

RECORD NO. 16-1062

**IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT**

APPALACHIAN POWER COMPANY,

Plaintiff - Appellee,

v.

**WILLIAM W. NISSEN, II;
LORA J. NISSEN,**

Defendants - Appellants,

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE**

**RESPONSE BRIEF OF APPELLEE
APPALACHIAN POWER COMPANY**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

American Electric Power Company, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

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 If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
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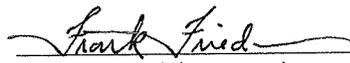
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I certify that on 1/27/16 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:


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STATEMENT OF THE CASE

This case arises out of construction of a grossly oversized dock, stripping of vegetation, and other impermissible construction activities by landowners within the boundary of a federally-licensed hydroelectric project. The project at issue is the Smith Mountain Hydroelectric Project (the "Project"), which is operated by Appalachian Power Company ("APCO" or "Appalachian") under a license (the "Federal License") from the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.*

Under a carefully crafted regulatory system, FERC has delegated power to APCO through the Federal License so that APCO can operate the Project in a manner consistent with the purposes of the FPA. To this end, construction of docks and other structures within the Project is regulated by a Shoreline Management Plan ("SMP"), which has been incorporated into the Federal License. The SMP's purpose is to "provide guidelines and regulations for shoreline development for Smith Mountain Lake and Leesville Lake." (JA 120.)

APCO has acquired the necessary rights from landowners through a Flowage Right and Easement Deed ("Flowage Easement"), which allows it to enter the premises at any time at its discretion to remove any structures or other objects located within the Project boundary. (JA 312.) The Flowage Easement also allows APCO to affect the premises in any manner whatsoever in connection with the

operation and maintenance of the Project. (JA 311.) The Flowage Easement also places limitations on the landowner's ability to use the portion of the property that is within the Project boundary. (*Id.*)

The appellants, William W. Nissen, II, and Lora J. Nissen (the "Nissens"), own property that is partially located within the Project boundary. It is the Nissens' position that APCO cannot prevent them from building docks, building roads, deforesting the shoreline, or dumping fill within the Project, even though such occupancies and uses violate regulations in a FERC Order (*i.e.*, the Order issuing the Federal License), which incorporates the SMP's restrictions on shoreline uses. The Nissens further contend that their limited right in the Flowage Easement "to cross" the premises to reach the impounded waters for recreational purposes is really a right "to build" whatever they desire within the Project.

APCO initiated this action against the Nissens by filing a complaint (the "Complaint") seeking declaratory and injunctive relief. Specifically, the Complaint sought declaratory judgment that the Nissens' activities within the Project boundary were in violation of APCO's rights and obligations under the Federal License and the Flowage Easement to regulate construction on and use of the Project's shoreline. The Complaint also requested injunctive relief to remedy the Nissens' violations. It is well established that federal district courts take

jurisdiction over such actions, and APCO filed the current suit in federal court as it has done before in numerous similar cases.

The Nissens filed a motion to dismiss primarily based on lack of subject matter jurisdiction. After the denial of this motion and a subsequent related motion (JA 586, 784), the Nissens filed an answer and counterclaim for declaratory judgment. (JA 587.) APCO filed a motion to dismiss the counterclaim, which was granted in part. (JA 664.) After the parties had an opportunity to engage in discovery, APCO filed a motion for summary judgment. (JA 829.) The Nissens did not file their own motion for summary judgment, nor did they submit any evidence in opposition to APCO's motion.

In its order and accompanying memorandum opinion granting summary judgment in favor of APCO (collectively, the "Summary Judgment Order"), the District Court first found that APCO "has the ability to regulate the use and occupancies of the Project lands under the Flowage Easement as expounded by the Federal Power Act, the FERC License Order for the Project, and the SMP." (JA 1084.) The District Court went on to conclude that the Nissens' dock, unauthorized removal of vegetation, road construction, and placement of fill constituted violations of APCO's rights. (JA 1085-90.) After ruling substantially in APCO's favor with respect to both parties' requests for declaratory relief, the District Court

also granted a permanent injunction requiring the Nissens to cease construction of their dock and prohibiting their further violation of APCO's rights.

STATEMENT OF FACTS

A. The Project is Operated Pursuant to a License Issued by FERC Order Which Delegates the Regulation of Non-Project Occupancy and Use of Project Lands to APCO. 

1. The Shoreline of the Lake is Within the Boundary of a Hydroelectric Project Operated Under the Federal License.

APCO operates the Project on Smith Mountain Lake and Leesville Lake in Virginia. (JA 13, 587.) In addition to the dams and powerhouses, the Project includes all lands enclosed by the Project boundary. (JA 67.) The Project boundary for Smith Mountain Lake generally conforms to the contour elevation 800 feet above mean sea level ("FMSL"). (JA 32.) The normal water level for the lake is 795 FMSL. (JA 883.)

Smith Mountain Lake was from its very inception, and still is, a creature of the license issued to APCO by FERC for development and operation of the Project. (JA 13, 27, 587.) The Project is required to be licensed under the FPA because it is located on a navigable waterway of the United States. (JA 27.) Consequently, in 1960, the predecessor to FERC¹ issued APCO its first license "for the construction, operation and maintenance of" **the Project.**  *Appalachian Power Co.*, 23 F.P.C. 624

¹ FERC was formerly known as the Federal Power Commission.

(1960). The 1960 License has since been renewed, and the Federal License which currently governs "the continued operation and maintenance" of the Project was issued in 2009. *Appalachian Power Co.*, 129 FERC ¶ 62,201 (2009) (copy of Federal License at JA 27-108.)

2. **FERC License Conditions and Control Over the Project.**



FERC requires its licensee APCO to acquire rights of occupancy and use of all property necessary or appropriate to construct, maintain, or operate the Project. (JA 14, 91.) Accordingly, APCO has obtained property rights to the lands upon which the Project was constructed. (JA 14.) APCO either owns the land within the Project boundary in fee, or it owns flowage right and easement deeds granting it the right to submerge and regulate land within the Project boundary. (*Id.*)



FERC retains ultimate control over the hydroelectric projects it licenses. Because a reservoir impounded by a project dam is part of the project and is a licensed project work, FERC "has not only the authority, but the obligation to insure that any uses of the reservoir will be consistent with the beneficial public purposes for which a license has been issued." *Union Electric Co.*, 90 FERC ¶ 61,249 (2000). FERC's licenses for hydroelectric power projects contain conditions under which the projects' property, including the reservoir, may be made available for non-project uses, such as private recreation. Permission for these uses may be withheld if the uses would interfere with other project purposes,

or are contrary to the public interest. *Id.* FERC has the power to approve or reject development plans for boat docks constructed on project lands and waters.

Coalition for Fair and Equitable Regulation of Docks v. FERC, 297 F.3d 771, 778 (8th Cir. 2002), *cert. denied*, 538 U.S. 960 (2003).

3. FERC Delegated Authority to APCO to Regulate Certain Non-Project Occupancies and Uses of Project Property.

An amendment made by FERC in 1998 added FERC's standard land use article, designated as "Article 41", to APCO's 1960 License. (JA 216.)  With Article 41, FERC gave APCO the authority to grant permission, without first obtaining FERC approval, for certain non-project uses and occupancies of Project lands and waters. (JA 216.) FERC delegated this authority to APCO to insure that FERC would not be inundated with requests for permission to issue permits for docks and other shoreline uses. *See Appalachian Power Co.*, 112 FERC 61,026, at ¶ 4 (2005).

4. APCO Developed a Shoreline Management Plan to Provide a Comprehensive Plan for Managing Development Along the Project Shoreline.

A Shoreline Management Plan is a plan for managing development along the shoreline of a project. In 2003, after years of consultation with state agencies, counties, and other interested parties, APCO created and filed a proposed SMP with FERC. *Id.*, at ¶¶ 4-12. The SMP set forth different classifications for the shoreline, upon which various densities of development could be permitted by

APCO without its having to seek prior FERC approval. (JA 133-35.) The SMP also imposed various requirements aimed at promoting, among other things, shoreline stabilization and the protection of aesthetic and environmental characteristics and water quality.

5. FERC Amended APCO's 1960 License to Incorporate the SMP. 

In July, 2005, FERC issued an Order approving the SMP as modified and amending APCO's 1960 License to incorporate the SMP. *Appalachian Power Co.*, 112 FERC ¶ 61,026 (2005). FERC ordered that Article 41(b) of APCO's license be amended such that the type of use and occupancy of project lands and waters for which APCO may grant permission without prior FERC approval included "piers, landings, boat docks, or similar structures and facilities *as determined under the Commission approved Shoreline Management Plan.*" (*Id.* at Ordering Para. B)(emphasis added). FERC noted that the SMP's restrictions on development were a reasonable compromise between protecting the Project's scenic, recreational and environmental values and providing adequate opportunities for development at the lake. (*Id.* at ¶ 74.) Regarding APCO's responsibility for managing the Project lands, FERC stated:

Appalachian has continuing responsibility under its license to supervise and control the use and occupancy for which it grants permission under the SMP, and to ensure the compliance with the conditions imposed under the SMP. If a permitted use and occupancy violates any applicable law or regulation, or any condition imposed by

Appalachian in its permits, for the protection and enhancement of the project's scenic, recreational, or other environmental values, or if a condition of the conveyance is violated, Appalachian must take any action necessary to correct the violation (including, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities).

Id. at ¶ 80. Thus, APCO has the **authority** and responsibility to regulate, *inter alia*, construction of docks and non-Project uses of Project lands as described by the terms of its federally issued and controlled license.

FERC issued a new license to APCO on December 15, 2009. *Appalachian Power Co.*, 129 FERC ¶ 62,201 (2009) (JA 27-108.) The SMP was incorporated into APCO's 2009 Federal License, with Article 41 now being identified as Article 415. (JA 86.) In 2010, the SMP was updated with input from state agencies, counties, business organizations, homeowner groups, stakeholders like realtors and dock builders, and the general public. (JA 126-28.) FERC approved the SMP following public notice and comment, and a mediated settlement with challengers to the SMP. *Appalachian Power Co.*, 146 FERC ¶ 62,083 at 4-5 (2014).

B. In Accordance With the FPA and the Federal License, APCO Possesses Sufficient Property Rights to Operate the Project.

1. FERC's Requirements and the Flowage Easement.

The Federal License requires APCO to acquire and retain fee title or the right to use in perpetuity, all property necessary or appropriate to construct,

maintain or operate the Project, including Project reservoirs. (JA 91.) Similar language was contained in the 1960 License. (23 F.P.C. 624, at Ordering Para. B.) Therefore, in September 1960, APCO obtained broad property rights to affect the property currently owned by the Nissens by way of a properly executed and recorded instrument titled "Flowage Right and Easement Deed Smith Mountain Combination Hydro Electric Project Upper Reservoir" ("Flowage Easement"). (JA 14, 19.)²

2. **The Flowage Easement Gives APCO the Ability to Enforce Obligations Associated With Operation of the Project.**



The Flowage Easement granted APCO the broad right to "affect so much of [the property]... continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station...." (JA 311) (brackets added). As it relates to APCO's right to remove docks, roads, fill and other items, the Flowage Easement gives APCO the right to, among other things, enter upon the property

at any time and from time to time and, at [APCO's] discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet.

² The Flowage Easement was acquired from the Nissens' predecessors-in-title Harry J. Cundiff and Maggie E. Cundiff on September 12, 1960, and was recorded in the land records of Franklin County, Virginia at Deed Book 179, Page 402. (JA 19, 311.)

(JA 312) (brackets and emphasis added).

The Flowage Easement also obligates the landowner to "not cause, permit or suffer any garbage, sewage, refuse, waste or other contaminating matter to be cast, drained or discharged onto" the portion of the subject property located within the Project boundary "or directly or indirectly into such impounded waters...." (*Id.*) The Grantors reserved the right to possess and use the premises in any manner not inconsistent with the estate, rights and privileges therein granted to APCO, including (1) the right to cross the lands to reach the impounded waters for recreational purposes, and (2) the right to extend necessary fences across the lands and into the water to keep livestock from wading around the fences. (*Id.*)

C. **The Nissens Have Engaged in Activities in Violation of the Shoreline Management Plan Incorporated Into the Federal License.** 

1. **The Nissens' Unpermitted Construction of a Massive Boat Dock.**

By deed dated April 14, 2014, the Nissens became owners of a narrow lot on the shoreline of Smith Mountain Lake, a portion of which lies within the Project boundary (*i.e.*, below the 800 foot elevation contour). (JA 19, 589.) The length of shoreline owned by the Nissens is only 98.71 feet. (JA 21-22.)

The SMP establishes regulations for the construction of docks on the shoreline of the Project. (*See e.g.*, JA 157-62.) Among other things, these regulations address the location, length, quantity, height and maximum size of

docks. (*Id.*) The SMP contains diagrams setting forth some of the requirements in the SMP. (JA 178-180.)

The Nissens' property is located on shoreline designated as "Low Density Single Family Residential " under the SMP. (JA 864.) The maximum size of a dock structure for Low Density Single Family Residential lots (such as the Nissens' lot) with less than 300 linear feet of shoreline is 1,500 square feet. (JA 158-59, 864-65.) Despite this, the Nissens commenced construction of a giant dock, which: (a) will be approximately 3,520 square feet in size; (b) will be approximately 110 feet in length; (c) will contain a 480 square foot enclosure on the far end of the dock; (d) will have a 12 foot wide walkway; (e) will be over 26 feet in height; and (f) will be located close to the extended property line of one neighboring lot. (JA 864-65.) The dock is not one which APCO would be allowed to permit under its Federal License and SMP because, among other things, it is too big, too long, too high, and is located too close to the neighboring property. (JA 865.)  The Nissens may obtain a permit for a smaller dock that would comply with the SMP, just as Mr. Nissen – an experienced dock builder at the lake – has obtained for his customers in the past. (JA 865.)

2. The Nissens' Unpermitted Construction of a Road.

The SMP provides that roads and boat ramps are not allowed to be constructed on low-density shoreline within the Project boundary. (JA 159.)

Despite this prohibition, the Nissens built a road to be used as a boat ramp that extends well below the Project boundary. (JA 972.)

3. The Nissens' Unpermitted Placement of Fill.

The SMP prohibits the depositing of fill within the Project boundary with the exception of only minimal amounts necessary for design and installation of an erosion control structure. (JA 192.) The Nissens, however, impermissibly caused dirt, gravel, and other debris to be placed upon property within the Project boundary. (JA 972.)

4. The Nissens' Unauthorized Clearcutting of Vegetation.

The SMP establishes certain Vegetative Cover Regulations, which require that vegetation "within the project boundary must be preserved if present[.]" but under certain circumstances, a property owner may apply to APCO for a permit to modify or remove vegetative cover. (JA 193.) Removal of vegetation is regulated by the SMP because "[s]horeline vegetation is important to the aesthetic qualities, environmental health, and water quality of" the Project. (JA 192.) The SMP also provides that a property owner "may be required to plant or pay for the planting of vegetative materials within the project boundary in the event that vegetation is removed without a permit." (JA 197.) Here, the Nissens removed virtually all the vegetation on their property within the Project boundary without APCO's permission. (JA 865, 972.)

D. APCO Filed Suit to Determine its Duties and Obligations Under Federal Law and to Enjoin Activities and Construction Done in Violation of the FPA and the Federal License Issued Thereunder.

1. APCO's Complaint for Declaratory and Injunctive Relief to Determine and Protect Rights and Obligations Arising Under Federal Law.

APCO brought this suit after the Nissens commenced construction of their boat dock and undertook other activities in violation of the SMP. The Complaint was filed pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, and the FPA, 16 U.S.C. §§ 791a *et seq.* (JA 12.)

In Count I of the Complaint, APCO alleged that the Nissens' dock construction, vegetation removal, road construction and unauthorized fill activity within the Project boundary was in contravention of the FERC Order that issued the Federal License and the SMP. (JA 23.) APCO specifically stated in Count I of the Complaint that the Nissens' actions constitute "an occupancy and use of Project lands and waters without Appalachian's permission and accordingly, are actions undertaken notwithstanding Appalachian's authority and obligation under the [Federal] License Order to permit only those uses of Project lands which protect and enhance the scenic, recreational, and other environmental uses of the Project." (*Id.*) (brackets added). In Count I of the Complaint, APCO sought declaratory judgment: (1) That, under the FPA, the Order issuing the Federal License, and the SMP, APCO has the authority and responsibility to regulate uses and occupancies



of the Project lands; and (2) That the Nissens have acted in contravention of APCO's obligations and authority under the FERC License Order and the SMP by their construction activities. (JA 23-24.)

In Count II of the Complaint, APCO sought a declaration that the Nissens are in breach of the Flowage Easement by constructing the dock, removing vegetation, constructing the road, and placing fill below the 800 FMSL contour. (JA 25.) In both Counts I and II of the Complaint, APCO requested that the Court issue an injunction against the Nissens, requiring them to cease construction of the dock (and any other structures), replace the vegetation, remove the road and related fill. APCO also requested that the injunction should also permanently enjoin the Nissens from occupying Project lands *except in compliance with the requirements of the FERC License Order and the SMP*. (JA 24, 25)(emphasis added).

2. The District Court Granted Summary Judgment to APCO.

The Nissens filed a motion to dismiss based on, among other things, lack of subject matter jurisdiction. (JA 347.) The Nissens' motion to dismiss and related motion to reconsider were denied, and the Nissens eventually filed an answer and counterclaim, which asserted five separate requests for declaratory relief. (JA 587.) On APCO's Motion to Dismiss the Counterclaims, the District Court dismissed four out of the Nissens' five requests for relief. (JA 822.) The Nissens' surviving request for declaratory judgment generally asked the Court to declare that the

Flowage Easement does not grant APCO sufficient property rights to regulate the property under the Federal License and the SMP. (JA 817.)

On December 18, 2015, the District Court issued the Summary Judgment Order granting APCO's motion for summary judgment. The District Court gave the Nissens the opportunity to affirmatively remedy the violations of the SMP by removing the dock, removing the road and fill, and by restoring the vegetation, or they could instead just reimburse APCO should it enter and remedy the violations. (JA 1098.) This appeal followed.

SUMMARY OF ARGUMENT

The current action is similar to other cases involving occupancy and use of project shorelines that routinely have been heard in federal courts, including this Court. *See VA Timberline, L.L.C. v. Appalachian Power Co.*, 343 Fed. App'x. 915 (4th Cir. 2009). Indeed, as noted by the trial court in this case, there are "a litany of decisions where federal district courts adjudicated claims where FERC licensees sought to force private landowners to comply with the conditions of the FERC licenses." (JA 584-85) (*citing, inter alia, Appalachian Power Co. v. Arthur*, 39 F. Supp. 3d 790 (W.D. Va. 2014); *Tri-Dam v. Schediwy*, 2014 U.S. Dist. LEXIS 29775 (E.D. Cal. 2014); *Union Elec. Co. v. Devine*, 2007 WL 4244989 (W.D. Mo. 2007), *aff'd*, 334 F. App'x 37 (8th Cir. 2009)).

The District Court had original jurisdiction over this case under 28 U.S.C. § 1331. The current action arises under the laws of the United States for purposes of § 1331 not only because the Complaint directly asks the court to interpret federal law, but also because the necessary elements of APCO's underlying claims require resolution of federal issues. A four part analysis is used to determine whether federal jurisdiction exists under the substantial federal question doctrine. *See Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013) (a federal issue must be (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress).

On its face, the Complaint necessarily raises federal issues in satisfaction of the first element of the *Gunn* analysis. The federal issues raised in this case are “actually disputed” because, as stated in the Complaint, the Nissens have created “a direct and immediate dispute by ignoring and acting in contravention of APCO’s obligation and authority under the FERC License Order and the SMP”, and their actions have been detrimental to APCO’s responsibilities under the FERC License Order and the FPA. (JA 23.) The Nissens' pleadings confirm that federal issues are actually disputed because throughout the litigation they assert their own interpretations of federal law and the licenses at issue. (*See, e.g.*, Opening Br. of Appellant (“Br.”), pp. 46-48, 53; and JA 588, 590, 1005, 1014, 1019.)

The remaining elements of the *Gunn* analysis also are satisfied. The federal issue here is substantial considering the federal government's important interest in maintaining control over water power resource projects licensed by FERC under the FPA throughout the nation. The federal-state balance established by Congress is not upset by taking federal jurisdiction over this action because Congress has expressed its desire for federal courts to have jurisdiction over such cases by enacting 16 U.S.C. §825p which, in pertinent part, provides: "The District Courts of the United States... shall have exclusive jurisdiction of... all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of the [FPA] or the rules, regulations, and orders thereunder."

The District Court properly exercised jurisdiction over this case and correctly found in favor of APCO on the motion for summary judgment. The Nissens offered no evidence in opposition to the motion, and they raised no genuine issue of material fact.

STANDARD OF REVIEW

Questions of subject matter jurisdiction are reviewed *de novo*. *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 815 (4th Cir. 2004) (*en banc*). The standard for review of dismissals under Rule 12(b)(6) also is *de novo*. *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 401 (4th Cir. 2005). Finally, the standard of review for "a district court's grant of a motion for summary judgment [is] *de novo*,

applying the same legal standards as the district court." *Glynn v. EDO Corp.*, 710 F.3d 209, 213 (4th Cir. 2013).

ARGUMENT AND AUTHORITIES

I. THERE IS FEDERAL JURISDICTION OVER THIS ACTION AND THE DISTRICT COURT CORRECTLY DENIED THE NISSENS' RULE 12(B)(1) MOTION TO DISMISS.

A. Many Federal Courts Have Properly Exercised Jurisdiction Over Similar Cases Involving Interpretation of a FERC License.

There are numerous other boat dock or shoreline use cases involving FERC licensed projects that have been initiated in, or removed to, federal district courts. *See, e.g., Tri-Dam v. Michael*, 2014 WL 1285644 (E.D. Cal. 2014) (action brought by FERC licensee under 28 U.S.C. § 1331 and 16 U.S.C. §825p for injunction requiring defendant to remove his unpermitted retaining wall and expansion to dock); *Union Elec. Co. v. Mowinski*, 2006 WL 1696541 (W.D. Mo. 2006) (action brought by FERC licensee under 28 U.S.C. § 1331 and 16 U.S.C. §825p for injunction requiring defendant dock owner to remove his unpermitted dock); *VA Timberline, LLC v. Appalachian Power Co.*, 2008 WL 269544 (W.D. Va. 2008), *aff'd*, 343 F. App'x 915 (4th Cir. 2009) (case removed to federal court under 28 U.S.C. §1331 and 16 U.S.C. §825p in which property owner contended APCO could not limit owner's ability to build docks at the Project).³

³ At least nine other similar cases are identified in the list at JA 408-09.

A federal court has an independent obligation to assess its subject matter jurisdiction, and it will "raise a lack of subject matter jurisdiction on its own motion." *Constantine v. Rectors and Visitors*, 411 F.3d 474, 480 (4th Cir. 2005). The courts in the numerous cases cited in the preceding paragraph—which are similar to the case at hand—did not dismiss any of these disputes for lack of subject matter jurisdiction. Multiple judges within the Western District of Virginia have previously held there is federal jurisdiction over cases involving APCO and other landowners with the Project. See *Arthur*, 39 F. Supp. 3d at 797 (W.D. Va. 2014) (J. Urbanski); *Pressl v. Appalachian Power Co.*, 2015 U.S. Dist. LEXIS 136075 (W.D. Va. 2015) (J. Moon)(on appeal, 4th Cir. record no. 15-2348); *Appalachian Power Co. v. Longenecker*, 2001 U.S. Dist. LEXIS 27185 (W.D. Va. 2001) (J. Turk).⁴

B. APCO's Complaint Raises a Substantial Question of Federal Law by Satisfying the Analysis in *Gunn v. Minton*.

⁴ The 2005 Order first approving the SMP states that "[i]f there is a question concerning specific property rights, it will have to be resolved between the property owner and Appalachian in a property law action in a court of *appropriate* jurisdiction." *Appalachian Power Company*, 112 FERC ¶ 61,026 at ¶ 89 (2005) (emphasis added). The *appropriate* jurisdiction for this case was in the Western District of Virginia, and FERC has rejected the specific argument that these cases must be brought in state court, noting "federal courts have determined that federal jurisdiction exists over property disputes between Appalachian Power and property owners surrounding the Smith Mountain Project." *Appalachian Power Co.*, 153 FERC ¶ 61, 299, at fn 44 (2015).

The District Court here had "original jurisdiction over this action under 28 U.S.C. § 1331 because it arises under the laws of the United States, particularly the FPA." (JA 12.) This action "arises under" federal law within the meaning of 28 U.S.C. § 1331 because, among other things, APCO's requested "right to relief necessarily depends on a substantial question of federal law." *Dixon*, 369 F.3d at 816. When a case depends on a substantial question of federal law, there can be federal jurisdiction over state law claims pursuant to the substantial federal question doctrine because it is a

doctrine that captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.

Grable & Sons Metal Prods. v. Darue Eng'g & Mfg, 545 U.S. 308, 312, (2005).

The Supreme Court has established a four part test to determine whether a "substantial federal question" is raised. *See id.* In *Gunn v. Minton*, the Supreme Court explained that "federal jurisdiction over a state law claim will lie if a federal issue is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." 133 S. Ct. at 1065. Here, as explained below, the claims set forth in the Complaint satisfy each element of the *Gunn* analysis.

1. In Satisfaction of the First Prong of the *Gunn* Analysis, APCO's Claims Necessarily Raise a Federal Issue.

a. Count I of the Complaint Directly Asks for Interpretation of Federal Law.

The first Count of the Complaint is for "VIOLATION OF OBLIGATIONS UNDER THE FERC LICENSE ORDER AND SMP." In this Count, APCO asks for a declaration that "under the FPA, the FERC License Order issuing and amending Appalachian's license for the Project, and the SMP, Appalachian has the authority and responsibility to regulate uses and occupancies of the Project lands[.]" (JA 23.) APCO asked the District Court for further declaratory relief as follows:

That Defendants have acted in contravention of Appalachian's obligations and authority under the FERC License Order and the SMP by, without permission, commencing construction of a dock, conducting illegal vegetation removal, and constructing a road causing unauthorized fill activity, which acts: (a) are uses and occupancies of the Project lands and waters that are inconsistent with the purpose of protecting and enhancing the scenic, recreational, and other environmental values and resources of the Project; (b) are not authorized by Appalachian under its authority and responsibility in the FERC License Order and SMP; and (c) are a use and occupancy of Project property in a manner inconsistent with the FERC License Order, including the SMP.

(JA 23-24.)

Count I of the Complaint expressly seeks interpretation of the Federal License and—notably—"[t]he terms of the FERC license... are interpreted under federal law." *Timberline*, 2006 U.S. Dist. LEXIS 52156 at *5 (citing *United States*

v. So. Cal. Edison Co., 413 F. Supp. 2d 1101, 1124 n. 13 (E.D. Cal. 2006)).⁵

Furthermore, the Federal License in this case specifically states that it "is subject to the terms and conditions of the FPA, which is incorporated by reference as part of this license, and subject to the regulations the [FERC] issues under the provisions of the FPA." (JA 67) (brackets added). Interpretation of instruments like the Federal License that expressly state they are governed by federal regulations raises a substantial question of federal law. *See Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607-608 (4th Cir. 2002) (finding substantial federal question where flood insurance policy was governed by FEMA regulations and would involve the application of federal common law).

The Nissens claim that there is no federal question in Count I because the FPA only regulates licensees, not property owners. (Br. at 4.) However, the land that they own is partially located within the boundary of the federal Project, and this case is about their construction activities on the specific portion of that land that is within the Project. The licensee of that Project (APCO) has acquired property rights over the land, and the licensee (APCO) has authority and

⁵ In *Timberline*, APCO removed a case which was seeking declaration of the parties' alleged vested property rights to construct docks on the Project shoreline. After removal, the district court denied the plaintiff's motion to remand. 2006 U.S. Dist. LEXIS 52156 (W.D. Va. 2006). APCO was eventually granted summary judgment, and this Court took jurisdiction over the matter and affirmed in 2009. *Timberline*, 343 Fed. App'x 915 (4th Cir. 2009). This Court noted that FERC has delegated the regulation of the Project lands to APCO. *Id.* at 917.

responsibilities regarding the Nissens' non-project occupancy and use of that land under the FPA and the Federal License.

The court must assume the truthfulness of the Complaint's allegations and draw all reasonable inferences in APCO's favor. *See Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009) ("[W]hen a defendant asserts that the complaint fails to allege sufficient facts to support subject matter jurisdiction, the trial court must apply a standard patterned on Rule 12(b)(6)"). APCO states sufficient facts to support federal jurisdiction because the Complaint alleges that: (1) APCO operates the Project subject to the Federal License under authority of the FPA (JA 13); (2) APCO has acquired sufficient property rights to regulate use of land within the Project boundary as required by FERC (JA 14); and (3) there is a dispute between the parties because the Nissens have ignored and acted in contravention of APCO's obligation and authority under the Federal License and the FPA. (JA 24.)

b. In Count II, Analysis of Federal Law is Required to Determine the Parties' Rights vis-à-vis the Flowage Easement.

The Flowage Easement gives APCO the right to affect the premises in any manner whatsoever as a result of the operation and maintenance of the Project. (JA 311.) Federal law dictates what is necessary to operate and maintain the Project, and thus interpretation of federal law is required to determine how APCO may "affect" the subject property. *See* 16 U.S.C. §§ 797(e), 799, 803(c) (giving

FERC power to license projects, conditioning such licenses upon conformity with terms of the license and the FPA, and requiring licensees to conform to rules and regulations as FERC may prescribe); *see also* 18 C.F.R. § 12.1 (establishing applicability of FERC regulations to projects licensed under the FPA). Indeed, APCO "must obey FERC's rules and regulations prescribed for the protection of life, health, and property." *DiLaura v. Power Auth.*, 982 F.2d 73, 79 (2d Cir. 1992). In other words, APCO must act as sanctioned by FERC, and an allegation to this effect was made in the Complaint and incorporated by all claims asserted therein. (JA 13) ("Appalachian operates [the Project] pursuant to an order issued by the Federal Energy Regulatory Commission (the "FERC") under the authority of the FPA.") (brackets added).

Notably, the language in the Flowage Easement granting APCO the right to "affect" the subject property in connection with the "construction, operation and/or maintenance" of the Project is carefully crafted to give APCO the specific rights it is required to have under the FPA and the Federal License. (JA 311.) Since its enactment in 1920, the FPA has required licensees to acquire "the right to use or damage the lands or property of others necessary to the *construction, maintenance, or operation* of any dam...." 16 U.S.C. § 814 (emphasis added). Similar language is used in standard Article 5 of the Federal License, which provides that APCO shall acquire "the right to use in perpetuity all lands... necessary or appropriate for

the *construction, maintenance, and operation* of the project." (JA 91) (emphasis added).

In essence, APCO's broad right to "affect" the subject property gives APCO the ability to continuously operate the Project without having to get new terms added to the Flowage Easement each time the applicable FERC requirements change. Because the Flowage Easement gives APCO the right to carry out its obligations to operate the Project in accordance with federal law, federal law necessarily would have to be interpreted to determine the nature of those rights and obligations.

The District Court understood this: stating that the language in the Flowage Easement concerning the "construction, existence, operation and/or maintenance"  of the **Project** proves that the original purpose of the grant "concerned an ongoing obligation, on APCO's part, to operate and maintain the dam and power station— obligations that continue to be monitored and determined through updated Licenses and SMPs." (JA 1082.) **The District Court also properly ruled that reference to the Federal License would be required to determine the outer limits of some of the broad rights granted to APCO in the Flowage Easement.** (JA 1083.) (*citing McCarthy Holdings, L.L.C. v. Burgher*, 282 Va. 267, 273-74, 716 S.E.2d 461, 464-65 (2011)).

- c. **In Addition to the Specific Federal Issues in Each Count of the Complaint, There are Other Federal Issues Necessarily Raised that are Common to Both Counts of the Complaint.**
- i. **Whether APCO has Sufficient Property Rights with Regard to the Nissens' Property as Required by Federal Law is Made Part of Each Count of the Complaint.**

The Nissens make a fallacious straw-man argument when they repeatedly misrepresent APCO's position as being that "by merely being the licensee [of FERC], it can automatically regulate [] private property owners' uses of their land." (Br. p. 12, 19) (brackets added). To the contrary, the Complaint explains the relationship between APCO's duties under the Federal License, the rights granted to it in the Flowage Easement, and the Nissens' actions in violation of APCO's rights and obligations.

As previously noted, provisions of the FPA and the Federal License require APCO to obtain property rights necessary and appropriate to operate the Project. *Supra* at p. 8. Accordingly, as specifically asserted in the Complaint, APCO "owns the land within the Project boundary in fee or, at certain other locations, [] owns flowage right and easement deeds that grant [APCO] the right to submerge the affected land, and regulate use thereof, lying within the Project boundary." (JA 14) (brackets added). Thus, the Complaint not only explains how APCO receives authority from FERC to regulate occupancy and use of Project lands and water in

compliance with federal law, but it also explains that the Flowage Easement entitles APCO to enforce federal law with regard to the portion of the Nissens' property within the Project boundary.

The allegation that APCO has acquired sufficient rights under the Flowage Easement to regulate the Nissens' property is incorporated into both Counts I and II of the Complaint.⁶ Thus, the Nissens' argument that Count I fails to state a claim is unavailing because Count I is underpinned, in part, by the assertion that APCO has obtained sufficient property rights to enforce the FPA-related duties delegated to APCO by FERC through the Federal License.

ii. Interpretation of the Flowage Easement as Expounded by Federal Law is a Necessary Element of Requests for Relief in Both Counts of the Complaint.

Because both Counts of the Complaint are supported by the premise that APCO has obtained sufficient property rights to enforce its FPA-related duties, issues of federal law are an "essential element" of the claims under *Grable* and *Gunn*. "Under Virginia law, a plaintiff seeking a declaration of his rights in an easement must prove 'the facts that give rise to the easement, whether by express

⁶ Count II of the Complaint incorporates all of the issues raised in Count I regarding how the Nissens' actions are in contravention of the FERC License Order and the SMP. In turn, such actions are "inconsistent with the estate, rights and privileges granted to Appalachian in the Flowage Easement." (JA 24.) Thus, the Nissens' argument that all federal issues would disappear with dismissal of Count I of the Complaint is meritless.

grant or reservation, by implication, or by other means." *Timberline*, 2006 U.S. Dist. LEXIS 52156 at *4-5 (quoting *Brown v. Haley*, 233 Va. 210, 355 S.E.2d 568 (1987)).

Interpretation of federal law would be required to resolve the parameters of APCO's FPA-related duties regarding regulation of use of the shoreline. The same is true for whether, under the Flowage Easement, the Nissens are "obliged to suffer, or refrain from doing something on [their] own tenement to the advantage of [APCO]." *Bunn v. Offutt*, 216 Va. 681, 684, 222 S.E.2d 522, 525 (1976).

No matter what legal theory could support judgment for relief in the Complaint, resolution of a federal issue would be necessary. A court would have to consult the  **Federal License** to know what activities would be prohibited by APCO's request to enjoin occupation of land within the Project boundary "except in compliance with the requirements of the FERC License Order and the SMP." (JA 24, 25.) Similarly, federal law would also have to be consulted to declare that: (1) under the FPA and the Federal License, APCO "has the authority and responsibility to regulate uses and occupancies of the Project lands;" and (2) that the Nissens "have acted in contravention of Appalachian's obligations and authority under the FERC License Order and the SMP..." by their construction activities. (JA 23-24.)

There is no alternative theory which would get APCO the relief requested that would not trigger federal question jurisdiction. Thus, for the various claims asserted in the Complaint, "every legal theory supporting the claim requires the resolution of a federal issue." *Flying Pigs, LLC v. RRAJ Franchising*, 757 F.3d 177 (4th Cir. 2014) (emphasis in original). The Nissens' attempt to rely on this quote from *Flying Pigs* is misplaced. The *Flying Pigs*' language is simply another way of stating the first of the *Gunn* Requirements, specifically, the requirement that a federal issue is "necessarily raised." *Gunn*, 133 S. Ct. at 1065. Here, this requirement is satisfied.

2. The Second Requirement of the *Gunn* Analysis is Satisfied Because Federal Issues Necessarily Raised in the Complaint are Actually Disputed.

As stated in the Complaint, there is "an actual and immediate controversy" with regard to the federal issues in this action. (JA 23.) Specifically, the Nissens have created "a direct and immediate dispute by ignoring and acting in contravention of Appalachian's obligation and authority under the FERC License Order and the SMP" and "[their] actions have been detrimental to Appalachian's responsibilities under the FERC License Order and the FPA." (*Id.*) The Complaint additionally alleges that there is an immediate controversy relating to whether the Nissens have acted in contravention to APCO's rights under the Easement Deed.

(JA 25.) Interpretation of the Flowage Easement requires interpretation of federal law. *Supra* at pp. 23-25.

A dispute over interpretation of federal law is not only asserted on the face of APCO's Complaint, but admitted by the Nissens in their Answer. For instance, the Nissens denied APCO's allegation that their activities were "in contravention of the FERC License Order and the SMP..." and "were undertaken notwithstanding Appalachian's authority and obligation under the FERC License Order". (JA 590) (denying paragraph 33 of the Complaint, JA 23). Furthermore, the Nissens denied that the Flowage Easement gives APCO the right to regulate use of their land within the Project boundary as required by FERC. (JA 588) (denying in pertinent part paragraph 11 of the Complaint, JA 14).

Positions taken by the Nissens throughout the course of this litigation further demonstrate that there are disputed federal questions at issue in this case.  For

instance, one of the Nissens' arguments against summary judgment was that there was a question whether APCO's 1960 FERC license or the current Federal License should be consulted when interpreting the language in the Flowage Easement. (JA 1005.) The Nissens also argued against summary judgment in this case on the grounds that APCO is "non-compliant with the Current License and/or SMP ..." (JA 1014.) The Nissens even concluded their brief in opposition to APCO's motion for summary judgment with the argument that there is a dispute over

whether they complied with the SMP, which is part of the Federal License. (JA 1019.)⁷ Thus, the Nissens' own arguments confirm that federal issues are actually disputed in this case. 

3. The Third Prong of the *Gunn* Analysis is Met Because the Federal Issues Raised in APCO's Complaint are Substantial.

The "substantiality inquiry" in a federal question analysis looks to the importance of the issue to the federal system as a whole." *Gunn*, 133 S. Ct. at 1066. The federal question in the instant matter, specifically, interpretation of federal law as it relates to operation of the Project, is substantial because the Federal Government has an "obvious concern in maintaining control over [the] engineering, economic, and financial soundness" of water power resource projects licensed by FERC. *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152, 172 (1946). Therefore, "[t]he meaning of the FERC license is a substantial and 'important issue of federal law that sensibly belongs in a federal court.'" *Timberline*, 2006 U.S. Dist. LEXIS 52156 at *5 (quoting *Grable*, 545 U.S. at 315). As was noted in *Timberline*, "the Government has a direct interest in the availability of a federal forum to vindicate its own administrative action, and those

⁷ On appeal, the Nissens continue to dispute the federal issues. *See, e.g.*, Brief at pp. 46-48 (asserting their interpretation of APCO's 1960 License to argue that the District Court erred in granting summary judgment).

affected by FERC licenses may find it valuable to come before judges used to federal regulatory matters." *Id.* (internal edits and citations omitted).

The Federal Government's direct interest in overseeing matters involving the Federal License is especially strong because such federal issues are "significant to the federal system as a whole," as opposed to "only being significant to the particular parties in the immediate suit." *See Gunn*, 133 S. Ct. at 1066. The following excerpt from the Western District's opinion in *Pressl*, which has been quoted nearly verbatim by other district court opinions in the Fourth Circuit,⁸ succinctly explains why issues regarding the Federal License constitute an important federal question:

[APCO's] license from FERC is sanctioned under the FPA, "a complete scheme of national regulation, promot[ing] the comprehensive development of the water resources of the Nation." *Albany Engineering Corp., v. Federal Energy Regulatory Commission*, 548 F.3d 1071, 1075, 383 U.S. App. D.C. 384 (D.C. Cir. 2008) (citing *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 180, 66 S. Ct. 906, 90 L. Ed. 1143 (1946)). Specifically, FERC's goal is to administer a uniform oversight of its licensees operating hydroelectric projects. *Id.* Therefore, the federal issue in this case is substantial, in order to ensure that FERC's Congressionally mandated purpose under the FPA is not diverted and the FERC orders under the project remain consistent and uniform.

2015 U.S. Dist. LEXIS 136075 at *17-18 (W.D. Va. 2015) (emphasis added)(on appeal, 4th Cir. record no. 15-2348).

⁸ *See, e.g., Snyder v. S.C. Elec. & Gas Co.*, 2016 U.S. Dist. LEXIS 54032 (D.S.C. 2016); *Soles v. S.C. Elec. & Gas Co.*, 2016 U.S. Dist. LEXIS 52744 (D.S.C. 2016).

The United States Supreme Court has stated "The closeness of the relationship of the Federal Government to these projects and its *obvious concern* in maintaining control over their engineering, economic and financial soundness is emphasized by... [provisions of the FPA]." *First Iowa*, 328 U.S. at 172 (brackets and emphasis added). Thus, this suit filed by APCO involves a substantial issue of federal law considering the Federal Government's *obvious concern* in controlling projects licensed by FERC.

Another issue that factors into the substantiality analysis is whether or not resolution of a "federal question will control numerous other cases (*i.e.*, the issue is not anomalous or isolated)." *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 570 (6th Cir. 2007). Here, any decision made regarding the federal issues in this case would set precedent applicable to other cases involving FERC licensees because of the common terms found in many FERC licenses,⁹ and the fact that numerous licenses incorporate plans similar to the SMP.¹⁰

⁹ For example, as part of its scheme of national regulation to promote the comprehensive development of the Nation's water resources, FERC includes standard license articles such as those found in APCO's Federal License when issuing licenses. *See Standardized Conditions for Inclusion in Preliminary Permits and Licenses Issued Under Part I of the Federal Power Act*, 54 F.P.C. 1792 (1975). Also, land use articles like Article 415 in the Federal License have "been included in Commission licenses issued since 1980...." *Appalachian Power Co.*, 82 FERC ¶ 62,109 (1998).

¹⁰ *See, e.g., Duke Energy Carolinas, LLC*, 153 FERC ¶ 62,134 (2015) (Catawba-Wateree project); *Alabama Power Co.*, 153 FERC ¶ 61,298 (2015)(Martin Dam

Given the similar requirements found in FERC licenses across the country, rulings in the instant case would have a ripple effect throughout the regulatory scheme set up by Congress to control development of the Nation's water resources.



Therefore, the federal issues decided in this action would not be "fact-bound and situation specific" as the Nissens argue. (Br. pp. 35-36.) If a court's decision is going to have such a clear impact on the implementation of the FPA—and an important federal interest—a federal court should make such a decision.

4. The Fourth Prong of the *Gunn* Analysis is Met Because Federal Issues are Capable of Resolution in Federal Court Without Disrupting the Federal-State Balance.

In satisfaction of the final requirement of the *Gunn* analysis, the federal issues at play in this case are "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 133 S. Ct. at 1065. "In determining whether finding jurisdiction would disturb the balance of federal and state judicial responsibilities, the Court must consider whether exercising jurisdiction would 'herald an enormous shift of traditionally state cases into federal courts.'" *Bd. of Comm'rs v. Tenn. Gas Pipeline Co., LLC*, 29 F. Supp. 3d 808, 863 (E.D. La. 2014) (quoting *Grable*, 545 U.S. at 319). In this case, "federal jurisdiction to resolve genuine disagreements over the terms of FERC licenses (like that exercised to resolve disagreement over federal tax law in project); *Sabine River Authority of Texas*, 148 FERC ¶ 62,171 (2014)(Toledo Bend project).

Grable) will portend only a microscopic effect on the federal-state division of labor." *Pressl*, 2015 U.S. Dist. LEXIS 136075, at *19 (internal quotations and edits omitted) (citing *Grable*, 545 U.S. at 314). As explained in *Timberline*, "it will be the rare state title case that raises a contested matter of federal law." 2006 U.S. Dist. LEXIS 52156 at *6. Thus, resolution of the federal issues in this case would not result in an inappropriate shift of state-law cases into federal courts.

Moreover, the FPA does not evidence an intent to keep cases like the current action out of federal court. To the contrary, the fact that the FPA includes 16 U.S.C. §825p shows that Congress expressly provided a federal forum for the cases like the one at bar. *See Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn., LLC*, 103 F. Supp. 3d 1000, 1025 (D. Minn. 2015) (holding that Natural Gas Act's analog to the FPA's §825p "is evidence of the fact that Congress affirmatively sought to provide a federal forum" and dispute of federal issues in such cases do not disrupt the Federal-State balance).

Recently, the district court for South Carolina found federal jurisdiction over a short case involving a FERC licensee and a landowner. *Bausinger v. S.C. Elec. & Gas Co.*, 2016 U.S. Dist. LEXIS 51943 (D.S.C. 2016). The Court noted that the source of the utility's duty of care to operate the Lake Murray Dam required reference to the rules and regulations of the FPA and FERC. *Id.* at *18. In looking at the fourth prong of the *Gunn* analysis, the court held that "the fact that the FPA

includes §825p, which provides federal courts 'exclusive jurisdiction' over cases involving the FPA, demonstrates that Congress affirmatively sought to provide a federal forum for cases like this one." *Id.* at *23.

Congress included 16 U.S.C. §825p in the FPA to give federal courts "exclusive jurisdiction of... all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of the [FPA] or any rule, regulation, or order thereunder." (brackets added). The present case falls under §825p because it was filed to enjoin a violation of, and enforce a duty created by, the Order issuing the Federal License. That said, the Complaint stated that the District Court had "original jurisdiction over this action under 28 U.S.C. § 1331," and did not rely solely on 16 U.S.C. § 825p for jurisdiction. Thus, the Nissens' heavy reliance on a Sixth Circuit decision to attack jurisdiction in this case is misplaced.¹¹ Obviously, Congress would not direct cases like this to federal court

¹¹ The Nissens mainly cite *Columbia Gas Transmission, LLC v. Singh*, 707 F.3d 583 (6th Cir. 2013), for its holding that a statute similar to 16 U.S.C. §825p did not, by itself, provide federal jurisdiction. (Br. p. 29). However, the holding in *Singh* is readily distinguishable from the present matter. In *Singh*, the court held that it was not clear from the complaint that a federal issue was disputed. 707 F.3d at 589. Here, on the other hand, the District Court noted that the Complaint makes "explicit references to the specific sections of the FERC license and the SMP that the Defendants are alleged to be in violation of." (JA 1078.) The present matter is further distinguishable from *Singh* by the fact that, here, a dispute over interpretation of federal law is not only asserted on the face of the Complaint, but admitted by the Nissens in their pleadings and confirmed by the positions taken by the Nissens throughout this litigation.

if it thought doing so would disrupt the state-federal balance that Congress itself established.

* * *

Because the issues raised in APCO's Complaint meet all the requirements to find federal jurisdiction under the substantial federal question doctrine, the District Court plainly had original jurisdiction under 28 U.S.C. §1331, and 16 U.S.C. §825p.¹²

II. SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE THE NISSENS FAILED TO COME FORWARD WITH ANY EVIDENCE CREATING A GENUINE ISSUE OF MATERIAL FACT.

A. Rule 56 Requires More Than Conclusory Assertions Made Without Evidential Support.

"A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotations omitted). All factual contentions must be made or opposed by the methods set out in Rule 56(c). A party asserting that a fact is genuinely disputed must support the assertion by citing

¹² For the same reasons the District Court correctly denied the Nissens' motion to dismiss, it also properly denied their motion for reconsideration. (JA 778.) That motion relied heavily on *Jeffrey Lake Dev., Inc. v. Cent. Neb. Public Pwr.*, 2011 WL 7122188 (D. Neb. 2011), which the District Court found to be distinguishable on "ample grounds", including the fact that the complaint in that case focused exclusively on interpretation of a lease, and did not seek a finding that the defendants were violating any regulations or orders issued under the FPA. (JA 780-81.)

to particular parts of the record or by submitting affidavits or declarations based on personal knowledge. F.R.Civ.P. 56(c). The party opposing summary judgment on the ground that there are disputed facts also must present *substantial* evidence.

Liberty Lobby, 477 U.S. at 249-252.

In opposition to APCO's Motion for Summary Judgment, the Nissens failed to submit any affidavits or declarations in opposition to the Motion. Thus, they failed to properly address APCO's assertions of facts, and the District Court could consider the facts set forth by Appalachian as undisputed for purposes of the Rule 56 motion. F.R.Civ.P. 56(e)(2).

B. The Summary Judgment Ruling was Correct on the Interpretation of the Flowage Easement, Including APCO's Right to Regulate Construction of the Dock.

1. The Flowage Easement Gives APCO the Right to Remove Any Structures, Such as the Nissens' Partially Completed Dock.

The District Court noted that "Defendants' argument that APCO does not have a property interest such that it can compel the Nissens to cease construction of the dock... is at odds with the plain language of the Flowage Easement." (JA 818.) The Flowage Easement provides APCO with the right to overflow and/or affect the premises as a result of the construction, existence, operation and/or maintenance of the dam and power station, and the impounding of the waters. (JA 311.) It also grants APCO the right:

. . . to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet.

(JA 312.)

Under this language, APCO can remove any structure, improvement or object below the contour elevation 800 FMSL, either that which was existing on the date of the document in 1960, or that which may exist at any time in the future. A boat dock is a structure, or an improvement, or an object. APCO can remove these things at its discretion.

APCO's right to remove structures from the Nissens' property is very broad. APCO can remove objects that are located below the 800 foot contour of the premises. There is no requirement that the structure or object being removed be interfering with the impounding of the waters. The District Court stated:

The Flowage Easement vests APCO with the power to remove structures located below 800 FMSL at any time and for any reason. There is no language in the instrument limiting APCO's ability to exercise this right to situations where the structures to be removed are interfering with the impounding of waters or the operation of the Smith Mountain Hydroelectric Dam. Thus I reject Defendants' contention that APCO may only exercise the rights granted to it by the Flowage Easement when necessary to ensure that waters may be impounded or that the operation of the dam is not interfered with.

(JA 818.) In the Summary Judgment Order, the District Court observed that this right to remove should be interpreted under Virginia law by a reasonableness

inquiry. (JA 1081-83.)¹³ Here, APCO simply seeks to enforce the SMP, which was updated with input from state agencies, counties, business organizations, homeowner groups, other stakeholders, and the public (JA 126-28), and then approved by FERC. *See, Appalachian Power Co.*, 146 FERC ¶ 62,083 at pp. 4-5. The Nissens' argument that APCO is powerless to restrict any dock-building, dumping upon, and stripping of the vegetated shoreline would lead to chaos along the Project boundary. The Court plainly and correctly recognized the flaws in the Nissens' attempt to contort the Flowage Easement's language.

a. The Nissens' Reliance on the 1960 License is Misplaced and Ignores the Powers Entrusted to APCO in that Document.

The Nissens argue that the Flowage Easement only granted APCO a limited privilege to flood the land and to remove structures and debris that could obstruct the waterway. (Br. p. 47.) They claim this is evident from the facts at the time the parties entered the Flowage Easement in 1960 – specifically APCO's 1960 Federal License – but they get the facts all wrong.

First, they incorrectly claim that under the terms of the 1960 Federal License, APCO had no obligations to FERC with regard to shoreline use or construction on the shoreline. (Br. p. 46.) In that license, the Project was described as including all lands enclosed by the Project boundary and interests in lands

¹³ The District Court stated "Under this analysis, the FERC License and SMP is used to ensure that APCO does not use its unfettered easement grant outside of what is needed to run the Smith Mountain Lake project." *Id.* at fn 3.

necessary or appropriate for purposes of the Project, which include recreation. (23 F.P.C. 624, at Finding Paras. (2)(a) and (7).) Article 17 of the License required APCO to retain the possession of all project property covered by the license as issued or later amended including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use, and required that that none of such properties necessary or useful to the project could be voluntarily sold, transferred, abandoned, or otherwise disposed of without the Commission's approval.

Therefore, starting with the 1960 License, the Project included all lands located below the 800 FMSL elevation contour, and APCO had the requirement to acquire and retain possession of that property. APCO met this requirement when it "obtained property rights to all Project lands (those below 800 FMSL), and either owns them in fee simple or has obtained rights of occupancy and use via flowage rights and easement deeds." (Summary Judgment Order, JA 1077.)

In addition, the 1960 License *incorporated* the FPA, and rules and regulations of the Commission. (23 F.P.C. 624, at Ordering Para. A.) Therefore, the 1960 license incorporated into it section 10(c) of the FPA (16 U.S.C. 803(c)), which required licensees to conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Taken together, these various provisions indicate that the Commission in

the 1960 license expected APCO to obtain and thereafter retain all property rights necessary for its project in order to comply with Commission requirements, and that those requirements could be as dictated by the Commission in the future. The District Court recognized that "the 1960 FERC License provided the possibility that FERC would issue new licenses in the future providing new rules and regulations." (JA 1083.) The license contemplated that APCO could, if directed by the Commission, institute a wide variety of shoreline protections and regulations.

Thus, the Nissens are incorrect when they claim that under the 1960 license, APCO had no obligation to regulate shoreline uses. (Br. p. 46.) They also were incorrect when they claimed in the proceedings below that under the 1960 License, APCO had no requirement to acquire fee title or the right to use in perpetuity all property necessary to operate the project, including project reservoirs. (JA 1008.) Their interpretation of the 1960 license has been wrong and remains so.

b. The Nissens' Misinterpret Amendments to the License.

The Nissens also are wrong in their interpretation of the 1998 amendment to APCO's Federal License. They claim that this amendment required APCO to permit non-project uses of Project lands. (Br. p. 47.) This amendment, which added Article 41 to the 1960 Federal License, did not require APCO to permit non-project uses; rather, it just gave APCO the *opportunity* to do so at its discretion

without going to FERC for prior approval in all cases. *Appalachian Power Co.*, 82 FERC ¶ 62,109 (1998). Of course, it is these types of FPA nuances which must be taken into account when interpreting the Federal License, and the Flowage Easement, and this is why interpretation of them is a matter for the federal court. *Timberline*, 2006 U.S. Dist. LEXIS 52156 at *5 (W.D. Va. 2006)("[t]he terms of the FERC license... are interpreted under federal law").¹⁴

The Nissens also attack the decision of the District Court for using the 2009 Federal License and SMP to interpret the breadth of the Flowage Easement. In fact, they even argued below that the question of whether to use the 1960 Federal License or the 2009 Federal License to interpret the Flowage Easement was a question of material fact that precluded summary judgment. (JA 1065.) However, the District Court correctly noted that determining the nature of an interest in land conveyed by deed is a question of law. (JA 1081)(citing *Bailey v. Town of Saltville*, 279 Va. 627, 633, 691 S.E.2d 491, 494 (2010)). Summary judgment was appropriate.

The District Court also properly rejected the Nissens' argument that Article 21 of the 1960 Federal License shows that the Flowage Easement has a limited

¹⁴ The Nissens also are wrong when they argue that because of the incorporation of the SMP into APCO's new license in 2009, APCO was obligated to obtain additional property rights "to the SMP's project boundary" within 5 years. (Br. at 7.) APCO had the obligation to acquire sufficient property rights beginning with the 1960 License (*supra* p. 8) and the new license in 2009 did not change this or obligate APCO to acquire more rights.

purpose. (JA 1008.) Article 21 of the 1960 Federal License specifically stated that "The Licensee shall, *prior to* flooding, clear all lands" 23 F.P.C. 624. The specific obligation in Article 21 of that license was limited to the clearing that was necessary *prior* to flooding the Project. The District Court correctly held that the Flowage Easement gave APCO more than rights that ended upon the filling of the reservoir because APCO was granted the right to enter the premises *at any time, and from time to time*, at its discretion, to remove therefrom any and all buildings, structures, improvements, and other objects. The Nissens want this Court to interpret the terms "enter . . . at any time and from time to time" to mean instead to enter only during a limited time, *i.e.* prior to flooding the Project. This construction of the Flowage Easement impermissibly requires that the language in the instrument be discarded and re-written.¹⁵

The Nissens further argue that if the Flowage Easement would have prevented the construction of a dock, then it would have expressly said so. (Br. p. 54.) However, the Flowage Easement granted APCO the right to remove, at APCO's discretion, any and all "buildings, structures, improvements ... and other objects and debris of any and every kind or description ... " A dock falls squarely

¹⁵ The Nissens suggest that the title of the Flowage Easement proves that the purpose of the instrument was just to give APCO the right to flood the property. (Br., p. 45.) The Nissens ignore both the substance of the document and its actual title, which is: "Flowage Right and Easement Deed Smith Mountain Combination Hydro Electric Project Upper Reservoir". (JA 311-12.) The document shows that its purpose was to facilitate operation of the Project. (*Id.*)

within that language. Therefore, the Nissens' dock-related arguments do not in any way create a question of genuine issue of material fact that precluded the entry of summary judgment.

2. The Retained Right "To Cross" the Premises is not a Right to Build A Structure.

In a twisting of the actual language in the document, the Nissens state that they have "an express and reserved right in the flowage easement to use their property for recreational purposes." (Br. p. 50.) However, they have misstated the language of the Flowage Easement, which provides:

IT IS UNDERSTOOD AND AGREED BY AND BETWEEN THE PARTIES HERETO THAT:

1. Grantors shall have the right to possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including (a) *the right to cross said land to reach the impounded waters for recreational purposes* and for obtaining their domestic water supply and water for their livestock and (b) the right to extend and maintain necessary fences across said land and into the impounded waters for a sufficient distance to prevent livestock from wading around said fences;

(JA 312)(emphasis added).

The Nissens' reserved **right "to cross"**  said premises to reach the impounded waters for recreational purposes is not a right to "build" a structure, such as a boat dock, within the Project boundary. The right is expressly limited to a right "to cross." Crossing is defined as "to pass over; go from one side to the other of", or "to go across". Webster's New Twentieth Century Dictionary, at 434.

This language contemplates that the Grantors retained a right to pass over the premises below the 800 foot contour to reach the impounded water for a recreational purpose. This means a right to walk over the land to engage in activities at the water such as swimming, wading, etc. Unlike the broad rights granted to APCO, this right was limited to a right "to cross", not to build a 3,520 square foot boat dock below the 800 foot contour.

A right of ingress and egress along an easement does not provide the holder of the dominant estate the right to build a structure upon the servient estate. *Nisanian v. Sirohi*, 243 Va. 337, 339-40, 414 S.E.2d 604, 606 (1992)(holding right of ingress and egress is not a right to build brick columns within the easement); *see also, Kwolek v. Swickard*, 944 N.E.2d 564, 572 (Ind. Ct. App. 2011)(holding right to use for ingress and egress does not confer the additional right to park vehicles within the easement); *Leposky v. Fenton*, 100 Conn. App. 774, 919 A.2d 533, 537 (2007)(same); *Franco v. Piccilo*, 49 A.D.3d 1182, 853 N.Y.S.2d 789, 789 (N.Y. App. Div. 2008) (same); *Cleveland v. Clifford*, 121 Ohio App. 3d 59, 698 N.E.2d 1045, 1047-48 (1997) (same).

A dock is a structure and an improvement. Building a dock on the portion of said premises below the 800 foot elevation contour would be inconsistent with the rights and privileges granted to APCO, which expressly include the right to remove

any structures or improvements or objects which are located there, at APCO's discretion, from time to time or at any time.

3. The Retained "Right to Cross" Cannot Be Interpreted So Broadly that it Conflicts with APCO's Right to Remove. 

The Grantors' reserved right was a right to possess and use said premises *if such use was not inconsistent with* the rights granted to APCO. (JA 312.) The Nissens' argument that the right of "crossing" negates APCO's broad rights to prohibit unauthorized construction is flatly inconsistent with the estate, rights, and privileges granted to APCO. Logically, this possession and use could not be in the form of unfettered "recreational" construction, which use would be expressly contrary to APCO's right to remove *any* structures.

Notably, the Flowage Easement specifically explained what type of construction below 800 FMSL would not be inconsistent with APCO's rights - - the right to extend and maintain fences. This right to build a type of improvement is contained in a separate subparagraph than the language regarding the right to cross to reach the waters. *See supra* at p. 45. This fact also provides evidence that the right to cross is different from a right to build a type of improvement, and lays waste to the Nissens' passing comment that the Flowage Easement does not specifically prohibit construction. (Br. p. 50.)

The District Court expressly rejected the Nissens' argument that the "right to cross" provides the right to construct anything as long as it is constructed for a recreational purpose. The District Court stated:

Moreover, the provision of the Flowage Easement retaining to the grantors "the right to cross said land to reach the impounded waters for recreational purposes" does not affect APCO's right to remove structures located below 800 FMSL. Giving these words their natural and ordinary meaning, the right to cross the land to access the lake for recreational purposes does not carry with it a right to build structures on that land, even if those structures are in furtherance of recreational use of the waters.

(JA 819.)

It is a settled rule of construction, both in deeds and wills, that if an estate is conveyed, or an interest is given, or a benefit bestowed in one part of the instrument, by clear, unambiguous and explicit words, such estate, interest or benefit is not diminished nor destroyed by words in another part of the instrument, unless the terms which diminish or destroy the estate before given be as clear and decisive as the terms by which it is created. *Greenan v. Solomon*, 252 Va. 50, 55, 472 S.E.2d 54, 58 (1996). The Nissens' interpretation simply tortures the language employed in the Flowage Easement.

The ruling in this case that the Flowage Easement gives APCO the right to stop unfettered construction and require removal of a dock that does not meet the SMP is consistent with the District Court's precedent. In *Arthur*, the Court  interpreted a flowage easement containing the same language found here, and held

that "APCO's easement deed expressly allows APCO to require or effect the removal of non-conforming structures like the ones at issue here." *Arthur*, 39 F. Supp. 3d at 797; *see also Pressl*, 2015 U.S. Dist. LEXIS 136075 at *20 (holding that similar flowage easement "provides APCO with the ability to determine the necessary steps that a party must take to build a dock to begin with"); *Longenecker*, Case No. 7:00-cv-00731 (W.D. Va. 2001)(granting summary judgment to APCO requiring defendants to remove structures located below the contour elevation 800 FMSL). The District Court's summary judgment ruling properly applied the governing law and language of the Flowage Easement.

C. Summary Judgment was Correct Regarding the Vegetation Issue Because the Facts Were Undisputed that the Nissens Removed Vegetation in Violation of the SMP and Flowage Easement.

A party opposing summary judgment on the grounds that a material fact is genuinely disputed must support the assertion by citing to particular parts of the record or by submitting affidavits or declarations based on personal knowledge. F.R.Civ.P. 56(c). The Nissens did neither.

The evidence in the record was undisputed that the Nissens removed vegetation within the Project boundary without APCO's permission. (Parcell Decl. at ¶ 13, JA 865.) Another APCO witness explained that based on review of prior aerial photography, the property had been mostly cleared of the pre-existing trees and bushes. (Bryant Decl. at ¶ 8, JA 972.)

The District Court correctly held that the removal of the vegetation violated the SMP and the Flowage Easement. (JA 1086). Under the Flowage Easement, APCO has the right to affect the premises in any manner whatsoever as the result of the operation and/or maintenance of the dam and power station. (JA 311.) This gives APCO the right to affect the Nissens' property that is within the Project boundary in any manner necessary to operate the Project.

With regard to vegetation, the SMP has certain Vegetative Cover Regulations, which require that "[v]egetation within the project boundary must be preserved if present." (JA 192-97.) Vegetation removal leads to introduction of contaminating matter into the Project boundary and impounded waters. In addition to typical erosion concerns, clearing vegetation along the shoreline can lead to the introduction of other contaminants from rain runoff such as animal waste, chemicals, and lawn clippings. These problems can become compounded as clear-cut shoreline can attract nuisance wildlife. (JA 195.)

A property owner may trim vegetation and should he wish to engage in extensive vegetation removal, may apply to APCO for a permit to modify or remove vegetative cover within the Project boundary. (JA 194.) By removing virtually all the vegetation that was within the Project boundary without APCO's permission, the Nissens acted in contravention of APCO's obligations and authority under its FERC license and the SMP. *See Pressl*, 2015 U.S. Dist. LEXIS 136075,

at *25, fn 9 ("APCO's ability to control... vegetation surrounding the Project is the same purpose as the original easement grant, to run the hydro electric dam....").

The virtual clear cutting of vegetation within the Project boundary by the Nissens also was a use of the premises that was "inconsistent with the estate, rights and privileges herein granted to Appalachian". (JA 312.) The Nissens' protests that they did not "virtually clear cut" the land are both unsupported by evidence and irrelevant. The uncontradicted record shows that they stripped all the vegetation but two trees. (JA 972.) The District Court properly granted summary judgment on this issue.

D. Summary Judgment Was Proper on the Road and Fill Issues Because The Nissens Constructed A Road and Dumped Fill In Violation Of The SMP And The Flowage Easement.

The Nissens did not deny that they constructed a road, (JA 22, 589) and APCO's witness confirmed its location, part of which lies within the Project boundary. (Bryant Dec. at ¶ 10, JA 972.) In their brief below, the Nissens conceded that they intended to use the road as a boat ramp. (JA 1017.)

The Flowage Easement gives APCO the right to enter upon the Nissens' Property to remove any and all improvements and other objects and debris of any and every kind which are located below the contour elevation 800 feet. (JA 312.) An "improvement" is defined as: "A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere

repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes." BLACKS' LAW DICTIONARY, 520 (6th Abridged Ed. 1991); *see also, Sellers v. Bles*, 198 Va. 49, 55, 92 S.E.2d 486, 490 (1956) (noting that the term improvement can be defined as "a valuable addition, or betterment, as a building, clearing, drain, fence, etc., on land.")

The District Court was correct when it held:

In this case, the Nissens' road fits the definition of the term "improvement." Construction of a road, even a gravel one, requires changes in a property to allow the road to be utilized. The Nissens admit to grading the land and adding gravel as a base to construct the road. Defs. And Countercl. Pls. answer to interrog. No. 10. Therefore, the road construction was an improvement in violation of APCO's Flowage Easement, thus triggering APCO's power to enter the Nissens' property and remove the road.

(JA 1089.)

APCO could not allow the construction of the road because under the SMP, roads and boat ramps are not permitted on shoreline that has been designated as Low Density Single Family Residential. (JA 159.)

The Nissens' concession that they built the road to use it as a boat ramp (JA 1017) reveals the fallacy of their later argument. Specifically, and again without evidentiary support, they contended that the road was merely an "access path" that is otherwise allowed under the Vegetative Cover Regulations of the SMP. (JA 196, 1019.) This argument is meritless.

What the Nissens did is entirely different from the winding access paths around existing vegetation that are described in the SMP. (JA 195-96.) As shown in the photographs in the record (JA 979-91), they cut almost all of the vegetation from below the Project boundary from left edge to right edge of the lot, leaving only two remaining trees. (See JA 983-84.) They constructed the road in a straight line after stripping the vegetation. This evidence is uncontested.

This was not the SMP's allowable siting of an access path "to fit into the character of the land", in which "the path should avoid existing vegetation". (JA 195.) Rather, this was a calculated plan to rid the shoreline of trees affecting their view of the water and the giant dock that they wanted to build. They cannot claim now – after providing no evidence below – that they somehow complied with the SMP. There is no genuine issue of material fact: building a road and depositing fill on Project land was in violation of the Flowage Easement, and the SMP.

The evidence showed that the Nissens caused dirt, gravel, and debris to be placed upon the portion of the property below the 800 foot contour elevation. (Bryant Decl. ¶ 9, JA 973.) This was in violation of the Flowage Easement. (JA 1089-90.) The Nissens assert, again without doing so by affidavit, that they added fill to the road in an effort to prevent erosion, and that this is a permitted use under the SMP. (Br. pp. 52-53.) Their attempt to apply the SMP to excuse their actions is incorrect. The SMP specifically prohibits "the depositing or stockpiling of

material within the Project boundary . . . with the exception of only the minimal amounts of fill necessary for the proper design and installation of an erosion control structure." (JA 192.) The road is a road, to also be used as a boat ramp. (JA 1017.) It is not an erosion control structure, like rip rap or a bulkhead. (JA 185-91.) Therefore, summary judgment was proper.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT NO DISPUTE OF MATERIAL FACT EXISTED AS TO THE NISSENS' CLAIMS THAT APCO LACKED RIGHTS TO REMOVE THE DOCK.

The final issue presented for review in this appeal is stated by the Nissens as follows: "Whether, with respect to the Nissen Counterclaim's third request for declaratory relief, the District Court erred in holding that the Nissens failed to state a plausible basis on which the court could declare that APCO lacked sufficient property rights to compel them to remove their dock." (Br. p. 3.) This issue was effectively disposed of in the Summary Judgment Order when the Court held that "no dispute of material fact exists that [the] Nissens' dock violates APCO's rights under the Flowage Easement, FERC Orders, and SMP." (JA 1085.)

The District Court noted that the Nissens' "have failed to state a plausible basis on which [the Court] could declare that APCO lacks sufficient property rights to compel them to remove the dock." (JA 819.) This observation was consistent with several other cases that were directly on point. *Arthur*, 39 F. Supp. 3d at 797 ("APCO's easement deed expressly allows APCO to require or effect the removal

of non-conforming structures like the ones at issue here."); *Longenecker*, 2001 U.S. Dist. LEXIS 27185, at *3 (APCO's "claim for declaratory judgment and injunctive relief is amply supported by the Flowage Right and Easement Deed."); *see also Pressl*, 2015 U.S. Dist. LEXIS 136075, at *22 (holding that similar flowage easement "provides APCO with the ability to determine the necessary steps that a party must take to build a dock to begin with").

The Nissens failed to make sufficient allegations to nudge their claim for declaratory relief from "possible" to "plausible." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). Furthermore, just because the Nissens alleged in their pleading how they interpret the Flowage Easement, this does not mean that the District Court had to accept such conclusory allegations as true. *See Eastern Shore Markets, Inc. v. J.D. Assoc. Ltd.*, 213 F.3d 175, 180 (4th Cir. 2000) ("While we must take the facts in the light most favorable to the plaintiff, we need not accept the legal conclusions drawn from the facts.") Indeed, from precedent binding upon the District Court, the Nissens' conclusions of law regarding APCO's rights under the Flowage Easement were clearly incorrect.

CONCLUSION

This is a case involving a federal project governed by a Federal License under the FPA. The case belonged in federal court, and the District Court properly

ruled on all the claims. For the foregoing reasons, the District Court's well-reasoned decision should be affirmed.

ORAL ARGUMENT STATEMENT

Appellees do not believe oral argument is necessary in this case. We will be happy to participate in oral argument if the Court so desires.

Respectfully submitted,

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I hereby certify that on this 31st day of May, 2016, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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