

RECORD NO. 15-2348

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

**RICHARD A. PRESSL;
THERESA PRESSL,**

Plaintiff - Appellant,

v.

APPALACHIAN POWER COMPANY,

Defendant - Appellee,

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

**RESPONSE BRIEF OF APPELLEE
APPALACHIAN POWER COMPANY**

Matthew P. Pritts (VSB # 34628)
Frank K. Friedman (VSB # 25079)
C. Carter Lee (VSB # 78731)
WOODS ROGERS, PLC
10 South Jefferson Street, Suite 1400
Roanoke, Virginia 24011
(540) 983-7600 Telephone
(540) 983-7711 Facsimile

Counsel for Appellee

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

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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:
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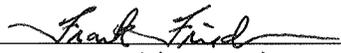
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STATEMENT OF THE CASE

This appeal involves proposed construction and development on the shoreline and waters of a federal hydroelectric project that is regulated by Appalachian Power Company ("APCO") under a license from the Federal Energy Regulatory Commission ("FERC") and whether threatened construction and development within the federal project are consistent with requirements imposed by the governing federal license and federal law. Pursuant to the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.*, APCO's license was issued under FERC's authority to manage hydroelectric projects affecting bodies of water over which Congress has jurisdiction. The federal project at issue in this case is known as the Smith Mountain Hydroelectric Project (the "Project"). The appellants, Richard A. Pressl and Theresa M. Pressl (the "Pressls"), own property that is partially within the Project boundary.

The Pressls commenced this action against APCO by filing a Complaint for Declaratory Judgment (the "Complaint") in state court. (JA 18-36.) The Complaint sought various forms of declaratory relief relating to whether APCO could regulate the Pressls' activity on property adjoining and under Smith Mountain Lake—a lake which owes its existence to APCO's construction and operation of a hydro-electric power generation plant. (*Id.*) Indeed, the capstone request for relief in the Complaint was the Pressls' request for a declaration that

they "be allowed to use their property in any manner not inconsistent with the maintenance of a dam and hydro-electric power generation plant operated by APCO." (JA 35-36.)

After APCO removed the Pressls' lawsuit to the Western District of Virginia and moved to dismiss the case, the Pressls filed a motion to remand for lack of federal jurisdiction. (JA 165-66.) The District Court considered the parties' motions and eventually denied the Pressls' motion to remand and granted APCO's Rule 12(b)(6) motion to dismiss. (JA 500.) Looking first at the motion to remand, the District Court noted that in declaratory judgment cases, courts should consider the coercive suit that the defendant could bring against the plaintiff in such proceedings. (JA 491.) In this case, APCO could have sought injunctive relief in federal court as it and others have done on numerous occasions. (JA 492.) The District Court also held there was federal jurisdiction over the lawsuit because, among other things, the Court would have to interpret the terms of APCO's license with FERC to determine the extent of the Pressls' and APCO's rights. (JA 492-96.) With regard to the motion to dismiss, the District Court granted this motion in favor of APCO based on the Pressls' failure to exhaust administrative remedies and on substantive grounds. (JA 496-99.)

STATEMENT OF FACTS

A. APCO Operates the Project Subject to a Federal License.

1. The Project and Origins of Smith Mountain Lake.

APCO operates the Project on Smith Mountain Lake and Leesville Lake in Virginia. (JA 21.) In addition to the dams and powerhouses, the Project includes “[a]ll lands, to the extent of the licensee’s interests in those lands, enclosed by the project boundary. . . .” (JA 300-01) (brackets added). The Project boundary for Smith Mountain Lake generally conforms to the contour elevation 800 feet above mean sea level. (JA 265.) Smith Mountain Lake and Leesville Lake were from their very inception, and still are, creatures of a license issued to APCO by FERC for development and operation of the Project. (JA 260.)

2. FERC Delegates its FPA-Related Duties and Responsibilities to Licensees but Retains Ultimate Control Over the Hydroelectric Projects it Licenses.

FERC is a federal agency, formerly known as the Federal Power Commission, created under the FPA. *See* 16 U.S.C. §§ 791a *et seq.* Congress gave FERC the authority to issue licenses for the development and operation of hydroelectric projects "across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States" 16 U.S.C. § 797(e). Section 10(a)(1) of the FPA requires that any project for which FERC issues a license shall be best adapted to a comprehensive plan to improve or

develop commerce, protect the environment, and for other beneficial public uses.

16 U.S.C. § 803(a)(1).

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 Company*, 90 FERC ¶ 61,249 (2000). When licensees violate the FPA or their license, the federal government may take over their project. *Northern States Power Co. v. Federal Power Commission*, 118 F.2d 141, 143 (7th Cir. 1941).

3. APCO’s Current License to Operate the Project.

The Project is required to be licensed under the FPA because it is located on a navigable waterway of the United States. (JA 260.) By Order issued December 15, 2009, FERC issued a new and amended license (“Federal License”) to APCO for the Project, effective April 1, 2010, for a period of thirty years. (JA 260-339.) The Federal License expressly provides 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 300) (brackets added).

4. The Shoreline Management Plan.

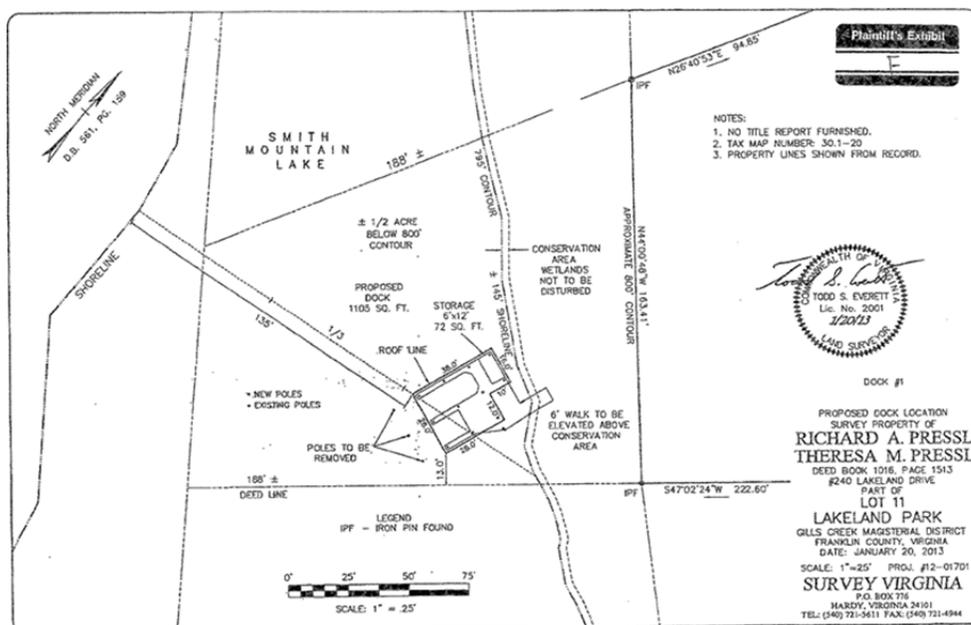
APCO's Shoreline Management Plan (the "SMP") "provides guidelines and regulations for shoreline development along Smith Mountain and Leesville Lakes." (JA 264.) The then-existing SMP was incorporated into the Federal License in 2009, and APCO also was required to file an SMP update. (JA 316.) APCO filed this update to the SMP, which was approved by FERC Order dated January 30, 2014. *Appalachian Power Co.*, 146 FERC ¶ 62,083 (2014). APCO's Federal License contains two standard articles found in most FERC project licenses to further project purposes and insure compliance with project plans such as the SMP, here, Articles 5 and 415 (JA 322, 317).

Standard Article 5 requires APCO to acquire property rights "necessary or appropriate for the construction maintenance, and operation of the [P]roject." (JA 322) (brackets added). Article 415 of the Federal License contains FERC's standard land use article. (JA 317.) Under Article 415, APCO has the authority and responsibility to allow only those uses and occupancies of Project property (such as the shoreline) which protect and enhance the scenic, recreational, and other environmental values of the Project. (JA 317.) To this end, Article 415 also allows Appalachian to establish a permit program for issuing permits for specified types of use and occupancy of Project lands and waters. (*Id.*)

B. The Pressls Own Property Within the Project Boundary Subject to a Flowage Easement Deed Which Permits APCO to, *inter alia*, Affect Such Property in Any Manner in Connection with Maintenance or Operation of the Project.

1. The Pressls' Property and Development Plans.

The Pressls are the owners of waterfront property in a narrow cove on Smith Mountain Lake, a portion of which lies within the Project boundary (*i.e.*, below the 800 foot elevation contour). (JA 19.) The shoreline on the Pressls' property contains conservation area wetlands – but the Pressls wish to develop the property by constructing a dock with a walkway crossing over the designated conservation area and by dredging the lake bottom. (JA 27, 30, 48.) A copy of the survey prepared for the Pressls' proposed dock is provided below. (JA 48.)



2. The Flowage Easement Deed Gives APCO Broad Rights.

The Pressls' property is subject to an instrument titled "Flowage Right and Easement Deed Smith Mountain Combination Hydro Electric Project Upper Reservoir" ("Flowage Easement Deed"), a copy of which was attached to the Complaint "and by reference made a part [t]hereof." (JA 21-22.) The Flowage Easement Deed grants APCO the 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 42) (brackets added). The Flowage Easement Deed also 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.

(JA 43) (brackets and emphasis added).

C. The Pressls Filed Suit for Declaratory Judgment Regarding the Extent to which APCO can Regulate the Pressls' Property and to Determine What Uses and Activities on Such Property Would Be Inconsistent With APCO's Operation of the Project.

1. The Pressls' Complaint in General.

In the Complaint, the Pressls allege that for a period of time they have desired to conduct certain activities on their property within the Project boundary, such as construction of a boat dock. (JA 27.) However, the Pressls claim that

APCO impermissibly attempts to regulate such activities. (*See e.g.*, JA 27-30.)

Additionally, the Complaint asserts that, as a condition to construct a dock below the 800 foot contour on the Property, APCO would require the Pressls to apply for and obtain a permit for the construction of the dock. (JA 31.) A sample of the proposed Occupancy and Use Permit (the "Dock Permit") is attached to and expressly made part of the Complaint. (*Id.*)

2. The Dock Permit Referenced in and Attached to the Complaint Explains APCO's Duties and Obligations Under the Federal License.

The Dock Permit states that APCO "has the authority and responsibility under its Federal Energy Regulatory Commission (FERC) license . . . and its land rights to review and authorize certain activities within the Smith Mountain Project boundary." (JA 49.) The Dock Permit goes on to explain that APCO, "pursuant to its License, has the continuing responsibility to supervise and control the uses and occupancies for which it has granted permission and to monitor the use of and ensure compliance with the conditions under which this Permit has been granted." (JA 50.)¹ Also, as part of APCO's responsibility to operate the Project in accordance with the FERC License, the Dock Permit references the SMP and states that APCO must ensure that work within the Project boundary shall be done in

¹ This continuing responsibility is found in Article 415 of the Federal License. (JA 317.)

accordance with the SMP and the FERC Orders modifying and approving the SMP. (JA 54.)

3. The Pressls' Specific Requests for Declaratory Relief Invoke Federal Law.

Although the Dock Permit references and explains APCO's responsibilities to comply with the Federal License, the Pressls seek a declaration that "APCO lacks the authority to require the plaintiffs to enter into a revocable license agreement as a condition for accessing the waters of Smith Mountain Lake for recreational purposes." (JA 34.) Along with protesting APCO's potential requirement for the Pressls to sign the Dock Permit in exchange for APCO allowing them to conduct certain activities within the Project boundary, the Pressls ask for the following additional forms of declaratory relief:

- C. That the Court further find that APCO lacks the *authority* to demand that your plaintiffs relinquish without compensation valuable property rights they and their predecessors in title retained by under the original flowage easement.
...
- E. That the Court find that APCO has no *regulatory authority* over the plaintiffs' property which lies below the 800 foot contour beyond those rights defined by the flowage easement, the contemporaneous expressions of the parties, and vested rights to build and own structures to access Smith Mountain Lake for recreational purposes;
- F. That the Court find that APCO cannot *regulate* the size and type of dock that the plaintiffs may construct on their property;

G. That the Court find that APCO cannot *regulate* how the plaintiffs stabilize the shoreline of their property by requiring them to plant vegetation below the 800 foot contour;

H. That the Court find that APCO cannot *regulate* whether the plaintiffs may dredge in front of their property to improve any dock which they may construct;

(JA 34-35) (emphasis added).

4. The Pressls' Summary Request for Declaratory Relief.

In addition to the above stated requests for relief, the Pressls asked for a final substantive declaration which summarizes and encompasses all the previous requests. Specifically, in request for relief "I," the Pressls asked the trial court to make the following declaration: "That the Court find that the Plaintiffs be allowed to use their property *in any manner not inconsistent with the maintenance of a dam and hydro-electric power generation plant operated by APCO.*" (JA 35) (emphasis added). Considering this, the District Court ruled that "[i]n order to effectuate whether the Pressls' activities are inconsistent with APCO's operation of the dam or power station, the Court would have to consider what is required of APCO to operate the Project." (JA 493) (brackets added).

D. The Same Matters at Issue in the Complaint Have Been Addressed in Prior Proceedings Before FERC.

As indicated in paragraph 20 of the Complaint, APCO has not only worked with the Pressls regarding the possible construction of a dock on their property, but also with the Pressls' predecessors in title. (JA 27-29.) In fact, one of the

predecessors in title to the Pressls' property, Richard Frie,² ("Mr. Frie") was involved in administrative proceedings before FERC (the "*Frie Proceedings*") that addressed the same issues now sought to be adjudicated in the present action. (See JA 344-45) (table illustrating similarity of issues in this case with those previously determined in *Frie Proceedings*). Specifically, this case and the *Frie Proceedings* involved attempts to build a dock at the exact same location as the Pressls' proposed dock—which is adjacent to protected wetlands—and to make other non-conforming uses of land within the Project boundary. (JA 71-86.) Additionally, an organization known as "Cut Unnecessary Regulatory Burden, Inc. ("CURB"), recently filed a complaint with FERC objecting to the result of the *Frie Proceedings* and raising other issues which are similar to the issues raised in the Complaint filed by the Pressls. (JA 117-43.)

1. FERC's November 10, 2010 Order Denying Permission to Construct a Dock on the Property Currently Owned by the Pressls.

On April 16, 2010, APCO filed an application to FERC requesting: (1) permission to allow Mr. Frie to build a dock on the property at issue; (2) permission to allow Mr. Frie to dredge an area around the proposed dock; and (3) a variance from the SMP's restriction on development of the shoreline of the property at issue (which was located in a Conservation/Environmental Zone where

² See JA 40 (survey for property attached as exhibit to the Complaint which identifies Richard W. Frie as the former owner of the Pressls' property).

docks generally are not allowed). *See Appalachian Power Co.*, 133 FERC ¶ 62,135 (2010) (JA 71-75.) In reviewing this application, FERC considered environmental concerns such as Mr. Frie's unauthorized removal of all of the vegetation from the shoreline, attempted mitigation for such vegetation clearing, and protection of unique shoreline vegetation (*e.g.*, wetlands). (JA 73-75.) Taking into account, among other things, "the proximity of the proposed dock and associated dredging to wetlands," FERC denied the request to build a dock and dredge on Mr. Frie's (currently, the Pressls') property. (JA 75.)

2. FERC's February 17, 2011 Order Denying Request for Rehearing and Motion for Late Intervention.

In response to the 2010 FERC Order, Mr. Frie filed a request for rehearing and a motion for late intervention. (JA 78.) Mr. Frie's request and motion were denied in *Appalachian Power Co.*, 134 FERC ¶ 61,113 (2011), which again addressed the issues of shoreline vegetation maintenance, whether a dock could be constructed, and whether dredging should be allowed at the location at issue in this case. (JA 78-86.) Mr. Frie appealed these FERC Orders to this Court, but the case was later dismissed as moot after Mr. Frie lost ownership of the property in question. *Frie v. FERC*, Case No. 11-1331, Dkt. No. 31 (4th Cir. 2011).

3. CURB Complaint to FERC.

Another FERC proceeding that is intertwined with the issues in the present action was filed April 20, 2015, by William C. Brush, the President of CURB, a

property rights advocacy group. (JA 115.) In its complaint to FERC, similar to the Complaint in this action, CURB asserted that APCO has not obtained sufficient property rights in its Flowage Easement Deed to implement the SMP. (*Compare* p. 9 of CURB complaint, JA 125, *with* ¶ 36 of the Complaint, JA 33.) The CURB complaint claimed that APCO, in effect, attempts to take property rights without compensation by requiring landowners to enter into revocable license agreements. (*Compare* pp. 11-12 of CURB complaint, JA 127-28, *with* request for relief "C," JA 34.) The CURB complaint even referred to the very shoreline of the Pressls' property when it referenced the *Frie* Proceedings as an example of FERC's and APCO's alleged impermissible regulation. (JA 135.) Notably, FERC ruled that APCO was not in violation of the Federal License, and FERC confirmed that the CURB complaint lacked merit in its recent Order Denying Rehearing. *Appalachian Power Company*, 153 FERC ¶ 61,299 (2015).

SUMMARY OF ARGUMENT

A federal question is presented on the face of the Complaint because, in addition to making numerous references to the federally licensed Project, the Complaint specifically asks the court to declare that the Pressls "be allowed to use their property in any manner not inconsistent with maintenance of [the Project]." (JA 42) (brackets added). Obviously, to determine what is "not inconsistent with" maintenance of the Project, a court would necessarily have to consult the Federal

License governing the Project. The terms of a FERC issued license such as APCO's Federal License in this case "are interpreted under federal law." *VA Timberline, LLC, v. Appalachian Power Co.*, 2006 WL 1993557 *2 (W.D. Va. 2006) (citing *United States v. So. Cal. Edison Co.*, 413 F. Supp. 2d 1101, 1124 n. 13 (E.D. Cal. 2006). Indeed, the Federal License 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 300) (brackets added).

The Complaint also makes specific reference to APCO's Federal License in language incorporated into the pleading through the Dock Permit.³ The Dock Permit, which the Pressls dispute they have to obtain, goes so far as to explain that APCO "has the authority and responsibility under its Federal Energy Regulatory Commission (FERC) license . . . to review and authorize certain activities within the Smith Mountain Project boundary." (JA 49.) Thus, the Complaint incorporates a clear statement that the Federal License is the source of APCO's "authority and

³ The Pressls also incorporate the Flowage Easement Deed into the Complaint. To interpret the Flowage Easement Deed, the trial court would again have to consult APCO's Federal License since the Flowage Easement Deed gives APCO the 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 maintenance of [the Project]." (JA 42) (brackets added). APCO's Federal License would also have to be interpreted to determine the extent of APCO's broadly stated rights granted in the instrument. *See McCarthy Holding L.L.C. v. Burgher*, 282 Va. 267, 273, 716 S.E.2d 461, 464-65 (2011).

responsibility" to regulate activities within the project, and then makes interpretation of the Federal License an issue by seeking declarations challenging APCO's "authority" and ability to "regulate" certain activities within the Project boundary. (JA 34-35.)

Given that a federal issue is necessarily raised on the face of the Complaint, the first prong of the four part test to find federal question jurisdiction is satisfied. *Gunn v. Minton*, 133 S.Ct. 1059, 1065 (2013). The remaining prongs of the *Gunn* analysis also are easily met. The federal issue here is "actually disputed" because, among other things, the Complaint specifically states there is a dispute over the extent of APCO's rights "to regulate the [Pressls'] use of their property." (JA 33) (brackets added). The federal issue 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 would not be upset by taking federal jurisdiction over this case because it will be a rare case where a plaintiff seeks specific declaratory judgment to determine what is or is not consistent with operation of a federally licensed hydroelectric project.

Even if there was no substantial federal question of law raised on the face of the Complaint, there would still be federal question jurisdiction pursuant to the coercive action doctrine. Under this doctrine, there may be federal jurisdiction in a

declaratory judgment action if the defendant could bring a coercive suit arising under federal law. Here, APCO could file a coercive suit seeking declaratory and injunctive relief to prevent the Pressls from using property within the Project boundary in a manner inconsistent with the Federal License.

Indeed, APCO and other FERC licensees have filed coercive suits in the past in federal court to enforce their rights and obligations under the FPA.⁴ Appellate courts, including this Court, have entertained and affirmed similar cases without dismissing them for lack of subject matter jurisdiction. *See Timberline*, 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 sought a declaration that APCO could not limit its ability to build docks at the Project). As extensive precedent attests, this case presents issues which belong in federal court.

After finding that there was federal jurisdiction, the Court also properly dismissed this case due to the Pressls' failure to exhaust administrative remedies. Under the FPA, any person may petition FERC to complain "of anything done or omitted to be done by any licensee...." 16 U.S.C. § 825e. A person aggrieved by an order issued by FERC may apply for a rehearing, and judicial review of FERC's final orders may be sought by appealing to the appropriate U.S. Court of Appeals.

⁴ *See infra* pp. 33-34. (sampling of similar cases litigated in federal court).

16 U.S.C. § 825*l*. Here, the Pressls completely failed to adhere to the rule that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Cavalier Tel. LLC v. Va. Elec. & Power Co.*, 303 F.3d 316, 322 (4th Cir. 2002).

Finally, the District Court was correct in ruling that the Pressls failed to state a judiciable controversy in seeking declaratory relief regarding whether they had to obtain a Dock Permit. The simple fact is that the Pressls have not obtained a Dock Permit, and thus no legal rights or obligations have been created or threatened. The District Court also properly dismissed the Pressls' requests for declaratory relief for being inconsistent with controlling law. *See Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (holding that courts need not accept "legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments") (internal citations omitted).

STANDARD OF REVIEW

The standard of review for questions of subject matter jurisdiction is *de novo*. *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 815 (4th Cir. 2004). The standard for review of dismissals under Rule 12(b)(6) is also *de novo*. *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 401 (4th Cir. 2005).

ARGUMENT AND AUTHORITIES

I. There is Federal Jurisdiction Over this Action and the District Court Correctly Denied the Pressls' Motion to Remand.

A. The Pressls' Requests for Declaratory Relief in this Lawsuit Raise a Substantial Question of Federal Law.

When a case turns upon the resolution of a substantial question of federal law, it is considered to "arise under" federal law within the meaning of 28 U.S.C. § 1331. *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (citing *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996)). A case "arises under" federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law...." *Franchise Tax Bd. v. Const. Laborers Vacation Trust*, 463 U.S. 1, 8-9, 103 S.Ct. 2841, 2846 (1983) (brackets added). Accordingly, "federal-question jurisdiction is not limited to cases where federal law creates the cause of action." *Ormet*, 98 F.3d at 806.

Here, the District Court held that it had subject matter jurisdiction over the current action under the "substantial federal question" doctrine. (JA 496.) Pursuant to this doctrine, federal jurisdiction exists over a plaintiff's claims, even if arising under state law, if such claims "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314

(2005). In finding federal jurisdiction in this case, the District Court used an analysis very similar to the one it applied previously in *Timberline*, a case where the court denied a motion to remand filed by a plaintiff challenging APCO's ability to regulate construction of docks within the Project boundary. 2006 WL 1993557. Later, this Court also acknowledged federal jurisdiction in the *Timberline* case when it affirmed summary judgment in favor of APCO. 343 F. App'x 915 (4th Cir. 2009).

Like *Timberline*, the current case satisfies the applicable analysis for federal jurisdiction. Specifically, the present action meets all the requirements set forth by the Supreme Court in *Grable* and *Gunn* (the "*Gunn* Requirements") to find jurisdiction under the substantial federal question doctrine. As explained in *Gunn*:

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. Where all four of these requirements are met... jurisdiction is proper because there is a 'serious federal interest in claiming the advantage thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

Gunn, 133 S.Ct. 1059, 1065 (quoting *Grable*, 545 U.S. at 314, 125 S. Ct. at 2363).

1. *The Pressls' Claims Necessarily Raise a Federal Issue in Satisfaction of the First Prong of the Gunn Requirements.*

To determine whether a federal issue is necessarily raised in an action, a court looks at the "elements" of a plaintiff's claim, and then determines if a federal

question "necessarily" would be addressed in the adjudication of the claim. *See Gunn*, 133 S.Ct. at 1065 (in finding that a federal question was necessarily raised, the Court noted that, to rule on the causation element of the plaintiff's legal malpractice claim, the court would have to consider federal law). Here, based on the contents of the Complaint and the nature of the Pressls' requests for relief, federal questions would necessarily be addressed in order to adjudicate the issues in this case in favor of the Pressls.

a. The Pressls' Summary Request for Declaratory Relief, *On its Face*, Requires Reference to APCO's Federal License.

The Pressls specifically seek a declaration in this action that they "*be allowed to use their property in any manner not inconsistent with [the Project].*" (JA 42) (brackets and emphasis added). To determine that the activities for which the Pressls seek court approval are "not inconsistent" with APCO's operation of the Project, the District Court would obviously have to consider what is required of APCO to operate the Project.⁵ Pursuant to the FPA, APCO must operate its "dam

⁵ The fact that APCO operates a hydroelectric project at Smith Mountain Lake is repeated numerous times in the Complaint. *See, e.g.:*

- "APCO operates the Smith Mountain Hydroelectric Project on Smith Mountain Lake and Leesville Lake" (JA 21);
- "It is clear that the plaintiffs may make any use of their property not inconsistent with APCO's right to maintain a hydroelectric dam" (JA 24, ¶ 13); and
- "The construction of a dock on the Pressls property does not interfere with APCO's ability to... operate a hydro electric dam at Smith Mountain" (*Id.*).

and hydro electric power generation plant" in accordance with the terms of the FERC license. 16 U.S.C. § 797(e). Given this, a court would have to necessarily interpret the Federal License to determine what uses of the Pressls' property are "not inconsistent" with APCO's maintenance of the Project.

b. Reference to the Federal License is Required to Determine the Parties Rights vis-à-vis the Flowage Easement Deed.

Even if the Complaint merely stated a cause of action for interpretation of an easement, reference to the Federal License would still be required to define the limits of APCO's rights under the Flowage Easement Deed. In order to secure a declaration that APCO does not have the right to "regulate" their property under the Flowage Easement Deed, the Pressls must prove that they are not "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) (brackets added); *see also, Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563, 567 (1987) ("An easement... is a privilege to use the land of another in a particular manner and for a particular purpose."). To rule on this necessary element of the Pressls' requests for relief, a court would obviously have to refer to the Flowage Easement Deed, and in turn, would have to refer to the Federal License.

One of the reasons a court must to look to the Federal License in interpreting the Flowage Easement Deed is because the latter instrument grants APCO the right to "affect so much of said premises... continuously or from time to time in any

manner whatsoever as the result of... operation and/or maintenance of the aforesaid dam and/or power station...." (JA 42.) To ascertain the limits of this privilege, reference would have to be made to the Federal License to determine what APCO must do to operate and maintain the "dam and/or power station," *i.e.*, the Project.

Another important term of the Flowage Easement Deed, interpretation of which would require reference to federal law, is the provision giving APCO the right to enter the Pressls' property within the Project boundary and "remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects...." (JA 43.) As noted in the District Court's opinion, "[a]lthough there is no language in the instrument limiting this grant, Virginia case law makes clear that this easement is limited by a reasonableness inquiry based on what the original purpose of the grant: in this case, the original purpose of the Project and FERC license." (JA 497) (*citing McCarthy Holding L.L.C.*, 282 Va. at 273, 716 S.E.2d at 464-65). Thus, to determine whether APCO is within its rights under the Flowage Easement Deed to prevent the Pressls from building structures like an unapproved dock, reference must again be made to the Federal License.

c. Reference to Federal Law is Necessary to Determine the Propriety of the Dock Permit.

The fact that APCO operates its "dam and hydro electric power generation plant" under the Federal License granted pursuant to the FPA is specifically acknowledged and referenced throughout the Dock Permit, which is incorporated into the Complaint. (JA 31.) For its part, the Dock Permit states, among other things, that: APCO holds a FERC License; the permit "may be granted under the License;" and the scope of the permit is limited by conditions found in the License (including the SMP). (JA 49-50, 54.) Therefore, the contention that APCO's rights are determined in part by the Federal License is expressly stated in the Complaint by incorporation of the Dock Permit.⁶ This contention becomes a disputed federal issue in this case since the Pressls contest APCO's authority to require a Dock Permit despite the presence of Article 415 of the Federal License. (JA 317.)

With regard to the Dock Permit's relationship to the Pressls' asserted causes of action, it is not some ancillary and superfluous exhibit to the Complaint. To the contrary, it is a necessary element of the Pressls' request for relief asking "[t]hat the

⁶ When applying the "well-pleaded complaint rule," courts may consider attachments to a complaint as if they were "on the face" of the pleading. *See Davoodi v. Austin Independent School District*, 755 F.3d 307, 310 (5th Cir. 2014) (holding that plaintiff's "well-pleaded complaint" included contents of document attached and fully incorporated into his complaint). Indeed, Rule 10(c) of the Federal Rules of Civil Procedure provides that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading *for all purposes*." (brackets and emphasis added).

Court further find that APCO lacks authority to require the plaintiffs to enter into a revocable license agreement [*i.e.*, the Dock Permit] as a condition for accessing the waters of Smith Mountain Lake for recreational purposes." (JA 34) (brackets added). Obviously, for the trial court to determine the propriety of the Dock Permit, the court would have to review the terms of the permit, and compare and contrast such terms with APCO's rights under the Flowage Easement Deed. As discussed above, interpretation of both the Dock Permit and the Flowage Easement Deed requires reference to the Federal License.

d. To Grant The Requests For Relief Stated In The Complaint, Questions of Federal Law Are Unavoidable.

Based on the face of the Complaint, the need to address federal questions in this case is inescapable. Indeed, by asking for the specific types of declaratory relief set forth in the Complaint, the Pressls defined their objectives for this litigation and ensured that they could assert no theory of recovery which would not require the resolution of a federal issue.⁷

⁷ The Pressls' argument that the District Court interpreted the Flowage Easement Deed without looking to the Federal License is unpersuasive and, moreover, factually inaccurate. With this argument, the Pressls attempt to flip the well-pleaded complaint rule on its head by turning the focus to what a defendant could prove to get a case dismissed rather than what the plaintiff would have to prove to obtain the relief requested. In any event, the District Court most certainly considered the Federal License in conjunction with its interpretation of the Flowage Easement Deed. For instance, after noting that APCO's rights under the Flowage Easement Deed are limited by the purpose of the instrument to operate the Project, the District Court stated "nothing suggests that APCO is expanding this

Given the need to interpret the Federal License, federal jurisdiction in this case is not defeated, as the Pressls suggest, by the holding in *Flying Pigs, LLC v. RRAJ Franchising*, 757 F.3d 177 (4th Cir. 2014). In *Flying Pigs*, this Court noted that "a plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when every legal theory supporting the claim requires the resolution of a federal issue." 757 F.3d at 182. By its plain language, and in the context of the case, the above quoted statement from *Flying Pigs* 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 (emphasis added).⁸

As discussed above, the Complaint here asks the trial court to probe the limits of what the parties are permitted to do with respect to the Pressls' property purpose, *found in the FERC license*, to burden Plaintiffs." (JA 497.) (emphasis added).

⁸ In *Flying Pigs*, the plaintiff filed a complaint in state court to foreclose on a lien against intellectual property. 757 F.3d at 180. The defendant removed the case to the Eastern District of North Carolina, characterizing the action as a dispute over two trademarks held and registered pursuant to the Lanham Act. *Id.* On appeal, this Court determined that it was entirely unnecessary for the plaintiffs to prove ownership of the intellectual property at issue since a court had already decided plaintiff was entitled to an equitable lien on such property. Since proof of ownership of the intellectual property was found not to be a prima facie element of the plaintiff's case, no federal issue was necessarily raised since there was no need to consult the Lanham Act. This Court went on to note that even if ownership of intellectual property was a necessary element of the case, such ownership could have been proven by use or state registration—and without reference to federal law.

within the Project boundary, and unlike the claim in *Flying Pigs*, adjudication of the issues raised in the Complaint necessarily involves interpretation of APCO's Federal License. Indeed, any analysis as to what rights and obligations APCO has within the Project boundary must start with a determination of what APCO is permitted to do by FERC since 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, FERC retains ultimate control over APCO's actions, and APCO may only act as sanctioned by FERC.

In sum, it is clear that a court necessarily would have to refer to the Federal License to rule in favor of the Pressls on their requests for declaratory relief. That established, the terms of a FERC issued license such as the Federal License in this case "are interpreted under federal law." *Timberline*, 2006 WL 1993557 at *2. Furthermore, APCO's 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 300) (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).

2. *The Federal Issues Raised in the Complaint are Actually Disputed in Satisfaction of the Second Prong of the Gunn Requirements.*

Under 28 U.S.C. § 2201, the Pressls' suit for declaratory judgment must present an actual dispute. *See Evers v. Dwyer*, 358 U.S. 202, 203, 79 S.Ct. 178, 179 (1958) ("federal courts will not grant declaratory relief in instances where the record does not disclose an actual controversy"); *see also* Va. Code § 8.01-184 (same under Virginia law). Here, the "actual justiciable case or controversy" as explicitly defined in the Complaint is the "dispute between the parties regarding the interpretation of the Flowage Easement Deed granted to the defendant and the rights which the defendant has to regulate the plaintiffs' use of their property." (JA 33.) As discussed above, interpretation of the Flowage Easement Deed requires reference to the Federal License, and determination of APCO's rights and obligations to "regulate" the Pressls' use of their property requires reference to federal law. Thus, the federal issues in this case are actually disputed.

Despite the fact that the Pressls allege in their own Complaint that there is a dispute over APCO's right to "regulate" their property, they make the facile argument that the second prong of the *Gunn* Requirements is not satisfied because "[t]he language of APCO's FERC license, the arguable federal issue, is not disputed." (Br. p. 38.) This argument ignores that disputes justifying federal

jurisdiction are not limited to disputes over construction of federal law, but also include disputes over the effect or application of federal law. *Grable*, 545 U.S. at 312, 125 S.Ct. at 2367 ("[A] state-law claim could give rise to federal-question jurisdiction so long as it 'appears from the [complaint] that the right to relief depends upon the construction or application of [federal law].") (brackets added).

Here, the Complaint would call upon a trial court to decide the extent to which the Federal License—which is federal law—reinforces and/or limits the parties rights vis-à-vis each other. Therefore, in the current action, a trial court would have to resolve an actual dispute over the extent to which the Federal License issued by FERC applies to and affects the rights of the parties, and in resolving this dispute, the court would have to interpret federal law.

3. *The Federal Issues Raised in the Complaint are Substantial in Satisfaction of the Third Prong of the Gunn Requirements.*

"The substantiality inquiry under *Grable* looks [] to the importance of the issue to the federal system as a whole." *Gunn*, 133 S. Ct. at 1066 (brackets added). Here, by asking the state court to find that the Pressls can conduct certain activities without deferring to APCO's rights and responsibilities related to its operation of the Project, the Complaint invites the court to essentially nullify or alter FERC orders and ignore the requirements set forth in APCO's Federal License. Such a ruling could severely hamper FERC's ability to regulate projects it licenses and undermine the purpose of the FPA, a law intended to provide "a complete scheme

of national regulation [to] promote the comprehensive development of the water resources of the Nation.” *Nantahala Power & Light Co. v. F.P.C.*, 384 F.2d 200, 206 (4th Cir. 1967), *cert. denied*, 890 U.S. 945, 88 S.Ct. 1030 (1968) (brackets added, *quoting First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 180, 66 S.Ct. 906, 919 (1946)).

"The FPA endowed FERC with full regulatory authority over projects . . . , entrusting a broad subject-matter to administration by the FERC, subject to Congressional oversight, in the light of new and evolving problems and doctrines." *DiLaura*, 982 F.2d at 79. Under the FPA, FERC has the authority to grant licenses for the construction and operation of hydroelectric projects, but licensees must obey FERC's rules and regulations. *Id.* (citing 16 U.S.C. §§ 797(e), 803(c)). In short, FERC must be able to oversee and administer all of its licensees operating hydroelectric projects uniformly pursuant to the mandate of the FPA and the regulations promulgated thereunder. Otherwise, FERC's role would vary from project to project in direct contradiction of the Congressional purpose of the FPA. This overview of the FPA and FERC's power over its licensees illustrates the enormity of the federal issue raised by the Pressls' purported "state law" claims.

Besides hampering FERC's ability to administer projects uniformly, allowing a state court to interpret APCO's rights and obligations under its Federal License would subvert Congressional grants of power to FERC. For example, the

FPA gives FERC the power to hold administrative hearings and make rulings to carry out the provisions of the FPA. *See* 16 U.S.C. § 825g. With respect to the current action, the very issues for which the Pressls seek state court review have been previously addressed through the process set out in the FPA. *See infra*, pp. 10-13. Allowing a state court to rule on matters which may contradict or invalidate previously-entered FERC Orders would undermine FERC's role in overseeing all of its licensees operating hydroelectric projects as it would permit state courts to potentially nullify proceedings before a federal agency.

The issues arising from the Pressls' Complaint are of significant importance to the federal system as a whole. In support of this position, the following excerpt from the District Court's decision in *Timberline* is directly on point:

The meaning of the FERC license is a substantial and “important issue of federal law that sensibly belongs in a federal court.” *Grable*, 125 S.Ct. at 2368. 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 Ia. Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152, 172 (1946). “The Government ... has a direct interest in the availability of a federal forum to vindicate its own administrative action,” *Grable*, 125 S.Ct. at 2368, and those affected by FERC licenses may find it valuable to come before judges used to federal regulatory matters. *See id.*

2006 WL 1993557 *2 (brackets in original).

4. *In Satisfaction of the Fourth Prong of the Gunn Requirements, the Federal Issues Here are Capable of Resolution in Federal Court Without Disrupting the Federal-State Balance.*

The fourth and final prong of the *Gunn* Requirements states that that federal issues arising from state law claims must be "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 133 S.Ct. at 1065. The center of balance of the federal question in this case is interpretation of the Federal License, and such licenses are only given out to persons or entities to construct or operate hydroelectric projects on bodies of water Congress already has authority to regulate. 16 U.S.C. § 797(e). Thus, licenses such as APCO's Federal License are not commonly held or easily obtained, and interpretation of such licenses to determine the rights and obligations of FERC licensees is not an issue that would have a disruptive effect on the relative caseload of state and federal courts.

In *Timberline*, a case with very similar issues as the current matter, the court denied the plaintiff's motion to remand after concluding that a federal forum may entertain the action without disturbing any Congressionally approved balance of federal and state judicial responsibilities. In reaching this conclusion, the court in *Timberline* reasoned as follows: "Federal jurisdiction to resolve genuine disagreement over the terms of FERC licenses (like that exercised to resolve disagreement over federal tax law in *Grable*), therefore, "will portend only a

microscopic effect on the federal-state division of labor.” 2006 WL 1993557 at *2 (citing *Grable*, 125 S.Ct. at 2368).

The analysis applied in *Timberline* also applies in this case. The federal issues here are capable of resolution in federal court without disrupting the federal-state balance, and the District Court correctly found federal jurisdiction.

B. Even If There Was No Substantial Federal Question Of Law Raised On The Face Of The Complaint, There Would Still Be Federal Question Jurisdiction Pursuant To The Coercive Action Doctrine.

As the Pressls concede, “[i]n declaratory judgment cases, the Court is allowed to consider and apply the so-called 'coercive action' doctrine.” (Br. p. 16.) For its part, the “coercive action” doctrine recognizes that “[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.” *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 19, 103 S. Ct. 2841, 2851 (1983). The “coercive action” doctrine was discussed by this Court in *Columbia Gas Transmission Corp. v. Drain*, where it was explained that

in a declaratory judgment action, the federal right litigated may belong to the declaratory judgment defendant rather than the declaratory judgment plaintiff. Thus, if the declaratory judgment plaintiff is not alleging an affirmative claim arising under federal law against the declaratory judgment defendant, the proper jurisdictional question is whether the complaint alleges a claim arising under federal law that the declaratory judgment defendant could affirmatively bring

against the declaratory judgment plaintiff. If the answer to this question is yes, federal question jurisdiction exists.

237 F.3d 366, 370 (4th Cir. 2001) (internal citations omitted).

1. The Mirror Image of the Pressls' Requests for Declaratory Relief Invokes Federal Jurisdiction Under the Coercive Action Doctrine.

Here, the District Court held that there was federal question jurisdiction in this case under the coercive action doctrine because APCO could have filed a "coercive suit... to enforce the duties and responsibilities that it has under the FPA, which include a duty to ensure that lands within the Project boundary comply with the SMP." (JA 492.) The thrust of the Pressls' argument against this holding is that their Complaint merely seeks interpretation of property rights, and any coercive suit brought by APCO would have to be the reverse of the relief sought by the Pressls. However, this argument is based on the false premise that all that is required to grant the relief requested by the Pressls is for a court to interpret a simple deed. The Pressls ignore the crucial fact that a trial court would be required to interpret APCO's Federal License to grant the relief requested.

If APCO were to seek the reverse or opposite of the declaratory relief sought in the Complaint in a putative "coercive suit," APCO would essentially be asking for a declaration that it could "regulate" certain activities inconsistent with operation of the Project. In other words, where the Pressls seek declarations that APCO *cannot* regulate certain activities, APCO's coercive suit would seek

declarations that it *can* regulate such activities. Thus, the Pressls are quite off the mark when they argue that the "reverse" of the Complaint would be nothing more than interpretation of everyday property rights.

2. APCO has Filed Several Coercive Suits in Federal Court to Enforce its Rights and Obligations Under its Federal License, and Other Federal Courts have taken Jurisdiction over Similar Suits.

The coercive suit that APCO would file here would be a suit for declaratory judgment and injunctive relief filed in federal court pursuant to 18 U.S.C. § 825p.

Indeed, this is exactly what APCO has done in similar cases over the years, none of which were dismissed due to lack of subject matter jurisdiction. *See e.g.*

Appalachian Power Company v. Nissen, Case No. 7:14-cv-00535 (W.D. Va. 2015)

(in action brought by APCO to enforce duties and obligations under Federal

License, APCO granted declaratory and injunctive relief); *Appalachian Power*

Company v. Arthur, 39 F. Supp. 3d 790 (W.D. Va. 2014) (in action brought by

APCO, court orders defendants to remove unpermitted docks and other structures

from within Project boundary); and *Appalachian Power Company v. Longenecker*,

Case No. 7:00CV 00731 (W.D. Va. 2001) (successful action brought by APCO to

remove encroachments from within the Project boundary).

Taking jurisdiction over such coercive suits is not unique to the Western District of Virginia, as there are numerous other boat dock, boat ramp, or shoreline use cases involving subject matter jurisdiction under 16 U.S.C. §825p that have

been adjudicated in federal district courts. *See, e.g., Tri-Dam v. Keller*, 2013 WL 2474692 (E.D. Cal. 2013)(suit brought by FERC licensee for injunction requiring defendant to remove unpermitted additions to dock); *Union Elec. Co. v. Devine*, 2007 WL 4244989 (W.D. Mo. 2007), *aff'd*, 334 F. App'x 37 (8th Cir. 2009) (action brought by FERC licensee to require defendant to remove his docks).⁹

3. APCO's Hypothetical Coercive Suit Satisfies Each of The *Gunn* Requirements for Federal Question Jurisdiction.

For all of the reasons discussed in part "A" of the "Argument and Authorities" section of this brief, *supra*, APCO's putative coercive suit in this matter would satisfy the analysis in *Gunn* to determine whether federal question jurisdiction exists. In fact, such a coercive suit would provide the following additional reasons to find that the *Gunn* Requirements are met and federal question jurisdiction exists.

a. *Additional Federal Issues would be "Necessarily Raised" and "Actually Disputed" in the Request for Injunctive Relief asserted in a Coercive Suit by APCO.*

A case arises under federal law if the court must determine a federal question when addressing a "necessary element" of one of the claims in an action. *Grable*, 545 U.S. 308, 309, 125 S.Ct. 2363, 2364 (2005). Here, a coercive suit

⁹ The fact that these cases were not dismissed or remanded is significant considering that 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." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104 (1982).

filed by APCO would include a request for injunctive relief to prevent unauthorized activities such as construction of the proposed dock. In order for APCO to prove the elements required to obtain the injunctive relief that would be sought in a coercive suit, reference to federal law would be required.

To prevail on a claim for injunctive relief, a litigant must submit proof regarding the following matters: irreparable harm, no adequate remedy at law, the balance of hardships, and that the public interest would be served. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391, 126 S. Ct. 1837, 1839 (2006). In order to prove these necessary elements of a claim for injunctive relief in the context of a coercive suit, a court would have to analyze APCO's rights and duties under the FPA and the Federal License. *See, e.g., Nissen*, 2015 WL 9296143 at *11-12 (referring to APCO's Federal License and operation of the Project when finding each of the necessary elements for injunctive relief); *see also Tri-Dam v. Schediwy*, 2014 WL 897337 at *12 (E.D. Cal. 2014) (In granting injunctive relief requested by FERC licensee, court held that the licensee would be irreparably harmed since "SMP violations places its license to operate the dam in jeopardy" and that the balance of hardships was in the licensee's favor since it had "a strong interest in obtaining an injunction ensuring compliance with its FERC license.")

b. *Federal Issues Raised by Requests for Injunctive Relief in Coercive Suit Would be "Substantial."*

Resolution of the federal issues presented in a coercive action by APCO could set precedent establishing the extent to which FERC licensees could seek injunctive relief in order to carry out their obligations and duties to FERC. In turn, such precedent could ultimately affect FERC's ability to control federally licensed hydroelectric projects if FERC licensees are found to have less power to remedy noncompliance by obtaining injunctions.

"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 Ia. Hydro-Elec. Co-op.*, 328 U.S. at 172, 66 S.Ct. at 915-16 (brackets and emphasis added). Thus, a coercive suit filed by APCO would involve a substantial issue of federal law considering the Federal Government's *obvious concern* in controlling projects licensed by FERC. *See Grable*, 545 U.S. at 315, 125 S.Ct. 2363 (interpretation of a federal tax provision was "substantial" because the Government had a strong interest in being able to recover delinquent taxes, not only in that case, but in future cases as well).

The importance of the federal issues here is amplified because future cases considering coercive actions brought by FERC licensees would likely look to the precedent set in APCO's would-be coercive suit given the uniformity of the terms

in FERC licenses. 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, articles like Article 415 in the Federal License (which gives APCO the authority to issue Dock Permits) have "been included in Commission licenses issued since 1980..." *Appalachian Power Co.*, 82 FERC ¶ 62,109 (1998).

In addition to the nationwide similarity of terms in FERC licenses, most FERC licensees will also incorporate plans similar to the SMP. This is so because the FPA requires that FERC, when issuing a license, give "equal consideration to the purposes of energy conservation, the protection, mitigation of, damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e). Indeed, many licensees across the country also have shoreline management plans incorporated into their FERC licenses. *See, e.g., Duke Energy Carolinas, LLC*, 153 FERC ¶ 62,134 (2015); *Alabama Power Co.*, 153 FERC ¶ 61,298 (2015); *Sabine River Authority of Texas*, 148 FERC ¶ 62,171 (2014).

Given that FERC licensees across the country are subject to the same license terms and are otherwise often similarly situated, the federal issues decided in a coercive suit brought by APCO would not be "fact-bound and situation specific" as the Pressls argue. (Br. p. 39.) To the contrary, rulings made in APCO's coercive suit would likely be apposite to many future cases brought by FERC licensees—and such rulings could have a ripple effect throughout the regulatory scheme set up by Congress to control development of the Nation's water resources.

c. Coercive Suits to Enjoin Violation of Federal License Will Not Disrupt the Federal-State Balance Approved by Congress.

As previously stated, Congress included 16 U.S.C. § 825p in the FPA, a provision that gives 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). Here, a coercive suit brought by APCO against the Pressls would fall under §825p because it would be filed to enjoin a violation of—and enforce a duty created by—the order issuing the Federal License. Thus, since APCO's coercive suit would involve substantial and disputed federal questions, the District Court not only had original jurisdiction under 28 U.S.C. § 1331, but also had exclusive jurisdiction under 16 U.S.C. § 825p.

Given Congress's inclusion of § 825p in the FPA, the Pressls are simply incorrect when they state that "there is nothing in the FPA to suggest that Congress

intended for state law causes of action, like interpretation of private contracts between property owners and licensees, to be litigated in federal courts." (Br. pp 39-40.) The fact that section 825p provides federal courts "exclusive jurisdiction" over cases involving violations of the FPA is evidence of the fact that Congress affirmatively sought to provide a federal forum for certain cases, such as this one, that involve substantial and disputed federal issues.

* * *

The District Court correctly held that this action should not be remanded and that it had proper jurisdiction to rule on APCO's Motion to Dismiss.

II. The District Court Correctly Granted APCO's Motion to Dismiss.

A. The Pressls Failed to Exhaust Administrative Remedies.

As the District Court stated in its opinion, "the Pressls [in this case] were not satisfied with the Permit requirement, so they brought this action. Instead, the Pressls should have sought the remedies set forth under the FPA." (JA 498) (brackets added). This ruling is supported by the fact that it "is a 'long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *See Cavalier Tel. LLC*, 303 F.3d at 322 (quoting *Myers*, 303 U.S at 50-51).

When determining when exhaustion is required, courts look to Congressional intent and to the role Congress has assigned to the relevant federal agency. *Id.* Accordingly, we will look to the FPA to determine whether exhaustion is required. The FPA is a

comprehensive statutory scheme endowing FERC with full regulatory authority over federal hydroelectric projects, and its authority is to be "broadly construed." *Dilaura v. Power Auth.*, 786 F. Supp. 241, 252 (W.D.N.Y. 1991), *aff'd*, 982 F.2d 73 (2d Cir. 1992). Judicial review of FPA action is strictly circumscribed by the FDA. *Id.*

J.W. Holdings, Inc., v. Appalachian Power Co., No. 6:04-CV-00033 (W.D. Va. 2005) (JA 161.)

Under the FPA, any person may petition FERC to complain "of anything done or omitted to be done by any licensee...." 16 U.S.C. § 825e. If there is a reasonable ground for the Complaint, FERC will perform an investigation and issue its findings. A person aggrieved by an order issued by FERC may apply for a rehearing, and a party to a hearing before FERC may obtain judicial review of any final order by appealing to the appropriate U.S. Court of Appeals. 16 U.S.C. § 825l.

The need for a plaintiff in very similar circumstances as the Pressls to exhaust administrative remedies under the FPA was examined in *J.W. Holdings*. (JA 156-64.) In that case, the plaintiff filed a suit against APCO in state court, and after removing the case, APCO filed a motion to dismiss for lack of subject matter jurisdiction because the plaintiff failed to exhaust its administrative remedies. *Id.* (JA 158.) In response to the motion to dismiss, the plaintiff argued that it was not required to exhaust its administrative remedies under the FPA because its lawsuit challenged APCO and FERC's ability to regulate its land because APCO allegedly

did not properly obtain property rights to such land. *Id.* (JA 162.) However, the Court concluded that "any land bordering Smith Mountain Lake below the 800 fmsl contour is clearly within the Project boundaries and within the regulatory power of FERC." *Id.* (JA 163.) Given this, the Court held that the plaintiff "failed to exhaust its administrative remedies as required by the FPA," and granted APCO's motion to dismiss for lack of subject matter jurisdiction. *Id.*

In the present case, the dispute revolves around what can and cannot be done on, and with respect to, land bordering Smith Mountain Lake below the 800 foot elevation contour (*i.e.*, within the Project boundary). As the District Court noted in its opinion, had the Pressls filed a "complaint to FERC, the Pressls could question any condition under the Permit and whether APCO can require these conditions." (JA 498.) Then, only after they had complied with all exhaustion requirements, the Pressls could seek judicial review of the matter. 16 U.S.C. § 825*l*.

The Pressls attack the District Court's holding regarding failure to exhaust administrative remedies on the grounds that their requests for declaratory relief involve property rights issues properly resolved in state court. However, this argument is incompatible with the relief actually requested in the Complaint regarding what is consistent with maintenance of the Project. (JA 35-36.) Truly, a determination of what is consistent with operation of a hydroelectric project is not a typical property rights issue—but it certainly is an issue on which FERC has

expertise. To the extent that property rights are relevant in this case, analysis of such property rights would be inescapably intertwined with interpretation of federal law. In other words, any property rights issues here cannot be determined without first deciding federal issues. The federal issues here should be submitted to FERC in accordance with the FPA. Parties should not be able to avoid long-settled law regarding exhaustion requirements by cloaking issues appropriate for adjudication before a federal agency as state law claims.¹⁰

B. The Pressls' Claims are an Impermissible Collateral Attack on Orders Issued By FERC and an Attempt to Side-Step the Exclusive Judicial Review Mechanism Mandated By the FPA.

If parties could avoid exhaustion requirements by framing issues appropriate for administrative adjudication as state law claims, a state court's ruling on such claims could contradict or invalidate previous administrative decisions. In the context of the FPA, this scenario could undermine FERC's role in overseeing all of its licensees operating hydroelectric projects as it would permit state courts to

¹⁰ While arguing against the District Court's ruling that the Pressls failed to exhaust administrative remedies, the Pressls also suddenly argue that part of the issues in the case dealing with interpretation of the easement "should have been severed and remanded." (Br. p. 42.) However, the authorities the Pressls cite for this argument do not support their conclusion. 28 U.S.C. § 1441(c)(2) only requires a sever-and-remand approach when claims are not within original or supplemental jurisdiction of the district court. This interpretation is actually reinforced by the case cited by the Pressls, as it provides that § 1441(c) "is addressed only to cases that involve federal claims combined with *unrelated* state law claims over which there is no federal jurisdiction." *Moore v. Svehlak*, 2013 WL 3683838 at *9 (D. Md. 2013) (emphasis added). Here, there are no unrelated claims, and as discussed above, there is federal jurisdiction.

potentially nullify proceedings before a federal agency. To prevent such duplication and inconsistency, Congress specifically defined how parties could seek judicial review of FPA matters in 16 U.S.C. § 825l (b).

1. 16 U.S.C. § 825l (b) – The FPA's Exclusive Judicial Review Mechanism.

16 U.S.C. § 825l (b) "necessarily preclude[s] *de novo* litigation between the parties of all issues inhering in the controversy and all other modes of judicial review." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (brackets added). This is so because, in enacting § 825l (b), Congress "prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." *Id.* Therefore, "all objections to the [FERC] order, to the license it directs to be issued, *and to the legal competence of the licensee to execute its terms*, must be made in the Court of Appeals or not at all." *Id.* (brackets and emphasis added).

2. The Pressls Commenced this Action in Contravention of 16 U.S.C. § 825l (b).

In the present case, the Pressls' Complaint seeks declaratory relief as to whether APCO has authority to regulate certain activities on the portion of their land that lies within the Project boundary. These activities include dredging, building a dock, and shoreline vegetation management. (JA 35.) These proposed activities were addressed and rejected by FERC in its previous administrative proceedings as evidenced by the previous FERC orders entered in the *Frie*

Proceedings. (JA 71-74, 84-86.) In fact, one of the few differences between the activities proposed by Mr. Frie and those proposed by the Pressls in this case is that the Pressls want to construct an even bigger dock.¹¹

To illustrate how it would contradict previously entered FERC Orders if a court granted the declaratory relief requested by the Pressls in this action, the following table compares the declarations requested in the Complaint to the issues addressed in the *Frie* Proceedings:

<u>Request for Relief From Complaint</u>	<u>Issues Addressed by Previous FERC Orders</u>
"F." (JA 35) (regarding construction of proposed dock)	Decision to not allow construction of dock at this location based on "doubt that wetlands would not be affected by the dock construction" and "that the proposed dock location was poor for logistical reasons...." 134 FERC ¶ 61,113 (JA 82.)
"G." (JA 35) (regarding regulation of vegetation)	Mr. Frie's clearing of "shoreline vegetation on company-owned lands within the project boundary, without authorization from [APCO]" and his failure to properly re-vegetate the site was part of the analysis by FERC. (<i>Id.</i>) (brackets added).
"H." (JA 35) (regarding dredging)	With regard to dredging, FERC noted that "[t]he SMP states that dredging is prohibited in wetland areas, and if allowed near any wetland areas, would require sufficient buffers to ensure no

¹¹As can be seen by looking at the comparison of the dock plan drawings at JA 343, the plans of Mr. Frie and the Pressls for the subject property are quite similar.

	adverse impact to the wetlands." 133 FERC ¶ 62,135 (JA 74) (brackets added). FERC found insufficient buffers to the wetlands on the property and denied a variance. (JA 82.)
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Furthermore, the same issues that underpin the Pressls' entire Complaint—the propriety of the Dock Permit and whether APCO has the authority and right to enforce the terms of the SMP—are at the heart of the CURB Complaint to FERC.¹² Thus, by commencing the current action, the Pressls are impermissibly attempting to have a trial court review FERC orders, and otherwise seek determinations properly left to the appropriate administrative agency. *See Skokomish Indian Tribe v. United States*, 332 F.3d 551, 560 (9th Cir. 2003).

3. This Court's Decision in *Halifax County v. Lever* Supports the Conclusion that the Pressls' Suit is Barred by 16 U.S.C. § 825l (b).

This Court has previously held that a plaintiff cannot obtain jurisdiction in state or federal court and effectively commence an end-run around the administrative procedures established under the FPA. In *Halifax County v. Lever*, 718 F.2d 649 (4th Cir. 1983), the County had failed to obtain a permit from FERC, which instead was issued to the defendant. The County then appealed to FERC, but lost. The County did not petition FERC for rehearing, instead, it filed suit in the district court alleging that the defendant had obtained the permit by fraud. The

¹² CURB has until a date in February to seek judicial review of FERC's December 17, 2015 Order Denying Rehearing.

County sought an injunction against the defendant licensee requiring it to relinquish its rights under the FERC permit. The district court held for the County, but this Court reversed. The Court noted that there is no *de novo* jurisdiction in either the state or district court to enter an order which effectively amounted to a review, or invalidation of the action of FERC in ruling on a prior issue. *Id.* at 652.

4. The Pressls Cannot Avoid Exhaustion Requirements by the Fact That They Were Not Parties to the Previous FERC Proceedings.

The fact that the Pressls were not involved in the administrative proceedings that gave rise to the previous FERC Orders does not permit them to avoid the judicial review provision of 16 U.S.C. § 825l (b). "[S]tatutes... that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are inescapably intertwined with review of such orders." *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001) (brackets added and internal quotations omitted). As recently explained by the Eleventh Circuit Court of Appeals, the

argument that [appellants] are not subject to the exclusive judicial review provision of § 825l (b) because they are distinct parties from SLISA [a party to a previously-commenced administrative proceeding] and did not participate in the proceedings before the FERC is unavailing. We do not read § 825l (b) as allowing any person or entity that was not a party to the FERC proceedings to collaterally challenge the final order resulting from those proceedings. Instead, we read § 825l (b) as limiting the persons who may seek judicial review of an order of the FERC to those parties who participated in the FERC proceedings. Thus, *non-parties to the*

proceedings before the FERC may not contest the agency's final decision in an alternative forum by bringing challenges that are inescapably intertwined with a review of the agency's final determination. Because section 8251 (b) enumerates the specific, complete and exclusive mode for judicial review of the Commission's orders, a non-party to the Commission's proceedings may not challenge the Commission's final determination in any court.

Otwell v. Alabama Power Co., 747 F.3d 1275, 1282 (11th Cir. 2014) (internal citations omitted) (brackets and emphasis added).

In *Otwell*, a real estate development company and property owners (the "*Otwell* Plaintiffs") brought a state court action against a public utility ("Alabama Power") which operated a dam producing hydroelectric power at Smith Lake pursuant to a federal license. *Id.* at 1276. In 2007, before the *Otwell* Plaintiffs had filed their complaint, a non-profit organization called the Smith Lake Improvement and Stakeholders Association ("SLISA") had intervened in Alabama Power's relicensing proceedings and proposed that the elevations of the lake be kept higher and more stable throughout the year. *Id.* at 1278. In 2010, FERC issued another license for Alabama Power to continue to operate its hydroelectric project, and in that license, FERC stated it had considered and rejected SLISA's proposal for more stable lake levels. *Id.* SLISA filed a petition for a rehearing, but the request was denied by FERC in an order that reiterated that SLISA's proposal for more stable lake levels was not in the overall public interest. *Id.* While SLISA's petition for rehearing was pending with FERC, the *Otwell* Plaintiffs filed a class action in state

court and alleged that "Alabama Power unreasonably decreased lake levels during certain months of the year to such an extent that they could not enjoy their property or the lake." *Id.* After removing the case to federal court, Alabama Power was granted summary judgment after the district court found, in pertinent part, that the *Otwell* Plaintiffs' claims were an impermissible collateral attack on the FERC's 2010 relicensing order. *Id.* at 1278-79.

On appeal, the Eleventh Circuit affirmed the decision of the district court and stated that the *Otwell* Plaintiffs' claims were "a collateral attack on the FERC's final relicensing determination. The Federal Power Act (FPA) contains a judicial review provision which vests the federal courts of appeals with exclusive jurisdiction to affirm, modify or set aside an order of the FERC." *Id.* at 1281. In coming to its decision, the *Otwell* court relied heavily on the Supreme Court's decision in *City of Tacoma*, 357 U.S. 320, and noted that

Appellants cannot escape § 825 l (b)'s strict judicial review provision by arguing that they are pursuing different claims and different relief than the parties before the FERC. See [City of Tacoma, 357 U.S. at 336, 78 S.Ct. at 1218] (stating § 825 l (b) encompasses "all issues inhering in the controversy"). Appellants' suit sought more stable water levels in Smith Lake, and Appellants explicitly requested an injunction requiring Alabama Power to construct cooling towers at Plant Gorgas—proposals expressly considered and rejected by the FERC in its relicensing proceedings, in the order issuing the 2010 License, and in its order denying rehearing. Appellants are attempting to obtain the same results and to place the same constraints on Alabama Power rejected by the agency in the exercise of its institutional expertise, and their claims are inescapably intertwined with a review of the FERC's final decision.

Otwell, 747 F.3d at 1281-82 (emphasis and bracketing added).

The *Otwell* court further explained that putative plaintiffs cannot avoid § 825l (b)'s judicial review provision simply because they did not participate in FERC proceedings because, otherwise, anyone with an interest in FERC proceedings could evade the FPA's exclusive judicial review provision by not participating in the proceedings, "or by creating a corporate entity to champion its interests before the agency. Then, following an adverse order, the non-participants could obtain a collateral redetermination of the identical issues considered and rejected in the FERC's final order because those persons were not parties to the proceedings." *Id.* at 1282-83. Whether coordinated or not, the situation contemplated in *Otwell* with the "corporate champion" participating in administrative proceedings while others with intertwined interests pursue related matters in trial courts appears to be playing-out in real life as the Pressls commenced the current action after CURB filed its Complaint with FERC.

* * *

In sum, in order to grant the declaratory relief requested in the Complaint, a court would essentially have to find that FERC erred in making its findings in the related administrative proceedings. Thus, construing § 825l (b) to allow the Pressls to maintain the current action would do harm to the statute's purpose of promoting judicial economy and the elimination of duplicative and potentially

conflicting review. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) ("Appellate courts develop an expertise concerning the agencies assigned them for review . . . In addition, exclusive jurisdiction eliminates duplicative and potentially conflicting review, . . . and the delay and expense incidental thereto.").

C. The District Court Properly Dismissed the Pressls' Complaint for Failure to State a Claim Upon Which Relief Could be Granted.

1. The District Court Properly Dismissed the Pressls' Requests for Declaratory Relief Regarding Whether they May Be Required to Obtain a Dock Permit.

The District Court noted that the Pressls' requests for Declaratory Relief in Paragraphs C and D of the Complaint "should be dismissed for failure to state a justiciable controversy." (JA 499.) The Pressls sought declarations "that APCO lacks the authority to demand that your plaintiffs relinquish without compensation valuable property rights. . . ." and that the trial court "further find that APCO lacks the authority to require the plaintiffs to enter into a revocable license agreement as a condition for accessing the waters of Smith Mountain Lake for recreational purposes. . . ." (JA 34.) These requests for relief relate to APCO's Dock Permit requirement, and the District Court correctly concluded that: "Until this permit is formally agreed upon, the parties are not in any justiciable controversy." (JA 499.)

Under the Declaratory Judgment Act, "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an

appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201 (brackets added). To satisfy the "actual controversy" requirement of the Declaratory Judgment Act, the dispute must "be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126, 127 S. Ct. 764, 771 (2007) (brackets added). Where a complaint seeking declaratory judgment concerns matters which do not present an actual controversy, it fails to state a cause of action. *Taylor v. U.S. Bd. of Parole*, 194 F.2d 882, 883 (D.C. Cir. 1952).

The Pressls' request for relief "C" asks the Court to find that APCO lacks authority to demand that the Plaintiffs relinquish property rights without compensation. As is clear from paragraphs 28-29 of the Complaint, the Pressls are referring to the Dock Permit proposed by APCO when they raise the specter of APCO making some "demand" for Plaintiffs to relinquish their property rights. (JA 31.) Similar to request "C," request for relief "D" asks the Court to find that APCO lacks the authority to require the plaintiffs to enter into a revocable license agreement (*i.e.*, the Dock Permit) as a condition for accessing the waters of Smith

Mountain Lake for recreational purposes. However, the Complaint only states that APCO "would" require the Plaintiffs to apply for such a permit, and it never actually alleges that APCO ever actually made such a demand to the Pressls. (JA 31, ¶ 28.) Indeed, the Dock Permit attached to the Complaint was not alleged to be a document offered to the Pressls by APCO, but is merely characterized as a sample of the "proposed" permit. Thus, the controversy asserted here, to the extent there is one, is too speculative to give rise to a justiciable controversy.

Assuming, for the sake of argument, that there was a justiciable controversy with regard to whether APCO could require the Pressls to obtain a permit before engaging in certain activities within the Project boundary, the District Court correctly held that "APCO's right to require the Pressls to obtain a Permit before commencement of their dock is logically tied to... APCO's ability to remove at the moment that the first structure has been erected." (JA 498.) APCO's right to remove structures to which the District Court is referring is clearly stated in the following language from the Flowage Easement Deed granting APCO the right to remove "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 [within the Project boundary]." (JA 43) (brackets added).

2. The District Court Also Properly Dismissed The Pressls' Requests Regarding APCO's Right to "Regulate" Certain Activities Within The Project Boundary.

The District Court held that APCO had the right to require the Pressls to obtain a Dock Permit based on APCO's right to regulate construction within the Project boundary. (JA 498.) Specifically, the District Court noted that the plain language of the Flowage Easement Deed gave APCO the right to undo any construction of a dock contrary to APCO's obligations to FERC, and this right was "logically tied" to APCO's ability to require Dock Permits. In opposition to this conclusion, the Pressls argue that APCO's actions are restricted to the conditions that existed in 1960 before the Federal License existed in its current state. The Pressls' argument is unavailing because APCO's original license with FERC's predecessor incorporated the terms and conditions of the FPA, and was made "subject to such rules and regulations as the [Federal Power] Commission has issued or prescribed under the provisions of the Act." *Appalachian Power Co.*, 23 F.P.C. 624 (1960) (at Ordering Paragraph (A)) (brackets added). Thus, APCO's original license also incorporated 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.

Additionally, when an instrument, such as the Flowage Easement Deed here, "is created by grant or reservation and the instrument creating the easement does not limit its use, the easement may be used for any purpose to which the dominant estate may then, *or in the future* be reasonably devoted." *Shooting Point*, 265 Va. at 266, 576 S.E.2d at 505-503 (2003) (emphasis added). Taken together, the provisions of APCO's original license and purpose to operate the Project indicate that FERC (or its predecessor) would issue new licenses and orders in the future providing new rules and regulations. The Pressls' suggestion to the contrary is meritless.

The District Court also correctly held that the Pressls' other substantive requests for declaratory relief could be dismissed. Specifically, based on broad language in the Flowage Easement Deed, (*see* JA 42-43; *supra* pp. 7,) and precedent which was directly on point, the District Court held that APCO had the right to regulate the Pressls property in the manner described in the Complaint and dismissed requests for relief E, F, H, and I. (JA 499) (*citing Nissen*, 2015 WL 1883647 (W.D. Va. 2015); and *Arthur*, 39 F. Supp. 3d 790 (W.D. Va. 2014)). Therefore, under controlling law, APCO has the right and obligation under the Flowage Easement Deed and its Federal License to regulate the Project, and the Pressls' assertions and arguments in the Complaint to the contrary were properly rejected.

CONCLUSION

This is a case involving a federal project governed by a Federal License under the FPA. It belonged in federal court and the District Court properly ruled on the Pressls' 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,

APPALACHIAN POWER COMPANY

By: /s/ Frank K. Friedman
Of Counsel

Matthew P. Pritts (VSB #34628)
pritts@woodsrogers.com
Frank K. Friedman (VSB #25079)
friedman@woodsrogers.com
C. Carter Lee (VSB #78731)
clee@woodsrogers.com
WOODS ROGERS PLC
Wells Fargo Tower
10 South Jefferson Street, Suite 1400
P. O. Box 14125
Roanoke, Virginia 24038-4125
Telephone: 540-983-7600
Fax: 540-983-7711
Counsel for Appellees

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January 20, 2016

/s/ Frank K. Friedman
Counsel for Appellee

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I hereby certify that on this 20th day of January, 2016, I caused this Response 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:

Pavlina B. Dirom, Esq.
J. Frederick Watson, Esq.
Caskie & Frost
2306 Atherholt Road
P.O. Box 6320
Lynchburg, Virginia 24505
pdirom@caskiefrost.com
fwatson@caskiefrost.com

/s/ Frank K. Friedman
Counsel for Appellee