 2 at 2-35, AR123852. The FEIS considered environmental effects from the primary components of the Proposed Action, including raising the height of the dam by 131 feet, building a new spillway over the

dam, constructing a new auxiliary spillway, using four construction staging areas, moving existing recreation and visitation areas, and relocating dam and spillway access roads. *See*, *e.g.*, Moffat FEIS, ch. 2 at 2-35-2-57, 2-111-118, 2-133-135.[5] In sum, the NEPA analysis in the FEIS covered the effects of modifying the dam—the very project over which FERC exercises its FPA licensing authority.

Not surprisingly, the Corps' and FERC's connected NEPA analysis played a central role in FERC's decision-making regarding the proposed license amendment. When FERC issued its Final Supplemental EA, it pointed to the FEIS, along with the Corps' ROD, and FERC's NEPA documents, as the "complete record of analysis for Denver Water's proposals to expand the Moffat Collection System and amend the license for the Gross Reservoir Hydroelectric Project." FERC Final Supp. EA. at vi; *see also id*. at C-25 (the "Final EIS and this Supplemental EA identify and address the effects of Denver Water's proposal before the Commission"). FERC's order also directly relied upon the jointly prepared FEIS as one of the documents that analyzed the environmental effects of Denver Water's proposal to amend its FERC license for the Moffat Project. *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 19 (2020). Thus, when Petitioners challenge the Moffat FEIS and the Corps' NEPA analysis, because those analyses are part and parcel of the FERC order, the Petitioners are in fact also challenging FERC's analysis.

[5] AR123852-AR123874, AR123928-AR123935, AR123950-AR123952.

Third, like the FEIS and related NEPA documents, the Corps' ESA consultations with FWS "inhere in the controversy" over the FERC order. *Taxpayers*, 357 U.S. at 336. FWS analyzed the potential impacts that the Moffat Project's increased water diversions into the Gross Reservoir will have on green lineage cutthroat trout that live upstream. Biological Opinion at 1, 26–35, AR007786, AR007811-7820. FWS subsequently withdrew the Biological Opinion. But, during its review process, FERC conceded that its ESA compliance obligations parallel those of the Corps, such that a challenge to either the Biological Opinion or the validity of FWS's decision to withdraw the Biological Opinion inhere in the controversy over the FERC order. *City and County of Denver, Colorado*, 172 FERC ¶ 61063, at P 30-32 & n.31 (2020).[6]

Fourth, in this case, claims challenging the Corps' ROD and Section 404 Permit also fall within the scope of the FPA's exclusive jurisdiction provision. Obtaining a Section 404 Permit was a necessary requirement before Denver Water

[6] The result is the same if FWS's withdrawal of the Biological Opinion is vacated. The Biological Opinion included conservation measures to reduce the Moffat Project's effect on the trout, and the opinion ties the timing of those measures to FERC's license amendment. Biological Opinion at 36, AR007821 (stating that Denver Water's agreement to Conservation Measure 1(B) begins "upon issuance of the FERC license amendment"); Biological Opinion at 39, AR007824 (stating that Denver Water is responsible for its commitment in Conservation Measure 2(B)(ii) "for a period of 15 years after the date of issuance of the FERC license amendment"). In other words, the Biological Opinion focused on the impacts if FERC authorized Denver Water to raise the height of Gross Dam.

could raise the dam. Moffat FEIS at ch. 1, 1-29, AR123806 (noting that a Section 404 Permit authorizes project components that require "surface-disturbing activities affecting waters of the U.S., including wetlands, such as construction of a dam, reservoir, diversion structure, roads and pipeline crossings"). As FERC explained in its licensing order:

> Raising the height of the dam requires expanding the base of the dam to support the higher structure. This involves placing concrete on the downstream slope of the dam (i.e., fill material) that would result in direct impacts to jurisdictional waters of the United States. Therefore, this action required a section 404 permit from the Corps under the Clean Water Act.

City and County of Denver, Colorado, 172 FERC ¶ 61063, at n.15 (2020).

Indeed, the Section 404 Permit is a necessary component of the dam project and Denver Water cannot move forward without it. The Corps' ROD acknowledged that if it did not issue the Section 404 Permit, it would have forced Denver Water into the No Action Alternative that left the dam at its current height and would require Denver Water to look at other ways to meet future water supply demand. Corps' ROD at 9, AR000024. But here, the Corps' ROD concluded that issuance of the Section 404 Permit was not contrary to the public interest and the Section 404 Permit authorized Denver Water to fill 2.24 acres of wetlands and 3.54 acres of Waters of the U.S. *See* Corps' ROD at 10, 35, AR000024, AR000050; Section 404 Permit at 4 (authorizing permanent impacts to waters of the United States and temporary wetlands impacts "associated with the enlargement of Gross Dam and

Reservoir"). FERC authorized Denver Water to raise the height of the dam after the Corps issued the Section 404 Permit. This close relationship satisfies the *City of Tacoma* standard.

Fifth, the procedural record reinforces this result. Petitioner Save the Colorado first sought to intervene in the FERC license amendment proceedings to challenge the NEPA process for the project and then, after FERC denied intervention, promptly sued in this Court raising similar claims. *See supra* pp. 11-12. On this record, Petitioners' suit is a collateral attack on FERC's proceedings. Although the Supplemental Petition mostly avoids referencing FERC, the thrust of Petitioners' allegations challenge the entire Moffat Project, including expansion of the Gross Reservoir and raising of the Gross Dam. *See*, *e.g.*, Supplemental Pet. ¶¶ 1-6, 67, 68. But parties should not be able to circumvent exclusive judicial review provisions that Congress established through creative pleading. *Save Our Streams*, 887 F.2d at 911.

If Petitioners are allowed to proceed with their lawsuit in this Court, "inconsistency, duplication, and delay" may result, *Nat'l Parks Conservation Assoc. v. FAA*, 998 F.2d 1523, 1529 (10th Cir. 1993), and it could affect the FERC licensing order and the jurisdiction of the courts of appeals. To be sure, not every challenge to a Corps' Section 404 Permit is a collateral attack on a related FERC order and Petitioners may rely on *Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Engineers*, 683 F.3d 1155, 1159–60 (9th Cir. 2012), to argue that their suit

is not such an attack on FERC's proceedings here. *Snoqualmie* held that a district court suit over a Corps' decision to allow a hydroelectric power plant operator to rely on a series of nationwide discharge permits for CWA Section 404 authorization was not a collateral attack on a FERC license and therefore not subject to the FPA's exclusive jurisdiction. *Id*. The *Snoqualmie* court explained that the plaintiff could not have challenged Corps' nationwide permit in a prior court of appeals case over FERC's license amendment because the Corps had not yet authorized the licensee to proceed under the general nationwide permits. *Id*. at 1159. That is not the case here.

Unlike the situation in *Snoqualmie*, Petitioners could have brought their claims against the Section 404 Permit in the courts of appeals, if they had timely intervened in FERC's proceedings. Indeed, parties participating in the FERC process are raising issues that overlap with those raised in the Supplemental Petition. *See* FERC Final Supp. EA. at C-1 (many of the comments FERC received focus on issues covered in the FEIS). Such issues may ultimately be challenged in the courts of appeals. The FPA's exclusive review provision was adopted to avoid this duplication of district court and appellate review. *See Harrison v. PPG Indus.*, 446 U.S. 578, 593 (1980) ("The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal."). Moreover, if Petitioners succeed on the merits of their claims and this Court invalidates the FEIS, then FERC's order likely will also be

invalid. And if this Court invalidates the Corps' ROD or Section 404 Permit, then Denver Water likely will not be able to carry out the project authorized by FERC. Under these circumstances, Petitioners' suit is an improper collateral attack on FERC's proceedings.

Petitioners should not be permitted to challenge the environmental review for this project in the district court when the exclusive remedy under the FPA provides for review in the courts of appeals.

C. Courts have concluded that similar claims must be asserted in the courts of appeals

Precedent addressing the FPA's exclusive review scheme also supports dismissal of Petitioners' claims. The Ninth Circuit rejected a similar district court action seeking to challenge a Forest Service decision related to a FERC-licensed facility. *Save Our Streams*, 887 F.2d at 912. In *Save Our Streams*, the plaintiffs sued the Forest Service under NEPA and the American Indian Religious Freedom Act, 42 U.S.C. § 1996, and did not challenge FERC directly. *Id*. at 911. The Ninth Circuit rejected the plaintiffs' argument that district court review was available because they were only seeking review of the Forest Service's failure to follow procedural and substantive steps outside the purview of power and energy regulation. *Id*. District court review was barred because the FPA's exclusive review provision controlled over the general and widely applicable procedures that regulate NEPA and other statutory challenges. *Id*. at 911-12. The Ninth Circuit also found

that district court review of issues related to FERC licensing decisions would result in substantial disruption of the statutorily mandated licensing procedure and would result in the duplication and inconsistency, which the FPA intended to eliminate. *Id*. at 911.

The Tenth Circuit adopted and applied *Save Our Streams* to the analogous jurisdictional scheme of the Federal Aviation Act. *Nat'l Parks Conservation Assoc.*, 998 F.2d at 1527. In that case, the Federal Aviation Administration (FAA) and Bureau of Land Management (BLM) cooperated on an EIS. *Id*. at 1525. The appellants challenged the FAA order approving the construction, operation, and funding of an airport in the Tenth Circuit, but separately challenged a related BLM decision in district court. *Id*. at nn.1-2. The Tenth Circuit rejected that approach, holding that courts of appeals had exclusive jurisdiction over any actions that facilitate the actions of the FAA. *Id*. at 1528-29. The appellate court noted that the district court suit focused on the effects of the airport, but "[w]ithout construction of the airport, the BLM's actions would be meaningless." *Id*. at 1529. And the appellate court found that a "bifurcated suit could result in inconsistency, duplication, and delay." *Id*. *Cf*. *Rochester v. Bond*, 603 F.2d 927, 935-37 (D.C. Cir. 1979) (exclusive jurisdiction lie in the courts of appeals for claims that the FAA and Federal Communications Commission violated NEPA).

Multiple courts have also concluded that the FPA provides the exclusive avenue for challenging biological opinions related to FERC licensing proceedings.

Me. Council of the Atl. Salmon Fed., 858 F.3d at 693 (courts have found "no good reason to read 'limited' into the Supreme Court's understanding of 'exclusive' jurisdiction"); *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006); *City of Tacoma*, 383 F. Supp. at 92-93 (rejecting the argument that the FPA was "irrelevant" because the expert wildlife agency was challenged under ESA and APA, not the FPA); *Idaho Rivers United v. Foss*, 373 F. Supp. 2d 1158, 1161 (D. Idaho 2005) (although the plaintiff pled claims solely against FWS, it was ultimately seeking to restrain FERC's licensing procedures); *cf. Southwest Ctr. for Biological Diversity v. FERC*, 967 F. Supp. 1166 (D. Ariz. 1997) (FPA warranted dismissal of ESA claims against Forest Service despite absence of challengeable FERC order).

D. APA review in this Court is unavailable

Finally, the Supplemental Petition pleads jurisdiction under the APA, 5 U.S.C. §§ 701-706, federal question jurisdiction, and other general review provisions. Supplemental Pet. ¶¶ 8, 11, 64-65. The APA, however, does not provide jurisdiction when a statute, like the FPA, provides the exclusive means for challenging an agency decision. *See* 5 U.S.C. § 701(a)(1) ("[T]his chapter applies . . . except to the extent that—(1) statutes preclude judicial review . . . .").

The APA authorizes district courts to review "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added). The APA further provides that "where adequate, the 'form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a

court specified by statute.'" *Cousins v. Sec'y of the U.S. Dep't of Transp.*, 880 F.2d 603, 611 (1st Cir. 1989) (quoting 5 U.S.C. § 703). The APA "codified the presumption evident in the case law that adequate statutory review is exclusive." *City of Rochester*, 603 F.2d at 935. "It is well settled that even where Congress has not expressly stated that statutory jurisdiction is 'exclusive,' as it has here . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (*TRAC*).

The decisions challenged by Petitioners are final agency actions. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). However, because the FPA provides the exclusive route for obtaining judicial review of these decisions, and because judicial review under the FPA is adequate, APA review in the district court is unavailable. *See TRAC*, 750 F.2d at 78 ("Where statutory review is available in the Court of Appeals it will rarely be inadequate."). The FPA preempts the more general remedies available under the APA, and allowing Petitioners to proceed in this Court would impermissibly thwart the FPA's detailed scheme for obtaining judicial review.

Conclusion

Petitioners' challenge to the Moffat FEIS, Biological Opinion, and the Corps' ROD and Section 404 Permit, and related agency actions inheres in the controversy over the FERC order providing for the expansion of Gross Reservoir and Dam. The

expansive scope of the FPA's exclusive jurisdiction provision deprives this Court of jurisdiction over Petitioners' claims. Accordingly, the Supplemental Petition must be dismissed.

Respectfully submitted on this 17th day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

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