

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

RICHARD A. PRESSL and THERESA M. PRESSL,)	
)	
)	
Plaintiffs,)	
)	Case No.: 7:15-cv-00343
vs.)	
)	
APPALACHIAN POWER COMPANY,)	
)	
Defendant.)	

**APPALACHIAN POWER COMPANY'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND**

Appalachian Power Company ("APCO") properly removed the current action because the Complaint filed by the plaintiffs, Richard A. Pressl and Theresa M. Pressl (the "Pressls"), raises a substantial and disputed federal issue. As recognized in the Complaint, "APCO operates the Smith Mountain Hydroelectric Project (the "Project") on Smith Mountain Lake."¹ Under the Federal Power Act ("FPA"), an entity like APCO that operates a hydroelectric project must do so pursuant to a license from the Federal Energy Regulatory Commission ("FERC"). See 16 U.S.C. § 817.² The Complaint filed in this action incorporates language that recognizes that APCO operates the Project pursuant to a federal license issued by FERC, and specifically states, among

¹ Compl., ¶ 6. The Project is an integral part of American Electric Power's grid and contributes over 625 megawatts of power to the federal system. The Project, which is one of over 1000 federally-licensed hydropower projects, includes 23,000 acres of water surface and over 500 miles of shoreline. The Project provides not only electric power to the nation, but also a recreational resource for the general public and over 20,000 persons who reside adjacent to the Project boundary.

² Congress enacted the FPA to provide "a complete scheme of national regulation, [to] promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 180 (1946).

other things, that APCO "has the authority and responsibility under its [FERC] license [] and its land rights to review and authorize certain activities within the [Project] boundary...."³

In the Complaint, the Pressls assert claims for declaratory relief that all hinge upon a determination of whether certain activities within the Project boundary are consistent with APCO's operation of the Project. **Indeed, the flowage easement which the Pressls ask the Court to interpret gives APCO the right to affect the servient tenement in any matter whatsoever as a result of operation and/or maintenance of the Project.**⁴  Recognized in the Complaint, under the FPA, APCO's operation of the Project is governed by APCO's federally issued license from FERC. Thus, interpretation of APCO's license with FERC is required in this case to determine what use of the land is consistent with APCO's operation of the Project and what activities within the Project boundary APCO is required to regulate pursuant to said license. Given this, the following excerpt from this Court's decision in *Va. Timberline, LLC v. Appalachian Power Co.*  makes it clear that a substantial federal question is raised by the Pressls Complaint and that this case was properly removed to federal court:

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 (2006) (denying motion to remand in case where state court complaint sought declaratory judgment determining plaintiff's rights pursuant to an easement within the Project boundary).

³ Exhibit G to Compl. (incorporated by reference in ¶ 29 of Compl.).

⁴ Compl., ¶ 16.

This Court also has jurisdiction over the current action because the Pressls are seeking declaratory relief in the form of a declaration that a certain flowage easement does not grant APCO the right to control and regulate certain uses of the Pressls' property. By seeking such a declaration, the Pressls are attempting to determine their rights before proceeding with certain activities on their property in an effort to avoid a potential injunction action which would likely be filed by APCO in federal court if they were to engage in such activities. Thus, the Pressls seek declaratory relief on a matter for which APCO could bring a coercive action against the Pressls arising under federal law. Because this Court would have had jurisdiction if APCO asserted a claim against the Pressls for injunctive relief for violation of its rights, this Court also has jurisdiction when the Pressls seek a declaration that its actions would not violate APCO's rights.



BACKGROUND INFORMATION

APCO operates the Project on Smith Mountain Lake and Leesville Lake in the Virginia counties of Bedford, Campbell, Franklin, Pittsylvania and Roanoke.⁵ Smith Mountain Lake and Leesville Lake were from their very inception, and still are, creatures of a license issued to APCO by the Federal Power Commission⁶ for development and operation of a hydroelectric project. Congress gave FERC the authority to issue licenses for the development and operation of hydroelectric projects

for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient ... for the development, transmission and utilization of power 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 ...

⁵ *Id.*, ¶ 6.

⁶ The Federal Power Commission, now known as FERC, is a federal agency created under the FPA. *See* 16 U.S.C. §§ 791a *et seq.*

16 U.S.C. § 797(e).

By Order issued December 15, 2009 ("FERC License Order")⁷, the FERC issued a new and amended license to Appalachian for the Project, effective April 1, 2010, for a period of thirty years. Pursuant to the FERC License Order, the Project consists of "[a]ll lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary. . . ." ⁸ The Project boundary generally conforms to the contour elevation 800 feet above mean sea level.⁹ Here, the Pressls are the owners of waterfront property on Smith Mountain Lake (the "Property"), a portion of which extends below the 800 foot elevation contour to the shoreline of, and under, the waters of the lake.¹⁰ This area of the Property is within the boundary of the federal Project.

The Pressls' property is subject to an instrument titled "Flowage Right and Easement Deed Smith Mountain Combination Hydro Electric Project Upper Reservoir" ("Flowage Easement"),¹¹ a copy of which was attached to the Complaint "and by reference made a part [t]hereof."¹² The Flowage Easement 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 maintenance of the aforesaid dam and/or power station...."¹³ The Flowage Easement also gives APCO the right to, among other things, enter upon the Property to "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

⁷ See Order Issuing New License, 129 FERC ¶62,201 (December 15, 2009), a copy of which is attached hereto as **Exhibit A**.

⁸ FERC License Order at p. 41.

⁹ *Id.* at p. 6

¹⁰ Compl., ¶¶ 1, 2.

¹¹ *Id.* ¶ 8.

¹² *Id.*, ¶ 9 (incorporating by reference the Flowage Easement as Exhibit D to the Complaint). A copy of the Flowage Easement is attached hereto as **Exhibit B**.

¹³ Flowage Easement (Ex. D to Compl., Exhibit B hereto).

may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet."¹⁴

In the Complaint, the Pressls allege that for a period of time they have desired to conduct certain activities on the Property within the Project boundary, such as construction of a boat dock.¹⁵ However, the Pressls claim that APCO impermissibly attempts to regulate such activities.¹⁶ Additionally, the Pressls assert 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 and maintenance of the dock, revocable at APCO's sole discretion."¹⁷ A sample of the proposed Occupancy and Use Permit (the "Dock Permit") is attached to and expressly made part of the Complaint.¹⁸

The Dock Permit  states that APCO "has the authority and responsibility under its Federal Energy Regulatory Commission (FERC) license ("FERC License") and its land rights to review and authorize certain activities within the Smith Mountain Project boundary."¹⁹ The Dock Permit goes on to explain that APCO, "pursuant with 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 and to monitor the use of and ensure compliance with the conditions under which this Permit has been granted." Also, as part of APCO's responsibility to operate the Project in accordance with the FERC License, the Dock Permit references the Shoreline Management Plan ("SMP") and states that APCO must ensure that

work within the project boundary shall be done in accordance with the Shoreline Management Plan for the Smith Mountain Pumped Storage Project, dated August

¹⁴ *Id.*

¹⁵ Compl., ¶ 19, 20.

¹⁶ *See e.g. Id.* ¶ ¶ 20, 23-25, 27.

¹⁷ *Id.*, ¶ 28.

¹⁸ *Id.*, ¶ 29. A copy of the Dock Permit is attached hereto as **Exhibit C.**

¹⁹ Comp. ¶ 29; Ex. G to Compl. (Ex. C hereto).

29, 2003, the Order Modifying and Approving Shoreline Management Plan issued by the Federal Energy Regulatory Commission (Commission) on July 5, 2005, the Order Amending Shoreline Management Plan issued by the Commission on April 14, 2006, and the Order Amending Shoreline Management Plan issued by the Commission on February 27, 2007, and all associated amendment, addendum and revision hereto in effect as of the date of this Permit.²⁰

While the Dock Permit references and explains APCO's requirements to comply with federal license issued by FERC, the Plaintiffs 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."²¹ Along with protesting APCO's potential requirement for the Pressls to sign the Dock Permit in exchange for APCO allowing the Pressls to conduct certain activities within the Project boundary, the Pressls ask for the following additional forms of declaratory relief:

- C. That the Court [] 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;

²⁰ *Id.*

²¹ Comp. p. 17 ¶ D.

- I. 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.²²

ARGUMENT AND AUTHORITIES

I. The Pressls' Claims For Relief Arise Under Federal Law Because They Hinge Upon A Determination Regarding APCO's Authority And Responsibility To Regulate Uses And Occupancies Of Project Land—A Determination Which Requires Interpretation Of APCO's FERC License To Operate The Project.

Under 28 U.S.C. § 1441, “any civil action brought in the State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). This Court has original jurisdiction to hear cases “arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. An action “arises under” federal law if (1) “federal law creates the cause of action,” or (2) “the vindication of a right under state law necessarily turned on some construction of federal law.” *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808–09, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986).

Courts determine “whether a state law claim necessarily raises a stated federal issue by applying the well-pleaded complaint rule.” *Va. Timberline, LLC v. Appalachian Power Co.*, 2016 WL 1993557 *2 (2006). The well-pleaded complaint rule “provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). However, plaintiffs “may not omit necessary federal elements of an included claim. . . . When a plaintiff omits from its pleadings federal questions that are necessary elements of a

²² *Id.*, pp. 18-19, ¶¶ C - I.

claim, courts will read the necessary federal elements into the complaint." *Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 707 F.3d 883, 890 (7th Cir. 2013).

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); *Island Pipeline, LLC v. Sequoyah Limited, LLC*, 2009 WL 413584 (M.D. Fla. 2009) (holding that an exhibit to the complaint was incorporated into the allegations on the face of the complaint and showed that the amount in controversy exceeded the jurisdictional requirement). 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." (emphasis added).

A. Plaintiffs' Requests For Relief 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)). "Where the vindication of a right under state law necessarily turn[s] on some construction of federal law," and "the plaintiff's right to relief necessarily depends on a substantial question of federal law," a plaintiff's case arises under federal law and may be removed to federal court. *Franchise Tax Bd. v. Const. Laborers Vac. Trust*, 463 U.S. 1, 9, 28 (1983). Accordingly, "federal-question jurisdiction is not limited to cases where federal law creates the cause of action." *Ormet*, 98 F.3d at 806.

This Court has subject matter jurisdiction over the current action under the "substantial federal question" doctrine. Under 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).

That is, 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 v. Minton, ___ U.S. ___, 133 S.Ct. 1059, 1065 (2013) (quoting *Grable*, 545 U.S. at 314, 125 S. Ct. at 2363). The present action meets all the requirements for jurisdiction under the substantial federal question doctrine as set forth by the Supreme Court in *Grable* and *Gunn* ("Gunn Requirements").

(1). *The Pressls' claims necessarily raise a federal issue.*

The first part of the Gunn Requirements asks whether a federal issue is necessarily raised. To answer this question, 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 in determining whether plaintiff would have prevailed in his previous patent infringement case). Here, the Pressls must prove, among other things, that under the terms of the Flowage Easement they have the "privilege to use the land... in a particular manner and for a particular purposes." *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d

563, 567 (1987). Stated differently, the Pressls have to prove that it would not be contrary to APCO's rights under the Flowage Easement for the Pressls to conduct certain activities on their land that is located within the Project boundary.

One of the rights that APCO has under the Flowage Easement is 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..."²³ The Flowage Easement further provides that 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 [APCO]." Not only are these terms of the Flowage Easement, but the Pressls specifically seek a declaratory relief to the effect 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 at Smith Mountain."²⁴

To prove that the activities for which the Pressls seek court approval are "not inconsistent" with APCO's operation of the Project, the Court would obviously have to consider what is required of APCO to operate the Project. With respect to APCO's requirements to operate the Project, pursuant to the Federal Power Act, APCO must operate its "dam and hydro electric power generation plant" in accordance with the terms of the FERC license.²⁵ Thus, whether interpreting the effect on the premises from the operation of the dam, or determining

²³ Compl. ¶ 9 (quoting Flowage Easement at p. (Ex. D to Compl., Exhibit B hereto)).

²⁴ Compl., pp. 18-19.

²⁵ The fact that APCO operates a hydroelectric project at Smith Mountain Lake is repeated numerous times on the face of the Complaint. *See e.g.*: ¶ 6 ("APCO operates the Smith Mountain Hydroelectric Project on Smith Mountain Lake and Leesville Lake"); FN 1 ("APCO is able to generate power by releasing water from Smith Mountain Lake into Leesville Lake"); ¶ 13 ("It is clear that the plaintiffs may make any use of their property not inconsistent with APCO's right to maintain a hydroelectric dam"); ¶ 14 ("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"); ¶ 15 ("These rights are not inconsistent with APCO's right to maintain a hydroelectric dam"); ¶ 16 (quoting portion of Flowage Easement giving APCO right to affect property "in any manner whatsoever, as the result of... operation and/or maintenance of the aforesaid dam and/or power station"); ¶ 17 (quoting portion of Flowage Easement stating APCO's purpose to construct "and operate in connection with such dam a hydro electric power station"); Request for Relief "I"; Exhibit D attached to Complaint (Flowage Easement); and Exhibit G (Use Permit).

what uses of the Pressls' property are "not inconsistent" with APCO's maintenance of the Project, this Court will have to examine the FERC License to determine what is entailed by APCO's operation and maintenance of the Project.

The fact that APCO operates its "dam and hydro electric power generation plant" pursuant to a license granted by FERC pursuant to the Federal Power Act is specifically acknowledged and referenced throughout the Dock Permit which is incorporated in the Complaint. As discussed in the "Background Information" section above, 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). 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 relevant to the Pressls' claims and directly referred to in their requests for relief where the Complaint asks "[t]hat the 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."²⁶

Obviously, for this Court to determine the propriety of the Dock Permit, the Pressls would have to prove the terms of the instrument, and compare and contrast such terms with those in the Flowage Easement. In other words, the Court would have to determine if the activities which may be allowed by APCO under its FERC license through the Dock Permit are activities that APCO could prevent or otherwise affect through its rights under the Flowage Easement. To conduct this analysis, the Court would have to determine what is permitted by FERC within the Project boundary because 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).

²⁶ Compl. p. 17.

In other words, FERC retains ultimate control over APCO's actions, and APCO may only act as sanctioned by FERC in the federal license.

Thus, challenges to APCO's authority to carry out its responsibilities under the license (*i.e.*, regulate the Pressls' activities within the Project boundary and/or prohibit activities inconsistent with the operation of the Project) are challenges to FERC Orders granting and amending APCO's federal license.

From the points discussed above, it is clear that the Court will have to refer to the FERC License to rule on the Pressls' requests for declaratory relief. The terms of a FERC issued license "are interpreted under federal law." *Timberline*, 2006 WL 1993557 *2 (citing *United States v. So. Cal. Edison Co.*, 413 F.Supp.2d 1101, 1124 n. 13 (E.D.Cal.2006)). Given this, interpretation of federal law is "necessary" to resolution of this case, and the first of the Gunn Requirements is satisfied. Although the Pressls may have attempted to plead state law claims only, there is no doubt that their claims raise a federal issue.²⁷

(2). *The federal issue in the Pressls' claims is actually disputed.*

In satisfaction of the second of the Gunn Requirements, the federal issue in this case is "actually disputed." For any court to take jurisdiction over a declaratory judgment action, there must be an actual dispute between the position of the declaratory plaintiff and the declaratory defendant. 28 U.S.C. § 2201; *Evers v. Dwyer*, 358 U.S. 202, 203 (1958) ("[F]ederal courts will not grant declaratory relief in instances where the record does not disclose an actual controversy."); Va. Code § 8.01-184; *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Sup'rs*, 285 Va. 87, 98 (2013) ("[B]efore a complaint for declaratory judgment can be entertained by the circuit court, it must appear that there is an 'actual

²⁷ The Pressls also want this Court to rule that "APCO has no regulatory authority over the plaintiffs' property [in the Project] beyond those rights defined by the flowage easement, the contemporaneous expressions of the parties, and vested rights", which again raises a federal question for the Court to decide - - What regulatory authority does APCO have under the FPA, the FERC License Order, and other FERC Orders, over the Property in question with regard to boat docks, dredging, and vegetation management?

controversy' existing between the parties based upon an 'actual antagonistic assertion and denial of right.'" (quoting Va. Code § 8.01-184)).

Here, the Pressls allege several times in the Complaint that they seek to engage in activities that are "not inconsistent" with APCO's operation of the Project, but that APCO asserts that it can "regulate" such activities. In fact, the Complaint expressly states that "there exists a dispute between the parties regarding... the rights which the defendant has to regulate the plaintiffs' use of their property."²⁸ Thus, APCO's ability to "regulate" certain activities within the Project boundary is clearly in dispute in this case. This disputed issue raises a federal question since, as discussed above, a court must interpret the FPA, Orders issued thereunder, and the scope of APCO's FERC license to determine the reach and scope of APCO's authority and responsibilities within the Project boundary.

(3). *The federal issues raised by the Pressls claims are substantial.*

The third prong of the Gunn Requirements, specifically, whether the federal issue in this case is substantial, is clearly satisfied in this case. "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. 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.**

APCO's license to construct, operate and maintain the hydroelectric project was issued pursuant to an Order of FERC. Subsequent amendments to the license, made pursuant to FERC Orders, further describe APCO's power to regulate uses and occupancies of Project lands and make APCO responsible for enforcing the terms of the license. *See Coalition for Fair and*

²⁸ Compl., ¶ 36. (emphasis added).

Equitable Regulation of Docks on Lake of the Ozarks v. FERC, 297 F.3d 771, 775 (8th Cir. 2002) (recognizing licensee’s authority to grant permission for certain uses of Project lands and waters, and also licensee’s responsibility to supervise and control the usages it permits). These Orders were not obtained lightly, either.²⁹

APCO’s license from FERC is sanctioned under the FPA, “a complete scheme of national regulation, [to] promote the comprehensive development of the water resources of the Nation.”

DiLaura, 982 F.2d at 78 (quoting *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 180 (1946)). Under the FPA, it is up to FERC to ensure that projects are developed to serve the public needs. *Id.* This overview of the FPA and FERC’s power over its licensees illustrates the enormity of the federal issue raised by the plaintiff’s “state law” claims. Allowing a state court to determine whether APCO can regulate uses of Project land pursuant to the terms of its license approved by Order of FERC subverts the federal grant 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. Considering this, FERC’s role in overseeing all of its licensees operating hydroelectric projects should be administered 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

²⁹ For instance, the original SMP was first made part of APCO’s license by FERC Order dated July 5, 2005. Development of that SMP included, but was not limited to, the formation of a steering committee which met for several years, the solicitation of public input through public meetings and questionnaires, and the compilation of studies and data regarding the entire shorelines of Smith Mountain and Leesville Lake. After more than two years of work, on September 2, 2003, APCO applied to FERC for approval of the plan. What then followed was almost two years’ worth of administrative proceedings before FERC addressing various issues regarding the SMP, until it was approved by FERC order in 2005. The FERC later required APCO to file an SMP Update, so in 2009 APCO formed another steering committee. The committee met with stakeholders to solicit comments, and APCO held public meetings for further comments. APCO then filed the SMP Update with the FERC, which noticed it for public comment. Challenges were made by intervenors, and administrative proceedings were held. In addition, a lengthy mediation between APCO and the intervenors was undertaken over a period of approximately 13 months. Finally, following a settlement reached during the mediation, a Revised SMP Update was filed. By Order dated January 30, 2014, FERC approved Appalachian’s Revised SMP Update, and it became the current SMP. 146 FERC ¶ 62,083.

purpose of the FPA—to create a complete scheme of regulation for the development of national water resources. *First Iowa Hydro-Electric Coop.*, 328 U.S. at 180.

Indeed, the very issues for which the Pressls seek state court review upon have been previously addressed through the process set out in the FPA. Specifically, the proposed activities of dredging, dock construction, and vegetation management on the shoreline property currently owned by the Pressls, and previously owned by **Richard Frie**, were considered and rejected by FERC in proper administrative proceedings. *See* Order Denying Non-Project Use of Project Lands and Waters and Denying Variance Under Shoreline Management Plan, 133 FERC ¶ 62,135 at p. 5 (November 10, 2010);³⁰ FERC's Order Denying Request for Rehearing and Motion for Late Intervention, 134 FERC ¶ 61,113, at ¶¶ 24-27 (Feb. 17, 2011).³¹ Should this case survive the motion to dismiss, the evidence will show that the delay in the Pressls obtaining permission from APCO to construct a boat dock arises in part from the parties' attempts to address the concerns that have already been raised by FERC as its justification for refusing to allow APCO permission to grant a permit to Mr. Frie for his proposed dock. The Pressls now seek to use the very same wooden pilings that Mr. Frie had driven into the lake to complete the currently unfinished dock, so the FERC's stated concerns about the proximity of the proposed dock and associated dredging to existing wetlands will be an issue in this case. Allowing a state court to rule on matters which may contradict or invalidate previously entered FERC Orders, such as the two orders cited above, would undermine FERC's role in overseeing all of its licensees operating hydroelectric projects and would harm FERC's ability to regulate such activity uniformly. Here, in particular, allowing a state court to rule on the Pressls claims could

³⁰ A copy of the November 10, 2010 Order Denying Non-Project Use of Project Lands and Waters and Denying Variance Under Shoreline Management Plan is attached hereto as **Exhibit D.**

³¹ A copy of the February 17, 2011 Order Denying Request for Rehearing and Motion for Late Intervention is attached hereto as **Exhibit E.**

invalidate the comprehensive scheme developed by APCO and adopted by FERC for managing development of the Project.

Because the Pressls' Complaint raises substantial federal questions regarding the application of the FPA and the interpretation of FERC's authority, this court should exercise jurisdiction over this action in order to promote consistency and uniformity. *See Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607-608 (4th Cir. 2002) (concluding that state law conversion and breach of implied covenant claims against insurer that had issued standard flood insurance policy pursuant to National Flood Insurance Program involved substantial federal question and were properly removed to district court where policy was governed by FEMA's flood insurance regulations and would involve the application of federal common law); *Dugdale v. Nationwide Mutual Fire Insurance Co.*, 2006 WL 335628, *3 (E.D. Va. 2006) ("As the government has a substantial interest in monitoring the [National Flood Insurance Program] and federal common law controls [standard flood insurance policy] interpretation, federal question jurisdiction exists under 28 U.S.C. § 1331 for disputes ... involving the interpretation of [standard flood insurance policies].").

In sum, 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 this 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.

(4). ***The federal issues in the Pressls' claims are capable of resolution in federal court without disrupting the federal-state balance approved by Congress.***

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. Here, the question of whether the federal-state balance approved by Congress can be maintained is clearly answered in the affirmative by, again, consulting this Court's decision in *Timberline*.

Plaintiff's cause of action is in the nature of a state title case, and as the Supreme Court has explained that "it will be the rare state title case that raises a contested matter of federal law..." 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." *Grable*, 125 S.Ct. at 2368.

2006 WL 1993557 *2 (denying motion to remand).

B. ***Federal Jurisdiction Also Exists Over The Pressls' Claims Because They Seek Declaratory Relief To Prevent APCO From Asserting Its Rights In Federal Court.***

Requests for declaratory relief, such as those sought by the Pressls in this action, are permitted under the Declaratory Judgment Act which, in pertinent part, provides that a federal court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Of course, the Pressls take the position in their Remand Brief that "federal subject matter jurisdiction is not justified [here] because the Pressls' interpretation of the flowage easement is a state-law claim that does not implicate a significant federal issue, and the FPA does not preempt Plaintiffs' state-law claim." Ps. Br., p. 5. However, even if this were true, the Pressls ignore the fact 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

(1983). This is exactly the situation we have here, and thus this Court has jurisdiction over the present action for declaratory judgment.

[I]n 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.

Columbia Gas Transmission Corp. v. Drain, 237 F.3d 366, 370 (4th Cir. 2001) (internal citations omitted).

Although the Declaratory Judgment Act "does not broaden federal jurisdiction, it does allow parties to precipitate suits that otherwise might need to wait for the declaratory relief defendant to bring a coercive action." *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1467 (11th Cir. 1987) (internal citations omitted). The fact that a "federal right actually litigated when declaratory relief is sought may belong to the declaratory judgment defendant rather than to the declaratory judgment plaintiff does not change the fact that the action arises under federal law." *Interstate Petroleum Corp. v. Morgan*, 249 F.3d 215, 226-227 (4th Cir. 2001) (en banc) (Wilkins, Williams, Motz, and Traxler, JJ., dissenting). As explained in *Gulf States Paper*, the declaratory judgment remedy "allows a party to bootstrap its way into federal court by bringing a federal suit that corresponds to one the opposing party might have brought." 811 F.2d at 1467. Accordingly, "[a] person may seek declaratory relief in federal court if the one against whom he brings his action could have asserted his own rights there." *Standard Ins. Co. v. Saklad*, 127 F.3d 1179, 1181 (9th Cir. 1997).

From the authorities discussed above, it is clear that where a plaintiff requests a declaration that will, in effect, prevent a potential coercive suit by the defendant, jurisdiction is

determined "by the character of the threatened action." *Hunter Douglas Inc. v. Sheet Metal Workers Int'l Ass'n, Local 159*, 714 F.2d 342, 345 (4th Cir.1983). Here, the threatened coercive action would be a suit for declaratory judgment and injunctive relief filed in the federal court—to be precise, this Court. See e.g. *Appalachian Power Company v. Nissen*, Case No. 7:14-cv-00535 (W.D. Va.), *Appalachian Power Company v. Arthur*, Case No. 7:09-cv-00360 (W.D. Va.). Federal jurisdiction is proper for such coercive suits because "[a] straightforward reading of 16 U.S.C. § 825p shows that district courts have subject matter jurisdiction over these kinds of actions." *Nissen*, 2015 WL 424811 at *4.

For its part, the relevant portion of 16 U.S.C. § 825p provides as follows: "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 Federal Power Act ("FPA")] or any rule, regulation, or order thereunder." Here, as explained in the Dock Permit, APCO has the authority and responsibility under its FERC License to review and authorize certain activities within the Project] boundary...." The Complaint states that there is a dispute as to "the rights which the defendant has to regulate the plaintiffs' use of their property."³² If the Pressls make use of their property in the ways referenced in the Complaint without APCO's permission or court approval, APCO would have to file suit "to enjoin any violation of [FPA] or any rule, regulation, or order thereunder." 16 U.S.C. § 825p. As this Court has succinctly explained, it is necessary for APCO to bring such suits

to enforce its liabilities and duties under the FPA. The FERC delegated to APCO its FPA-related duties and responsibilities with respect to operation of the Project. It did so by means of a license order that incorporated the terms of the SMP. Now APCO is suing[] in order 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. This action thus falls within the exclusive jurisdiction of the District Courts of the United States.

³² Compl., ¶ 36.

Nissen, 2015 WL 424811 at *4.

II. The Pressls' Arguments In Support Of Remand Are Unavailing And Do Not Undermine Defendants' Demonstration Of Federal Jurisdiction.

APCO has satisfied its burden in demonstrating that removal was proper, and has established that this court has jurisdiction over plaintiff's claims because they hinge on the resolution of a substantial federal question. The Pressls' arguments to the contrary are insufficient to erode the position firmly established by APCO.

In Plaintiffs' Memorandum in Support of Their Motion to Remand, Dkt. No. 7 (the "Pressls' Brief), the Pressls spend much time arguing that APCO's duties under the FPA do not transform this case into one arising under federal law because the Complaint seeks interpretation of the Flowage Easement and not the FERC license. However, this position ignores the fact that, to interpret what is permitted under the Flowage Easement, a court would necessarily have to refer to APCO's license with FERC. This is so because the Flowage Easement gives 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...." As explained above, in order to determine what is required of APCO to operate the Project, a court must consult the FPA and APCO's license with FERC. The Pressls' position also ignores the fact that they allege APCO lacks authority to regulate certain uses of land within the Project boundary, which again requires the Court to refer to the FERC license and the FPA.

The Pressls' Brief also takes the position that the face of the Complaint makes no reference to the FPA, APCO's FERC license, or the SMP. To maintain this position, the Pressls have to ignore the clear language of Rule 10(c) of the Federal Rules of Civil Procedure which provides that the exhibits attached to their Complaint are " a part of the pleading for all purposes." (emphasis added). The Pressls seek to avoid the application of this rule because the

Dock Permit attached to the Complaint frequently references both the FERC license and the SMP. In order to do this, the Pressls cite several non-mandatory authorities, but the Court need not look to such cases given the clear language of FRCP 10(c). Additionally, the Pressls' numerous references to APCO's operation of the Project³³ indicate that APCO holds a license from FERC to operate a hydroelectric project issued under the Federal Power Act. *See Carraway v. Mayflower Transit, Inc.*, 36 F.Supp.2d 262, 264 (E.D.N.C.1998) (finding that, although complaint did not allege that transaction was conducted under an interstate bill of lading which would give the court federal jurisdiction, removal was still proper because references in the complaint indicated that a bill of lading was involved).

In the Pressls' Brief, they rely heavily on an unpublished opinion written by a magistrate judge for the District Court of Nebraska in *Jeffrey Lake Development Inc. v. Central Nebraska Public Power & Irrigation Dist.*, 2011 WL 7122188 (D. Neb. 2011).³⁴ In *Jeffrey Lake*, the only part of the plaintiff's complaint that remotely referenced federal law was a request for the court to interpret "other related or applicable rule[s], regulations[s], or polic[ies]" in connection with a state law breach of lease claim. *Id.* at *2. Here, on the other hand, the Pressls' Complaint specifically references APCO's FERC license and the SMP incorporated therein. The court in *Jeffrey Lake* also found it significant that "the defendant ha[d] not cited to a specific provision of the FPA, its regulations, the License, or the Management Plan which addresses the specific issues raised by the plaintiffs." *Id.* at *6. However, here, APCO can point to the fact that Article

³³ See fn 25, *supra*.

³⁴ The precedential value of the *Jeffery Lake* opinion is undermined by the fact that it ignored precedent from this Court from the *Va. Timberline* action after failing to carefully review the history for that case. As this Court noted in a previous decision where *Jeffery Lake* was analyzed, "while the magistrate judge in *Jeffrey Lake* opined that *VA Timberline, L.L.C. v. Appalachian Power Co.*, 343 Fed. Appx. 915 (4th Cir. 2009) did not raise the issue of subject matter jurisdiction, I note that an earlier decision in that same case, namely, *VA Timberline, LLC v. Appalachian Power Co.*, No. CIV.A. 4:06-CV-00026, 2006 U.S. Dist. LEXIS 52156, 2006 WL 1993557 (W.D. Va. July 13, 2006), considered and found subject matter jurisdiction on facts similar to those now before me." *Appalachian Power Co. v. Nissen*, 2015 U.S. Dist. LEXIS 45030, *8 (W.D. Va. Apr. 6, 2015).

415 in its FERC License Order places responsibility on APCO to allow only those uses and occupancies of Project property which protect and enhance the scenic, recreational, and other environmental values of the Project.³⁵ APCO can also cite to the SMP which sets forth specific regulations relating to issues set forth in the Complaint such as limits on the size and location of docks.

Next, the Pressls' Brief argues that 16 U.S.C. § 825p is inapplicable to this matter.

However, 16 U.S.C. § 825p is applicable to this case because, by filing this declaratory action, the Pressls are seeking to preempt APCO from filing an injunction action in federal court pursuant to said statute. As previously discussed, if a declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then such suit would necessarily present a federal question. However, this argument is a moot point because there is clearly federal jurisdiction here under the substantial federal question doctrine. Since reference must be made to the FPA and APCO's FERC license to rule on the Pressls' claims, this court has original jurisdiction over the claims pursuant to 28 U.S.C. § 1331. *See Timberline*, 2006 WL 1993557 (holding that, because the Court had to interpret APCO's FERC license to rule on plaintiff's claims, "[t]his court would have original jurisdiction over the Plaintiff's claim pursuant to 28 U.S.C. § 1331, and therefore removal is proper under 28 U.S.C. § 1441").

One of the final arguments against removal made in the Pressls' Brief asserts that they "aren't requesting this Court to determine what [APCO] must do to maintain its FERC license." However, this is not consistent with what the Complaint requests of the court. Indeed, the Complaint specifically asks the court to "find that the Pressls be allowed to use their property in any manner not inconsistent with the maintenance of a dam and hydro electric power generation

³⁵ December 15, 2009 Order Issuing New License, 129 FERC ¶62,201 (Exhibit A hereto).

plant operated by APCO at Smith Mountain."³⁶ In the Pressls' Brief, they note that their Complaint's "reference to the maintenance of the dam comes directly from the language of the flowage easement itself." Here, the Pressls are absolutely correct! The Flowage Easement truly allows APCO to affect the servient property in connection with maintenance or operation of the Project—and thus interpretation of the deed requires reference to APCO's FERC license.

The Pressls' Brief also argues that the existence of administrative proceedings relating to this case are irrelevant to the question of federal jurisdiction. This, however, ignores the strict judicial review provision in 16 U.S.C. § 825 l (b) which provides the only way to challenge FERC Orders, or, for that matter, the only way to obtain judicial review of any issue that is or should be presented to FERC. The Pressls' argument here also ignores the fact that the related administrative matters and FERC's administrative review powers illustrate the point that interpretation of FERC orders and licenses is an important federal question.

IV. The Pressls Are Not Entitled To Costs, Actual Expenses, And Attorney's Fees Incurred As A Result Of The Removal Of This Case.

The Pressls are not entitled to costs, actual expenses, or attorney's fees incurred because a substantial federal question exists and their motion for remand should be denied. In the event that their motion is granted, it strains credulity for the Pressls to maintain that APCO lacked an objectively reasonable basis for seeking removal. Without rehashing all of APCO's arguments and authorities stated above, suffice to say that APCO had a colorable, if not undeniable, reason to remove this action.

CONCLUSION

The Complaint seeks interpretations of the Flowage Easement and the Dock Permit, and such interpretation requires reference to federal law. The Flowage Easement gives APCO the

³⁶ Compl., pp 18-19.

right to affect the Pressls' property in connection with its operation and maintenance of the Project. APCO's power to operate and maintain the Project flows directly from FERC, the federal agency established to administer the Federal Power Act. APCO owes certain duties to FERC under the license, one of which was to develop a comprehensive shoreline management plan to fairly and consistently regulate uses and occupancies of the Project land. FERC approved this plan and incorporated it into the terms of Article 41, and now Article 415, of APCO's license. The Complaint consistently recognizes that APCO operates a hydroelectric project and acknowledges APCO's duties to FERC in the Complaint through the Dock Permit incorporated into the face of the pleading. Therefore, in order to determine what activities are not inconsistent with APCO's operation of the Project, the court must refer to federal law. For these reasons, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, removal was proper, and plaintiff's motion to remand should be denied.

Dated: August 10, 2015

Respectfully submitted,

APPALACHIAN POWER COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2015, a true copy of the foregoing was filed with the court's CM/ECF system, which will send electronic notice to all attorneys of record.

/s/ C. Carter Lee