**Civil No. S258574**

[Fee Exemption, Gov. Code § 6103]

# IN THE SUPREME COURT
## OF THE
# STATE OF CALIFORNIA

---

**COUNTY OF BUTTE, COUNTY OF PLUMAS, et al.**,
*Petitioners and Appellants,*
v.

**DEPARTMENT OF WATER RESOURCES**,
*Defendant and Respondent*;

---

**STATE WATER CONTRACTORS, INC., et al.**,
*Real Parties in Interest and Respondents.*

---

# STATE WATER CONTRACTORS' CONSOLIDATED RESPONSE TO AMICUS CURIAE BRIEFS

---

After a Decision by the Court of Appeal
Third Appellate District
Case No. C071785

Appeal from Superior Court
Yolo County Case No. CV09-1258
The Honorable Daniel P. Maguire, Judge Presiding

DOWNEY BRAND LLP
David R.E. Aladjem (SBN 152203)
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
Telephone: (916) 444-1000
Facsimile: (916) 444-2100
daladjem@downeybrand.com

DUANE MORRIS LLP
Thomas M. Berliner (SBN 83256)
Paul J. Killion (SBN 124550)
Jolie-Anne S. Ansley (SBN 221526)
Spear Tower One Market Plaza, Suite 2200
San Francisco, CA 94105-1127
Telephone: (415) 957-3000
Facsimile: (415) 957-3001
tmberliner@duanemorris.com
pjkillion@duanemorris.com
jsansley@duanemorris.com

*Attorneys for Respondents and Real Parties in Interest*
Alameda County Flood Control & Water Conservation District, Zone 7,
Kern County Water Agency, San Bernardino Valley Municipal Water District,
Santa Clara Valley Water District, The Metropolitan Water District
of Southern California, and State Water Contractors, Inc.

## TABLE OF CONTENTS

**Page**


I. SUMMARY OF ARGUMENT ..... 7

II. ARGUMENT ..... 12

A. Amici Misstate the Nature of this Dispute ..... 12

B. Issue No. 1 Arguments ..... 15

1. Amici Incorrectly Assert that CEQA is Not Preempted Because its Application Occurs "Upstream" of FERC's Jurisdiction Under the Federal Power Act. ..... 15

2. Amici (like the Counties and DWR) Incorrectly Rely on Inapplicable Case Law Involving the Anticommandeering Doctrine for the Proposition that Preemption only Operates in Cases Involving Private Parties. ..... 18

3. Relying on the Incorrect Premise that the Lack of an Express Preemption Provision in the Federal Power Act is Dispositive, Amici Conclude, Without Analysis, that No Preemption Exists in this Matter. ..... 20

4. Congress Clearly and Unmistakably Intended the FPA to Occupy the Field of Hydropower Licensing, Including License Conditions Relating to Environmental Concerns. ..... 23

5. Contrary to Amici's Arguments, It is Through the Remedies Demanded by the Counties that the Extent of the Proposed Interference With FERC's Regulatory Role is Revealed. ..... 28

6. The Narrow Savings Clause under Section 27 of the FPA Is Not at Issue in this Case. ..... 30

C. Issue No. 2 Arguments. ..... 34

1. Amici Misperceive the Scope of the State's Authority Delegated Under Section 401—While It Is Broad, It Is Not So Broad as to Excuse Failure to Comply with the FPA and CWA Requirements and Deadlines. ... 35

2. Ultimately, the Issue Presented with Section 401 is For the Legislature to Resolve. ..... 40

III. CONCLUSION ..... 42

CERTIFICATE OF COMPLIANCE ..... 44

## TABLE OF AUTHORITIES

**Page(s)**

**Federal Cases**

*Alcoa Power Generating Inc. v. FERC* (D.C. Cir. 2011)
643 F.3d 963 ..... 35

*Barnett Bank of Marion County, N.A. v. Nelson* (1996)
517 U.S. 25 ..... 10

*California v. FERC* (1990)
495 U.S. 490 ..... *Passim*

*Chesapeake & Ohio Ry. Co. v. Martin* (1931)
283 U.S. 209 ..... 23, 26, 32

*Crosby v. National Foreign Trade Council (2000)*
530 U.S. 363 ..... 19, 20-21

*First Iowa Hydro-Electric Coop. v. Federal Power Com.* (1946)
328 U.S. 152 ..... *Passim*

*Hoopa Valley Tribe v. F.E.R.C.* (D.C.Cir. 2019)
913 F.3d 1099 ..... 35, 37

*Hughes v. Talen Energy Marketing, LLC* (2016)
136 S.Ct. 1288 ..... 21

*Keating v. F.E.R.C.* (D.C. Cir. 1991)
927 F.2d 616 ..... 37

*Murphy v. Nat. Collegiate Athletic Assn.* (2018)
138 S.Ct. 1461 ..... 8-9, 18, 21, 27, 30

*Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.* (2d Cir. 2012)
673 F.3d 84 ..... 9, 33

*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994)
511 U.S. 700 ..... 38-39

*S.D. Warren Co. v. Me. Bd. of Envtl. Prot.* (2006)
547 U.S. 370 ..... 38-39

*Sayles Hydro Associates v. Maughan* (9th Cir. 1993)
985 F.2d 451 ..... 8, 10, 23-27, 29, 31-33

*United States v. Appalachian Power Co.* (1940)
311 U.S. 377 ..... 32

*Virginia Uranium, Inc. v. Warren* (2019)
139 S.Ct. 1894 ..... 15-17

*Wyeth v. Levine* (2009)
555 U.S. 555 ..... 9

**California Cases**

*California Oregon Power Co. v. Superior Court* (1955)
45 Cal.2d 858 ..... 27

*County of Amador v. El Dorado County Water Agency* (1999)
76 Cal.App.4th 931 ..... 23, 32, 34

*E.L. White, Inc. v. City of Huntington Beach* (1978)
21 Cal.3d 497 ..... 12

*Friends of the Eel River v. North Coast Railroad Authority* (2017)
3 Cal.5th 677 ..... 21, 30

*Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010)
183 Cal.App.4th 330 ..... 8, 23-25, 27, 32, 39

*Pratt v. Coast Trucking, Inc.* (1964)
228 Cal.App.2d 139 ..... 12

*Scott v. Industrial Acc. Com.* (1937)
9 Cal.2d 315 ..... 23, 32

*Stock v. Plunkett* (1919)
181 Cal. 193 ..... 23, 26

**Federal Statutes**

16 U.S.C. §§ 791a et seq. (Federal Power Act) ..... *Passim*

16 U.S.C. § 797 ..... 17, 20, 22-24, 29

16 U.S.C. § 803 ..... 17, 23-24, 29

16 U.S.C. § 821 ..... 30-31

33 U.S.C. § 1341 (Clean Water Act § 401) ..... *Passim*

42 U.S.C § 4332 ..... 24

**State Statutes**

Public Resources Code §§ 21000 et seq. (CEQA) ..... *Passim*

Public Resources Code § 21081 ..... 35-36

Public Resources Code § 21167 ..... 41

Water Code § 11464 ..... 13

Water Code § 13160 ..... 41

Water Code, § 13330 ..... 36-38, 40-41

**Other Authorities**

18 C.F.R. § 5.5 ..... 17

18 C.F.R. § 5.17 ..... 17

40 C.F.R. § 121.6(e) ..... 38

Cal. Code Regs., tit. 14, §§ 15091, 15093, 15096(h) ..... 36

85 Fed.Reg. 42279-42280 July 13, 2020) ..... 38

Pub. L. No. 99-495 (Oct. 16, 1986) 100 Stat. 1243 ..... 24

9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 505 ..... 23, 26, 32

Respondents and Real Parties in Interest the State Water Contractors, Inc., et al. ("SWC") submit this brief in response to the following three amicus curiae briefs submitted in support of Petitioners Butte County, Plumas County and Plumas County Flood Control and Water Conservation District ("the Counties"): (1) amicus curiae brief of the Sierra Club, Center for Biological Diversity, Friends of the River, California Sportfishing Protection Alliance, and Friends of the Eel River ("Sierra Club Brief"); (2) amicus curiae brief of the California State Association of Counties ("CSAC Brief"); and (3) amicus curiae brief of the California Water Impact Network and AquAlliance ("CWIN Brief") (collectively "Amici").

## I. SUMMARY OF ARGUMENT

Amici launch out on juridical expeditions that bear little resemblance to the case actually before this Court. The Sierra Club Brief repeatedly frames the issues as if the case involves the construction of a new dam, or the continued existence of the current dam. (Sierra Club Brief, at 9-13.) And all the amici spend pages discussing the 2017 spillway collapse, which has nothing to do with this action. (CSAC Brief at 7-8; CWIN Brief, at 5, 18-19; Sierra Club Brief, at 11-12; see Court of Appeal Opinion on Transfer dated September 5, 2019, p. 2 fn. 1 ("2019 Opinion").)

As the Court of Appeal made clear, "the project subject to environmental review by the state is not the dam and facilities as built." (2019 Opinion, p. 17.) Instead, the project subject to environmental review is "the project to further mitigate the loss

of habitat caused by construction of the dam in 1967," which is set forth in the Settlement Agreement. (*Id*., at pp. 17, 32.)

As to the two issues on which this Court granted review, the Amici repeat the same analytical mistakes made by the Counties and Department of Water Resources ("DWR").

First, as to Issue No. 1, like the Counties and DWR, the Amici argue that preemption is inapplicable because "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States," and no private actors are involved here. (See Sierra Club Brief, at 17 [citing *Murphy v. Nat. Collegiate Athletic Assn*. (2018) 138 S.Ct. 1461, 1471 (*Murphy*)]; see also CWIN Brief, at 12-13; DWR Answer Brief, at 40-41; Counties' Reply Brief, at 15.) But the principle discussed in *Murphy*—known as "anticommandeering" (138 S.Ct. at 1471)—is not implicated by the field preemption at work in this case. As the Court of Appeal explained, "[w]ith one relevant exception, the FPA *occupies the field* of licensing a hydroelectric dam and bars environmental review of *federal* licensing procedure in the state courts." (2019 Opinion, p. 13, citing *First Iowa Hydro-Electric Coop. v. Federal Power Com*. (1946) 328 U.S. 152 (*First Iowa*); *California v. FERC* (1990) 495 U.S. 490; *Sayles Hydro Associates v. Maughan* (9th Cir. 1993) 985 F.2d 451 (*Sayles Hydro*); *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330 (*Karuk*) [first emphasis added].)

In other words, the principle involved in this case is a federal right to be free from state regulation in an area Congress

has delegated to federal regulatory control. In *Murphy*, the United States Supreme Court explained that "in substance, field preemption does *not* involve congressional commands to the States. Instead, like all other forms of preemption, it concerns a clash between a constitutional exercise of Congress's legislative power and conflicting state law." (138 S.Ct. at 1480 [emphasis added].) Because the Counties' lawsuit seeks to interfere with the licensing process in order to impose California's CEQA-based mitigation measures as conditions on the Federal Energy Regulatory Commission ("FERC") license, their action is preempted.

Second, the failure of Amici (as well as the Counties) to acknowledge that field preemption is at work here, leads to another analytical error regarding Issue No. 1—they approach the case as if it is one concerning express preemption, mistakenly thinking that the preemption issue is quickly resolved because "[t]he [Federal Power Act] does not contain an express preemption clause." (Sierra Club Brief, at 14, quoting *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist*. (2d Cir. 2012) 673 F.3d 84, 95; see also Counties' Reply Brief, at 17-20.) But field preemption—which is a form of *implied* preemption—is just as valid as express or conflict preemption. (*Murphy*, 138 S.Ct. at pp. 1480-81.) While "the purpose of Congress is the ultimate touchstone in every preemption case" (*Wyeth v. Levine* (2009) 555 U.S. 555, 565), congressional purpose is not relegated exclusively to statutory language, but sometimes is revealed in the overall structure and purpose of legislation.

(See *Barnett Bank of Marion County, N.A. v. Nelson* (1996) 517 U.S. 25, 31 [explaining that where "explicit pre-emption language does not appear, or does not directly answer the question . . . courts *must* consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent."][emphasis added].) This is particularly true where field preemption is involved.

Twice the United States Supreme Court has recognized the preemptive sweep of the Federal Power Act on the licensing of hydropower facilities. (See *First Iowa*, 328 U.S. at p. 181 ["The detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls."]; *California v. FERC* (1990) 495 U.S. at p. 499 ["By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with final authority to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA to elaborate and reaffirm First Iowa's understanding that the FPA establishes a broad and paramount federal regulatory role."].) Other than control over proprietary water rights under Section 27 to the FPA, "Congress has occupied the entire field." (*Sayles Hydro*, 985 F.2d at p. 453-55, citing *First Iowa*, 328 U.S. at pp. 175-76; see also 985 F.2d at p. 454 ["The rights reserved to the states in [§27] are all the states get."].) As the Ninth Circuit summed it up in *Sayles Hydro* (a case DWR and Amici all studiously avoid citing), "[o]nce the [Supreme] Court [in *California v. FERC*] made it clear that the

state could control only proprietary rights to water, that established the category as 'occupy the field' preemption for everything but proprietary rights to water." (985 F.2d at p. 456.)

More specifically as to environmental regulations framed by Issue No. 1 before this Court, the Ninth Circuit concluded: "There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." (*Ibid.*) For purposes of the relicensing of a hydropower project under the Federal Power Act, CEQA is preempted and cannot be used to impose conditions on a FERC license.

But there is one role for CEQA under the separate Clean Water Act, which is framed in Issue No. 2: All parties and the three Amici *agree* that the FPA does not preempt state court challenges to an environmental impact report prepared under CEQA to comply with Section 401 of the federal Clean Water Act. Nonetheless, the Amici devote many pages to making this undisputed point. Where there is disagreement, however, is whether the Counties have preserved any right to challenge the 401 water certification for the Oroville Facilities. And on this point, both SWC and DWR agree—the Counties waived their right to challenge the Water Board's certification, and it is too late now to raise a CEQA-based attack. (See SWC Brief, at 57; DWR Brief, at 55, fn.11 & 64, fn.15.) Amici's half-hearted

attempt to push back on the Court of Appeal's waiver finding is unavailing.

The decision of the Court of Appeal should be affirmed.

## II. ARGUMENT

### A. Amici Misstate the Nature of this Dispute

It is "the general rule that an amicus curiae accepts the case as he finds it and may not 'launch out upon a juridical expedition of its own unrelated to the actual appellate record.'" (*E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511, quoting *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 143.) In several important respects, the Amici misconstrue the case actually before this Court.

Initially, Amici mischaracterize the case as one that involves review of the environmental impacts of the construction and continued existence of the Oroville Facilities, including the dam and reservoir. (See Sierra Club Brief, at 9-13.) In reality, the proposed project at issue is the Settlement Agreement signed March 21, 2006 and submitted to FERC. (AR G000108, G000210-211, D000422-576 [signed Settlement Agreement].) The objective of the Settlement Agreement is continued operation and maintenance of the Oroville Facilities for power generation, with the addition of new environmental and recreational measures. (AR A000013, G000108-110, E000842.) As the Court of Appeal correctly explained, "the project subject to environmental review in this case is not the existing dam and facilities but the project to further mitigate the loss of habitat caused by construction of the dam." (2019 Opinion, p. 17.)

Like the Counties, Amici also raise the 2017 Oroville spillway problems to inflame the tone of the case and distract from the actual issues before the Court. (Counties' Opening Merits Brief, at 21; CSAC Brief, at 7; CWIN Brief, at 18-19; Sierra Club Brief, at 11.) "This action does not concern the construction, repair or replacement of the dam spillways, the need for which occurred during the pendency of this case." (2019 Opinion, p. 2 fn. 1.) Nothing in the Settlement Agreement pertains to the design or repair of the spillway.

Amici further claim, incorrectly, that what is at stake is CEQA review in support of the "state's sovereign decision to build, operate, or pursue relicensing of a state-owned hydroelectric facility." (CWIN Brief, at 13; see also Sierra Club Brief, at 10-18.) Again, this is not the case before this Court. *First*, this case does not involve a CEQA document in support of DWR's decision to *build* the Oroville Facilities, which were constructed in the 1960s as part of the State Water Project. (AR E001167, G000108, G000184.) *Second*, the case does not involve a decision whether to continue to *operate* the Oroville Facilities. At no point did DWR contemplate not operating the Oroville Facilities, assuming arguendo it could even obtain FERC approval for such an extreme action or avoid application of the anti-divestiture mandate of Water Code § 11464. DWR never considered, as an alternative, the outright rejection of a project license issued by FERC. (See AR G000110-111, G000250-254.) Likewise, DWR declined to analyze any alternative in which it surrendered its license, finding that such an occurrence was not

"reasonably foreseeable" and "would not support the primary purpose and needs of the Oroville Facilities that relate to providing electric power." (AR G000252-253.) *Finally*, as SWC explained at length in their Answer Brief, the EIR here cannot be the basis for the DWR' 2002 decision to *pursue relicensing* of the Oroville Facilities because that decision was made long before the EIR was issued in 2008. (AR B068710-68717; SWC Brief, at 43-49.) DWR subsequently spent years of collaborative effort with stakeholders, including extensive environmental studies and analysis for the federally required "Preliminary Draft Environmental Assessment" (or "PDEA") to develop the Settlement Agreement, which DWR signed and submitted to FERC as the new license application in 2006, two years *before* the certification of the EIR in 2008. (AR A000003-101, D000422-576 [signed Settlement Agreement]; G000108, G000134, G001042-1043.)

Finally, Amici suggest blithely that the writ and other remedies sought by the Counties are irrelevant to the issues before this Court. (Sierra Club Brief, at 18-19; see also DWR Brief, at 52-53; Counties Reply Brief, at 28-29.) But it is how the Counties seek to *apply* CEQA in this particular case that triggers the preemption doctrine. This case is not about whether, under all circumstances, CEQA is preempted in connection with FERC licensing proceedings or FERC-licensed hydropower facilities. It is about the application of CEQA in this specific licensing process with the DWR as the applicant. Where, as here, CEQA is used to collaterally attack the environmental sufficiency of the

Settlement Agreement (i.e. the proposed FERC License) and to stay the licensing process pending CEQA review so enforceable environmental mitigation measures may be forced onto the license, CEQA invades FERC's jurisdiction and is preempted. (See 2019 Opinion, at p. 3. fn.3; AA1 {1} pp. 0001-28; AA1 {3} pp. 0030-43.)

### B. Issue No. 1 Arguments

#### 1. Amici Incorrectly Assert that CEQA is Not Preempted Because its Application Occurs "Upstream" of FERC's Jurisdiction Under the Federal Power Act.

Relying on *Virginia Uranium, Inc. v. Warren* (2019) 139 S.Ct. 1894, Amici argue that CEQA is not preempted in this matter because the "State decision to pursue dam licensing is 'upstream' of, in other words, preceded, the involvement, or control of FERC over the ultimate outcome of what is being pursued." (Sierra Club Brief, at 15-16.) However, *Virginia Uranium* is not applicable to this case because the application of CEQA sought by the Petitioners is *during* the licensing process, squarely intruding on FERC jurisdiction over environmental considerations in licensing.

*Virginia Uranium* addressed preemption issues in the context of a Virginia law banning uranium mining. (139 S.Ct. at p. 1900.) A private company intending to mine uranium in the state, Virginia Uranium, Inc., challenged the law claiming it was preempted by the Atomic Energy Act ("AEA"), which gives the Nuclear Regulatory Commission ("NRC") significant authority over the milling, transfer, use, and disposal of uranium. (*Ibid.*)

Responding to claims that the AEA reserved regulation of uranium mining to the NRC, the Supreme Court issued a plurality decision that concluded that the text and context of the AEA make clear that uranium mining lies outside of the NRC's jurisdiction, which arises only after the uranium is mined. (*Id*. at pp. 1901-1907.) As a result, the Court rejected Virginia Uranium's claim that there was field preemption under the AEA. (*Ibid*.) The Court also rejected claims of obstacle/conflict preemption, finding that every indication in the AEA suggested that Congress elected to leave mining regulation on private land to the states and to grant the NRC regulatory authority only after the uranium is removed from the earth. (*Id*. at pp. 1907-1909.)

In a concurring opinion joining in the judgment, Justice Ginsburg, joined by Justices Sotomayor and Kagan, reached the same conclusion that state law is not preempted under theories of field or obstacle preemption. (*Id*. at p. 1909.)[1] In her analysis of field preemption, Justice Ginsburg adopted a different rationale, noting that a "state law regulating an upstream activity within the State's authority is not preempted simply because a downstream activity falls within a federally occupied field." (*Id*. at pp. 1914-15.) Her supporting footnote makes clear that the distinction does not turn on whether the state-regulated activity is upstream or downstream of the federally preempted field, but rather that it does not come within the defined field. (*Id*. at p.

[1] Chief Justices Roberts, joined by Justices Breyer and Alito, separately dissented.

1915, fn.4.) There, uranium mining was "upstream" of the jurisdiction of the NRC. It is this upstream/downstream analysis in Justice Ginsberg's concurring decision that the Amici seek to use in this case.

But nothing in *Virginia Uranium*, which turns on an analysis of the statutory text of the AEA, is dispositive in this case involving the FPA. Furthermore, even if the upstream/downstream concept has application here, the Counties use of CEQA in the FERC relicensing process for the Oroville Facilities is clearly not "upstream" of the federally regulated field. Here, CEQA compliance began together with compliance with the National Environmental Policy Act ("NEPA") when the DWR filed its Notice of Preparation (for CEQA) and Scoping Document (for NEPA). (AR C000025.) But, importantly, the bulk of the CEQA analysis occurred far downstream, including issuance of the draft EIR in 2007 and the final EIR in 2008. (AR G000001.3, A000102.) Rather than "upstream," the EIR analysis occurred five years *after* DWR filed its notice to FERC in 2002 of its intention to seek a renewed license as required by 18 C.F.R. § 5.5, and two years *after* DWR filed its application with FERC for a new license in 2005 as required by 18 C.F.R. § 5.17. (AR B068710-68717; G000168.)

FERC has exclusive jurisdiction to both license the Oroville Facilities, and, with the exception of Clean Water Act Section 401 discussed below, to balance environmental concerns through conditions on the license. (16 U.S.C. §§ 797(e), 803(a), 803(j).) Counties challenge the proposed license before FERC, seeking to

apply CEQA to force DWR to stay the proposed project – again the proposed license before FERC – pending further state-level environmental review and the addition of enforceable mitigation measures to the executed Settlement Agreement. (See 2019 Opinion, p. 3 fn.3.; AA1 {1} pp. 0001-28; AA1 {3} pp. 0030-43.) Such requested actions are not upstream of FERC authority, but rather occur squarely in the middle of the licensing process (which began long before the EIR was issued), and they would directly interfere with FERC's jurisdiction.

### 2. Amici (like the Counties and DWR) Incorrectly Rely on Inapplicable Case Law Involving the Anticommandeering Doctrine for the Proposition that Preemption only Operates in Cases Involving Private Parties.

Relying on *Murphy v. National Collegiate Association*, 138 S.Ct. 1461 and related cases, Amici contend preemption is inapplicable here because "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States," and no private actors are involved. (See Sierra Club Brief, at 17; see also CWIN Brief, at 12-13; DWR Answer Brief, at 13, 40-41; Counties' Reply Brief, at 15.) Nothing in the FPA, however, purports to "command" the States to do anything—the statute solely occupies the field of hydropower regulation.

In *Murphy*, the United States Supreme Court considered whether the federal Professional and Amateur Sports Protection Act ("PASPA"), which makes it unlawful to "authorize" sports gambling schemes, was compatible with the system of "dual sovereignty" with the States embodied in the Constitution. (*Id.*

at p. 1468.) The genesis of the case was New Jersey's attempt first to authorize sports gambling expressly and then to effectuate the same result by repealing its prior ban on sports gambling. (*Id*. at pp. 1469-1472.) Relying on the anticommandeering doctrine, New Jersey argued that PAPSA was flawed because it regulated a state's exercise of its lawmaking powers by prohibiting it from modifying or repealing its laws prohibiting sports gambling. (*Id*. at p. 1471.) The Court found that the PASPA provision violated the anticommandeering doctrine because it dictated what a state legislature may or may not do. (*Id*. at p. 1478.)

The anti-commandeering doctrine withholds from Congress the power to issue orders directly to the States; it is a limit on Congressional authority. (*Id*. at p. 1476 ["[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority."].)

But, importantly, the anticommandeering doctrine "does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." (*Id*. at p. 1478 [emphasis added].) Field preemption is such an example, which the Supreme Court recognized. "[I]n substance, field preemption does not involve congressional commands to the States. Instead, like all other forms of preemption, it concerns a clash between a constitutional exercise of Congress's legislative power and conflicting state law." (*Id*. at p. 1480, citing *Crosby v. National*

*Foreign Trade Council*, 530 U.S. 363, 372, n. 6 (2000).) Because "[t]here is simply no way to understand the [PAPSA] provision as anything other than a direct command to the States," the Court concluded it was unconstitutional based on the anticommandeering doctrine. (*Id*. at p. 1481.)

*Murphy* did not involve a statute that imposed field preemption, unlike the FPA. Here, almost all non-federally owned hydropower projects are subject to the FPA's comprehensive regulatory scheme (i.e. it occupies the field). (16 U.S.C. § 797(e); 2019 Opinion, p. 4.) The Federal Power Act applies regardless of whether the owner of the hydropower project is a state or local government agency or a private party. Indeed, no party to the case has ever questioned that the licensing of the Oroville Facilities falls within FERC's jurisdiction under the FPA, or that the FPA itself is a valid exercise of congressional authority under the Commerce Clause. Because the FPA's licensing provisions apply to both state and private actors, the anticommandeering doctrine does not apply.

### 3. Relying on the Incorrect Premise that the Lack of an Express Preemption Provision in the Federal Power Act is Dispositive, Amici Conclude, Without Analysis, that No Preemption Exists in this Matter.

Amici (and the Counties) appear to suggest without authority that only an express preemption provision in a federal act can provide the clear and unmistakable expression of Congressional intent to preempt state law. (CWIN Brief, at 13; Sierra Club Brief, at 14-15; see also Counties' Reply Brief, at 8-9.) Amici ignore principles of federal preemption that recognize

implied preemption, such as field or conflict preemption. (*See Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 704-705 (*Friends*); *Murphy*, 138 S.Ct. at pp. 1480-1481.)

With field preemption, like all forms of preemption express or implied, the "fundamental question regarding the scope of preemption is one of congressional intent." (*Friends*, *supra*, 3 Cal.5th at p. 704; see also *Hughes v. Talen Energy Marketing, LLC* (2016) 136 S.Ct. 1288, 1297 ["the purpose of Congress is the ultimate touchstone in every pre-emption case"].) As a question of statutory interpretation, to define the "field" preempted by a given statute, courts look to the text of the statute, the overall function of the statute, and Congress' purpose in constructing the surrounding regulatory framework, as disclosed by the legislative history. (*Friends*, *supra*, 3 Cal.5th at p. 702.) It is not necessary that the FPA specifically reference preemption of state-level environmental review of a hydroelectric license for preemption to operate. "Even without an express provision for preemption, we have found that state law must yield to a congressional Act…[w]hen Congress intends federal law to 'occupy the field'[.]" (See *Crosby*, *supra*, 530 U.S. at p. 372.)

Amici claim, without any analysis of the FPA's statutory structure, context or legislative history, that "[t]here is no unclear or ambiguous, let alone *unmistakably* clear, language in the FPA hinting, suggesting, or mandating that public and/or private dam owners cannot have laws, regulations, or guidelines to guide their discretion as to whether and how to pursue dam

relicensing." (Sierra Club Brief at 13-15; see also CWIN Brief, at 12-13 ["The FPA has no 'unmistakably clear' language, or any language, preempting CEQA."].)

Like the Counties, Amici wholly dismiss dispositive Supreme Court case law, including *First Iowa and California v. FERC* and their federal and state progeny, on the grounds that those cases "involved state regulation of private projects not owned by the State." (Sierra Club Brief, at 14; see also CWIN Brief, at 12.) Amici ignore that the sweep of regulatory authority under the FPA applies to both private and public operators of nearly all non-federal hydropower facilities. (16 U.S.C. § 797(e).) More significantly, Amici ignore that such case law, including United States Supreme Court precedent, provides the governing interpretation of Congressional intent in enacting the FPA, including the 1986 environmental amendments, and defines the regulatory jurisdiction (the "field") of both FERC and the States in hydropower licensing.

With respect to the Federal Power Act, decisions of the United States Supreme Court, federal courts, and California state courts, have all recognized that, under the concept of field preemption, the FPA occupies the field of hydroelectric relicensing, establishing a broad and paramount federal regulatory role. (See *First Iowa*, *supra*, 328 U.S. at p. 181 ["detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls"]; *California v. FERC*, *supra*, 495 U.S. at pp. 499-500 [Congress intended the FPA to establish "a broad and

paramount federal regulatory role"]; *Sayles Hydro*, *supra*, 985 F.2d at pp. 454-456 [Congress has occupied the entire field, preventing state regulation; "the only authority states get over federal power projects relates to allocating proprietary rights in water."]; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 959 ["the FPA occupies the field of federal power projects, and prevents state regulation for anything but proprietary rights to water."]; *Karuk Tribe*, *supra*, 183 Cal.App.4th at pp. 342-360 [the FPA "occupies the field of hydropower regulation"].)

The United States Supreme Court's interpretation of the Federal Power Act to occupy the field of hydropower regulation is binding on this Court. (See *Chesapeake & Ohio Ry. Co. v. Martin* (1931) 283 U.S. 209, 220-21; *Stock v. Plunkett* (1919) 181 Cal. 193, 194-95; *Scott v. Industrial Acc. Com*. (1937) 9 Cal.2d 315, 323; see also 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 505, pp. 568-569.)

#### 4. Congress Clearly and Unmistakably Intended the FPA to Occupy the Field of Hydropower Licensing, Including License Conditions Relating to Environmental Concerns.

Congress vested in FERC comprehensive planning authority over the development of waterways for hydroelectric projects, expressly including environmental considerations. (16 U.S.C. §§ 797(e), 803(a).) The FPA clearly mandates FERC's consideration of the environmental impacts of any hydroelectric license and requires FERC itself to set the terms and conditions of the license for the adequate protection, mitigation and

enhancement of fish and wildlife and for other beneficial uses. (See 16 U.SC. §§ 797(e), 803(a), 803(j); see also 42 U.S.C § 4332 [NEPA].) This congressional intent to vest FERC with environmental review authority over hydroelectric licensing was re-emphasized and strengthened in the amendments to the FPA promulgated pursuant to the Electric Consumer Protection Act of 1986 (Pub. L. No. 99-495 (Oct. 16, 1986) 100 Stat. 1243) which amended 16 U.S.C. §§ 797 and 803(a) and added 16 U.S.C. § 803(j).

Together, Sections 4(e), 10(a), and 10(j) provide FERC with the paramount regulatory role in balancing environmental considerations in the issuance of a license to operate a hydroelectric project, as the United States Supreme Court held in *California v. FERC*, 495 U.S. at pp. 499-500. Examining the FPA and the subsequent 1986 amendments, the Court concluded: "By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with final authority to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA to elaborate and reaffirm *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role." (*Id.* at pp. 499-500; see also *First Iowa*, *supra*, 328 U.S. at 181; *Sayles Hydro*, *supra*, 985 F.2d at pp. 454-456; *Karuk Tribe*, *supra*, 183 Cal.App.4th 330, 342-360; see also DWR Brief, p. 18).)

Congress expressly crafted the FPA to provide states with the power to *recommend* environmental conditions on a license, but not the power to impose such conditions on a license. (*California v. FERC*, *supra*, 495 U.S. at p. 499.) As the Ninth Circuit observed in *Sayles Hydro*, "[t]here would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." (*Sayles Hydro*, *supra*, 985 F.2d at p. 456.)

In *Karuk Tribe of Northern California v. Cal. Regional Water Quality Control Board*, *North Coast* (2010) 183 Cal.App.4th 330, the court of appeal addressed the regulatory jurisdiction of FERC over hydropower facilities. There, petitioners sought a writ of mandate seeking to require the Regional Water Quality Control Board for the North Coast ("Regional Board") to enforce provisions of the Porter-Cologne Water Quality Control Act pertaining to waste discharge requirements to the Klamath Hydroelectric Project, which is licensed by FERC. (*Id*. at pp. 337-338) The Regional Board maintained that the FPA preempted application of these state-law provisions. (*Id*. at pp. 339-341.) In a comprehensive decision authored by Justice Richman of the First District, Division Two, the court examined all aspects of the issue, both legal and practical, and concluded that the FPA preempted California regulation of waste from hydroelectric projects. (*Id*. at pp. 359-360.)

Looking first at the relatively small body of case law addressing the FPA, the court observed that *First Iowa* is central to understanding the scope of federal preemption under the FPA, noting in particular the Supreme Court's conclusion that "the detailed provisions of the Act providing for the federal plan of regulation *leave no room or need for conflicting state controls*." (*Id*. at p. 344 quoting *First Iowa*, 328 U.S. at 180-181.) Considering *First Iowa* in conjunction with *California v. FERC* and *Sayles Hydro*, the court further concluded that "twice has the Unites States Supreme Court, followed by the Ninth Circuit, in the most expansive terms, validated expansive federal authority over the conditions governing operations of hydroelectric projects." (*Id*. at p. 350.) The Court stated that while none of these cases involved the provision at issue, these cases could not be dismissed and had an impact on its analysis. (*Id*. at p. 351.)

Observing that while the Ninth Circuit decision in Sayles Hydro might not be binding on California courts, "we are bound by the decisions of the United States Supreme Court in the construction and application of federal law." (*Id*. at 352, citing *Chesapeake & Ohio Ry. Co. v. Martin* (1931) 283 U.S. 209, 220-21; *Stock v. Plunkett* (1919) 181 Cal. 193, 194-95; 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 505, pp. 568-569.) The court rejected plaintiffs' requests to analyze preemption from "square one." (183 Cal.App.4th at pp. 358-359.)

While the court acknowledged that "when the matter of a state's water resources becomes the subject of a state-federal dispute, it would be hard to identify a more vital state interest"

(*Id*. at pp. 354-355), the court nonetheless recognized that "when that interest has twice been subordinated to sweeping federal authority in the form of the FPA, there is no 'skew' because the federal interest prevails even in the presence of the 'high value tension' of traditional state power." (*Ibid*.) The court of appeal rejected application of the principle that courts presume that Congress did not intend to preempt the States power over traditional subjects of regulatory authority (an argument Amici and Petitioners make here), explaining that the Supreme Court in *California v. FERC* explicitly held that this principle is not operative vis-à-vis the FPA. (Id. at p. 356 citing *California v. FERC*, 495 U.S. at 497-498.)[2]

As to the clash between state regulation and the FPA (which *Murphy* later recognized is the hallmark of field preemption), Justice Richman offered this: the "crucial points are (1) that it is Congress that determines what is the extent of state input, and (2) that input takes place within the context of FERC licensing procedures as specified in the FPA." (*Id*. at p. 360.) "It

---

[2] The *Karuk* court also distinguished and strongly questioned the continued validity of *California Oregon Power Co. v. Superior Court* (1955) 45 Cal.2d 858, a case which predates *California v. FERC* and *Sayles Hydro*, the CWA and the Porter-Cologne Water Quality Act, as well as CEQA. (183 Cal.App.4th at pp. 356-358.) The court of appeal criticized the case because it failed to recognize that *First Iowa* had found that the FPA preempted the *field* of hydropower regulation, a ruling subsequently reinforced in *California v. FERC* and recognized by other states. (*Ibid*.) In addition, the Court distinguished the case because the facilities at issue in *California Oregon Power* were not licensed under the FPA. (*Ibid*.)

is only when states attempt to act outside of this federal context and this *federal* statutory scheme under authority of independent state law that such collateral assertions of state power are nullified." (*Ibid*.) The court concluded: "Reasonable minds might disagree as to the wisdom of entrusting the subject to federal supremacy, but the reality of that decision is no longer open to debate." (*Ibid*.)

**5. Contrary to Amici's Arguments, It is Through the Remedies Demanded by the Counties that the Extent of the Proposed Interference With FERC's Regulatory Role is Revealed.**

Amici attempt to downplay the remedies sought by the Counties in this case, arguing remedies are not relevant. (Sierra Club Brief, at 18-19.) But it is the remedies sought by the Counties that reveal the extent to which the Counties seek to use CEQA to interfere with—to trench upon—FERC's regulatory control over the licensing process.

The Counties seek a host of remedies pursuant to CEQA that directly interfere with FERC's regulatory jurisdiction. These remedies include: (1) enjoining and suspending the consideration of the Settlement Agreement as the basis for FERC's renewed license; (2) demanding that the application be withdrawn pending CEQA review; and (3) imposing mandatory mitigation measures as conditions on the proposed federal relicensing project pursuant to CEQA. (AA1 {1} p. 0024, AA1 {3} p. 41; 2019 Opinion, p. 3 fn. 3.) In effect, the Counties seek to halt the federal relicensing of the Oroville Facilities based on state CEQA law.

In fact, the Counties asked the superior court to "retain *jurisdiction over [the Oroville Facilities'] operations*" pending CEQA compliance, and, during that period, to order DWR to "annually compensate Butte County for its costs of hosting the Oroville project." (AA5 {78} pp. 1079, 1128 [emphasis added].)

Amici have no response to these remedies other than to ignore them, claiming that consideration of remedies belongs only in the CEQA merits litigation if preemption is not found. (Sierra Club Brief, at 19.)

Of course, to save the case from preemption, the Counties and Amici now disavow such remedies and seek to frame the case as a question of CEQA for CEQA's sake. (Counties' Opening Brief, at 36, fn. 5; Counties' Reply Brief, at 22; Sierra Club Brief, at 19.) But to what end?

The answer is that under the Federal Power Act, aside from Section 401 certification, states are provided only the ability to make *recommendations* as to environmental concerns in relicensing proceedings. (16 U.S.C. §§ 797(e), 803(a), 803(j).) It is FERC that has the authority to *set the terms and conditions of* hydroelectric licenses and to balance environmental considerations in doing so. (*Ibid*; *California v. FERC*, 495 U.S. at pp. 506-507 [allowing California to impose higher minimum stream flow requirements "would disturb and conflict with the balance embodied" in FERC, "contrary to congressional intent regarding the Commission's licensing authority, and would 'constitute a veto of the project that was approved and licensed by FERC'"]; *Sayles Hydro*, 985 F.2d at p. 456.)

Apparently unhappy with Congress' delegation of authority to FERC, Amici assert that FERC's authority under the FPA "is far from a substantive mandate, and the limited scope of the FPA cannot be a substitute for the DWR's distinct responsibility as the CEQA lead agency tasked with identifying and considering mitigation measures of its own project." (CSAC Brief, at 10.) Amici point out that CEQA requires public agencies to refrain from approving projects if there are feasible alternatives, and that CEQA requires the imposition of feasible enforceable mitigation measures. (*Id*. at 9-10.) Of course, the halting of the FERC licensing process, pending CEQA review for the purpose imposition of mitigation measures on the proposed FERC license is precisely the "clash between a constitutional exercise of Congress' legislative power and conflicting state law" that defines preemption. (See *Murphy*, 138 S.Ct. at pp. 1480-1481.) This Court recognized the same point in *Friends*: "[L]ike the private owner, the state as owner cannot adopt measures of self-governance that *conflict* with [federal law] or invade the regulatory province of the federal regulatory agency." (Friends, 3 Cal.5th at p. 691.)

Because the Counties' CEQA challenge and requested relief directly invades the regulatory domain of FERC, it is preempted. (*Friends*, *supra*, 3 Cal.5th at p. 691; see also 2019 Opinion, p. 6.)

**6. The Narrow Savings Clause under Section 27 of the FPA Is Not at Issue in this Case.**

Like the Counties and DWR, Amici argue the narrow exception to federal jurisdiction under Section 27 of the FPA (16 U.S.C. § 821) is applicable here. (Sierra Club Brief, at 14; see also

Counties' Reply at 30-32; DWR Brief at 46-47.)[3] But the provision has no application to the Counties' action for several reasons.

First, the Section 27 saving clause is limited to proprietary water rights, which are not involved here. Twice the United States Supreme Court has interpreted Section 27 as preserving only state proprietary water rights. In *First Iowa*, the Supreme Court first addressed Section 27 and held: "The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive reference to such *proprietary rights*." (328 U.S. at pp. 175-176 [emphasis added].)

Forty-four years later, when the Supreme Court addressed Section 27 again in *California v. FERC*, 495 U.S. 490, it reached the same conclusion, out of deference to "to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes." (*Id.* at pp. 498-499 ["We decline at this late date to revisit and disturb the understanding of § 27 set forth in *First Iowa*."]; see also *Sayles Hydro*, 985 F.2d at p. 454 ["We cannot…construe [§27] on a blank slate. The Supreme Court [in *First Iowa*] has read the broadest

---

[3] Section 27 provides: "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. § 821.)

possible negative pregnant into this 'savings clause.' …The rights reserved to the states in this provision are all the states get."].)[4]

The United States Supreme Court's interpretation of Section 27 stated in *First Iowa and California v. FERC* is binding on this Court. (See *Chesapeake*, *supra*, 283 U.S. at 220-21; *Stock*, *supra*, 181 Cal. at 194-95; *Scott v. Industrial Acc. Com*. (1937) 9 Cal.2d 315, 323; see also 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 505, pp. 568-569.) Every California court to consider the issue has reached the same conclusion. (See *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 959-60 [reviewing *First Iowa*, *California v. FERC* and *Sayles* and concluding §27 applies "only if proprietary rights to water are involved"]; *Karuk Tribe of Northern California v. Cal. Regional Water Quality Control Board* (2010) 183 Cal.App.4th 330, 342-352 [discussing *First Iowa*, *California v. FERC* and *Sayles Hydro* at length and concluding "with the exception of their proprietary water rights, states are excluded from interposing their law into the field of hydropower regulation."].)

---

[4] Furthermore, even as to the state's proprietary rights, the Supreme Court made clear that the states' "'control of the waters within their borders'" was "'subordinate' " and " ' "subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers." ' " (*First Iowa*, 328 U.S. at p. 182, quoting *United States v. Appalachian Power Co*. (1940) 311 U.S. 377, 405; see also *Karuk Tribe, supra,* 183 Cal.App.4th at p. 344, fn.9.).

Undeterred, Amici, like the Counties and DWR, argue that Section 27 preserves *dual* authority with the state. (See Sierra Club Brief, at 14-15 [citing *Niagara Mohawk Power Corporation v. Hudson River-Black River Regulating Dist.* (2d Cir. 2012) 673 F.3d 84, 95; Counties' Reply, at 16 [same], 20; DWR Brief, at 46-47.) In *Sayles Hydro*, the Ninth Circuit squarely rejected this interpretation of *First Iowa* and *California v. FERC*: "[T]he separation of authority between state and federal governments 'does not require two agencies to share in the final decision of the same issue.' [Quoting *First Iowa*, 328 U.S. 152, 167-168.] *California v. FERC* reaffirms *First Iowa*, uses the 'occupy the field' characterization 'broad and paramount federal regulatory role,' [quoting *California v. FERC*, 495 U.S. at 499], and plainly states that 'constricting § 27 to encompass only laws relating to proprietary rights' accomplishes this 'no sharing' purpose. [Quoting *id.* at pp. 502-503.]" (*Sayles Hydro*, 985 F.2d at 455-456, fn. omitted.)[5]

[5] Surprisingly, other than two passing references in the Counties' Opening Brief, the Counties, DWR and Amici do not address *Sayles Hydro*. Their reliance instead on *Niagara Power* is unavailing. Rather than recognize dual authority over a FERC-regulated dam, the Second Circuit's decision simply holds that the FPA does not "curb the authority of the states to regulate and assess *non-licensed*, *non-hydropower*-project properties" such as that at issue in the Second Circuit case. (673 F.3d at 95 [emphasis added].) Here, in contrast, the project is both a hydropower facility and FERC-licensed.

Second, proprietary water rights are not at issue in this proceeding. The fact that the existing Oroville Facilities serves many purposes, including providing municipal and irrigation water, does not provide a Section 27 "backdoor" for the application of CEQA to this federal relicensing process. The project at issue in this case has nothing to do with DWR's water rights and involves no change in such rights, which are not within FERC's purview in any event. (*Cf. County of Amador*, 76 Cal.App.4th at 960 [§27 implicated only because the project under consideration in the case directly affected water rights, changing the project from "a single-purpose hydroelectric project to multipurpose use that also permits consumptive use of water" and involved a "*new* proprietary use of water"] [emphasis added].)

Finally, in tacit acknowledgment of Section 27's inapplicability, the provision was never raised by the Counties below as a basis for application of CEQA, nor did the Counties ever contend below that proprietary water rights are at issue. The Counties' new argument that they are permitted to raise Section 27 now because it goes to "jurisdiction" (Counties' Reply Brief, at 30, fn.7) is unavailing because this Court is bound by the United States Supreme Court's decisions as to the scope of the provision in any event.

In sum, Section 27 provides no basis to escape preemption in this case.

**C. Issue No. 2 Arguments.**

All parties and Amici agree that issuance of the Water Board's 401 certification required CEQA documentation under

then-applicable California regulations. Nonetheless, Amici spend multiple pages making this undisputed point. (Sierra Club Brief, at 19-25; CSAC Brief, at 11-15; CWIN Brief, at 14-20.) Amici do not address, however, the fact that the Counties in this case waived their right to challenge the certification once it was finalized and submitted to FERC.

### 1. Amici Misperceive the Scope of the State's Authority Delegated Under Section 401—While It Is Broad, It Is Not So Broad as to Excuse Failure to Comply with the FPA and CWA Requirements and Deadlines.

A state receiving a request to issue a 401 certification is required to act "within a reasonable period of time (which shall not exceed one year)," or the certification requirements of Section 401 "shall be waived." (33 U.S.C. § 1341(a)(1); *Hoopa Valley Tribe v. F.E.R.C.* (D.C.Cir. 2019) 913 F.3d 1099, 1101 ("Hoopa Valley") cert. denied *sub. nom California Trout v. Hoopa Valley Tribe* (2019) 140 S.Ct. 650.)[6]

Here, the Water Board certified that it had independently reviewed the record, including the Final EIR prepared by DWR, and made the findings required by Public Resources Code section

---

[6] In *Hoopa Valley*, the Court held that FERC was arbitrary and capricious for not finding that California and Oregon had waived their Section 401 authority by failing to act within one year on a request for 401 certification. (913 F.3d at p. 1105.) The court stated "[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." (*Id* at p. 1101 [quoting *Alcoa Power Generating Inc. v. FERC* (D.C. Cir. 2011) 643 F.3d 963, 972].)

21081, adopting both a statement of overriding considerations and a mitigation, monitoring and reporting plan. (AA11 {95} pp. 2384-2385.); Cal. Code Regs., tit. 14, §§ 15091, 15093, 15096(h).) The 401 certification for the relicensing of the Oroville Facilities became final 30 days after issuance, and the certification was subsequently submitted to FERC on February 1, 2011. (Wat. Code, § 13330; Water Board November 4, 2019 Request for Depublication, p. 3, fn. 1.) The Counties did not challenge the 401 certification.

Amici, like the Counties, all assume that (1) somehow a writ directed at the DWR will also operate on the Water Board, which is not a party to this proceeding, and (2) that a final 401 Certification submitted to FERC, which was never itself challenged, can be re-opened and redone without falling afoul of the Clean Water Act's strict one-year deadline. (Sierra Club Brief, at 19-25; CSAC Brief, at 11-15; CWIN Brief, at 14-20; Counties Reply Brief, at 37-38.) They are wrong on both counts.

As to the Water Board, the Counties brought their action in 2008, two years *before* the Water Board's 2010 issuance of the 401 certification, and they challenged only the environmental sufficiency of the Settlement Agreement submitted to FERC, not the 401 process pending before the Board. (2019 Opinion, p. 6; AA11 {95} p. 2369-2418; AA1 {1} pp. 0001-28; AA1 {3} pp. 0030-43.) As acknowledged by the Water Board, DWR, and the Court of Appeal, the Counties' petitions are not a challenge to the issued 401 certification nor to the Water Board's process in issuing the 401 certification. (2019 Opinion, pp. 6-7, 20; DWR

Brief at 55, fn.11 and 64, fn.15; Water Board's November 4, 2019 Request for Depublication, pp. 2-3; DWR November 4, 2019 Request for Depublication p. 2, fn. 2.) In fact, the Counties dismissed the Water Board from their action in 2009, prior to the issuance of the 401 certification. (AA2 {29}, pp. 0284-0300.)

As to the 401 certification itself, it is simply too late for the Counties to challenge it because it became final 30 days after its issuance, and it may not be reconsidered or redone under the strict time limits of the Clean Water Act. (Wat. Code, §§ 13330, subds. (a), (d) [providing that "[i]f no aggrieved party petitions for writ of mandate" within 30 days of issuance of certification, it "shall not be subject to review by any court" emphasis added].); 33 U.S.C. § 1341(a)(1); *Hoopa Valley Tribe*, *supra*, 913 F.3d at 1105.)[7]

Furthermore, once the 401 certification was issued, along with the Water Board's findings under CEQA, the Counties did nothing. They did not seek reconsideration from the Water Board, nor challenge the 401 certification, the Water Board's reliance on the Final EIR, or the Water Board's independent

---

[7] 33 U.S.C. § 1341(a)(3) provides no authority to "re-open" or "reconsider" a final 401 certificate under the facts of this proceeding. Section 1341(a)(3) creates "a presumption that a state certification issued for purposes of a federal construction permit will be valid for purposes of a second federal license related to the operation of the same facility. [footnote omitted] A state may overcome that presumption and revoke certification for purposes of the second federal license, but only under limited circumstances expressly defined in the statute." (*Keating v. F.E.R.C.* (D.C. Cir. 1991) 927 F.2d 616, 623.)

findings regarding environmental impacts under CEQA. (Wat. Code, § 13330; Cal. Code of Regs., tit. 23, § 3867.) In other words, the Counties let the Water Board's 401 certification become final. It is too late to challenge the 401 certification now. (See DWR Brief at 64, fn.15 ["A challenge to the section 401 certification would at this point be untimely."].)[8]

Rather than address the Counties' waiver problem, Amici argue the 401 certification requirement somehow delegates to the States plenary authority over all environmental aspects of the FERC relicensing for the Oroville Facilities, apparently without regard to applicable federal deadlines. (See CSAC Brief at 11 [§401 empowers the State to review environmental impacts of relicensing "on water quality and *beyond*," emphasis added]; Sierra Club Brief at 24.) Like the Counties, Amici cite *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700 and *S.D. Warren Co. v. Me. Bd. of Envtl. Prot*. (2006) 547 U.S. 370, to argue the state's reach under 401 environmental review is wide. (Counties' Reply Brief, at 33; CSAC Brief, at 12; Sierra Club Brief, at 24; CWIN Brief, at 20.)

But while state water quality certification authority over FERC licensed hydropower projects is broad substantively, it is nonetheless subject to the narrow procedural limitations

---

[8] Indeed currently operative federal regulations governing 401 certification, and the EPA's stated interpretation of such regulations, provide that section 401 does not grant States the authority to either unilaterally modify a certification after it is issued or to include "reopener" clauses in a certification. (See 40 C.F.R. § 121.6(e); 85 Fed.Reg. 42279-42280 (July 13, 2020).)

governing how and when that authority may be exercised. The state only has an opportunity to deny or condition certification in connection with the FERC licensing process, which occurs only when the original license is issued, the project is relicensed, or the licensee applies for a FERC license amendment. And the state must exercise that authority through the CWA certification process.

The limits on state authority delegated under Section 401 were addressed in *Karuk Tribe*, which considered whether section 401 of the Clean Water Act was an exception to the FPA's field preemption recognized by the United States Supreme Court in *First Iowa* and *California v. FERC*. (*Karuk Tribe*, 183 Cal.App.4th at pp. 358-360.) After examining the Supreme Court cases, including also *PUD No. 1*, *supra*, 511 U.S. 700 and *S.D. Warren*, *supra*, 547 U.S. 370, the court of appeal rejected the argument that the state's role is unlimited, explaining that even the state's broad role under Section 401 is subject to the determination by Congress as to "the extent of state input" and that such input "takes place within the context of FERC licensing procedures as specified in the FPA." (*Karuk Tribe*, 183 Cal.App.4th at pp. 359-60.)

The Counties' failing here is that they did not properly and timely exercise any rights they may have had to challenge the Water Board's 401 certification under CEQA. As noted, the Counties have no claims against the Water Board in this proceeding. The Water Board is not a party to this action nor is there a separate action against the Water Board. If the Counties

believed the Water Board was proceeding contrary to law, they could have sued for failing to issue a 401 certification that addressed the substance of the issues about which the Counties were complaining. (Water Code § 13330.) They did not.

In response to these failings, the Counties argue they "are not claiming the [Water] Board was required to prepare a new or revised EIR [nor that they have] additional claims against the State Board's certificate." (Counties' Reply Brief, at 37.) Instead, the Counties argue that if they "prevail in this case, DWR must correct the deficiencies in the EIR and, potentially, modify its approved project [and] [i]f DWR prepares new environmental review, modifies its project, or both, the State Board would then review the new CEQA documentation as it relates to matters within its jurisdiction. (CEQA Guidelines § 15096.) The State Board could reassess the 401 certification in view of the revised EIR and any other relevant changes." (*Id*. at 37-38.) The problem with the Counties' argument is that it is too late to "reassess" the 401 certification in light of a revised EIR. The 401 certification has already been issued and filed with FERC. It is final.

### 2. Ultimately, the Issue Presented with Section 401 is For the Legislature to Resolve.

In many ways, the heart of the issue in this case is a clash between incompatible state and federal environmental review structures and timelines. In their Opening Merits Brief, the Counties argued "as a practical matter, litigants cannot wait to challenge a project's ultimate implementation because the

approval date (not implementation) triggers a very short, often 30-day, limitations period for challenging an EIR or a certification condition. (See Pub. Resources Code § 21167; Wat. Code § 13330(b).)" (Counties' Opening Merits Brief, at 45.) Ultimately, this is an issue for the legislature to resolve.

In fact, California has taken the first step. In 2020, in an attempt to resolve this incompatibility and a growing onslaught of waiver decisions issued by FERC against the Water Board, the California Legislature amended Water Code section 13160 to provide that the State may issue 401 certification before completion of the CEQA environmental review if there is a risk of waiver under the CWA's one-year deadline, with a reservation to "reopen" the issued 401 Certification, to the extent authorized by federal law, if necessary following environmental review.[9] As noted above, however, current 401 certification regulations do not

[9] The amended provision now states: "The state board may issue the certificate or statement under paragraph (1) before completion of the environmental review required under Division 13 (commencing with Section 21000) of the Public Resources Code [CEQA] if the state board determines that waiting until completion of that environmental review to issue the certificate or statement poses a substantial risk of waiver of the state board's certification authority under the Federal Water Pollution Control Act or any other federal water quality control law. To the extent authorized by federal law, the state board shall reserve authority to reopen and, after public notice, an opportunity for comment, and, when appropriate, an opportunity for a hearing, revise the certificate or statement as appropriate to incorporate feasible measures to avoid or reduce significant environmental impacts or to make any necessary findings based on the information provided in the environmental document prepared for the project." (Water Code Section 13160(b)(2).)

permit modification of issued 401 certifications, including through the use of reopener provisions, as a way to circumvent the one-year CWA 401 certification deadline. More importantly, California's new Water Code provision establishes that an environmental review is not necessary to issue a final 401 Certification.

In sum, neither the 401 certification nor the process by which the Water Board issued the 401 certification remains at issue in this case. Instead, the Counties' action is a collateral state law attack on the proposed license before FERC, and the FERC relicensing process itself. As such, this case does not implicate the issue of whether the FPA preempts state court CEQA-based challenges to a 401 certification.

## III. CONCLUSION

As to Issue No. 1, the FPA preempts application of CEQA, even when the state is acting on its own in the exercise of self-governance, if the application of CEQA conflicts with federal law or, as here, if it invades the regulatory province of FERC. As to Issue No. 2, the FPA does not preempt state court challenges to an environmental impact report prepared under CEQA to comply with Section 401 of the federal Clean Water Act; however, Petitioners waived their right to challenge the 401 certification for the Oroville Facilities.

///

///

///

///

The State Water Contractors, as well as their member agencies who are parties to this litigation, respectfully request that the decision of the Court of Appeal be affirmed.

Dated: October 16, 2020

Respectfully submitted,

**DUANE MORRIS LLP**

By: */s/ Thomas M. Berliner*
Thomas M. Berliner
Paul J. Killion
Jolie-Anne S. Ansley

*Real Parties in Interest and Respondents*
STATE WATER CONTRACTORS, INC., et al.

## CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this State Water Contractors' Consolidated Response to Amicus Curiae Briefs contains 9,245 words, including footnotes, according to the Microsoft Word software, and not including the Tables of Contents and Authorities, the caption page, signature blocks, any attachments or this certification page.

Dated: October 16, 2020

*/s/ Thomas M. Berliner*
Thomas M. Berliner

DM2\13217336.1

| CA Supreme Court<br>Court Name | **PROOF OF SERVICE** | S258574<br>Case Number |
|---|---|---|

1. At the time of service, I was at least 18 years of age.
2. My email address used to e-serve: **PJKillion@duanemorris.com**
3. I served a copy of the following document(s) indicated below:

Title(s) of documents served:

**BRIEF:** SWC CONSOLIDATED RESPONSE TO AMICUS CURIAC BRIEFS

| Person Served | Service Address | Type | Service Date |
|---|---|---|---|
| Laura Hirahara | lhirahara@counties.org | e-Serve | 10-16-2020 10:30:15 AM |
| California State Association of Counties | | e1823b77-ac0c-41a8-836b-644cfe255751 | |
| Jennifer Henning | jhenning@counties.org | e-Serve | 10-16-2020 10:30:15 AM |
| California State Association of Counties | | 21e1c379-e308-43c3-a45e-f5a357fca02e | |
| E. Wright | bwright@friendsoftheriver.org | e-Serve | 10-16-2020 10:30:15 AM |
| Friends of the River | | 41d74978-ee1f-42d8-81e3-6d4f3ed2bbbf | |
| David Aladjem | daladjem@downeybrand.com | e-Serve | 10-16-2020 10:30:15 AM |
| Downey Brand LLP | | c3893331-d667-4b85-80c0-ce7fcc1aa874 | |
| Roger Moore | rbm@landwater.com | e-Serve | 10-16-2020 10:30:15 AM |
| Law Office of Roger B. Moore | | 149a0795-320f-4662-a725-fa16491cc5d8 | |
| Thomas Berliner | tmberliner@duanemorris.com | e-Serve | 10-16-2020 10:30:15 AM |
| Duane Morris LLP | | 9040d231-6093-4c29-8120-cf11f789f6db | |
| Edward Schexnayder | schexnayder@smwlaw.com | e-Serve | 10-16-2020 10:30:15 AM |
| Shute Mihaly & Weinberger LLP | | 552dd13c-528b-4424-bc35-abfe247aab26 | |
| Bruce Alpert | balpert@buttecounty.net | e-Serve | 10-16-2020 10:30:15 AM |
| Office of County Counsel | | d14bc3e0-c15b-42b3-ba46-40bd68426a17 | |
| Joshua Patashnik | josh.patashnik@doj.ca.gov | e-Serve | 10-16-2020 10:30:15 AM |
| Office of the Attorney General | | 7ed08a07-648b-4f41-8798-f384c0e042d2 | |
| Russell Hildreth | russell.hildreth@doj.ca.gov | e-Serve | 10-16-2020 10:30:15 AM |
| Office of the Attorney General | | f4f98fa2-143f-41b7-9e22-89e41657bf7e | |
| Matthew Goldman | Matthew.Goldman@doj.ca.gov | e-Serve | 10-16-2020 10:30:15 AM |
| Office of the Attorney General | | 5039e214-a428-4e2c-ace5-bc49201c0cc1 | |
| Carolyn Rowan | Carolyn.Rowan@doj.ca.gov | e-Serve | 10-16-2020 10:30:15 AM |
| Office of the Attorney General | | 741b63af-9295-4e26-9927-b5cfa463ea2d | |
| Jolie-Anne Ansley | JSAnsley@duanemorris.com | e-Serve | 10-16-2020 10:30:15 AM |
| | | | |

| | | | |
|---|---|---|---|
| Duane Morris LLP | | e786d2dc-21d9-4765-a3d8-7d0c1bead343 | |
| John Buse | jbuse@biologicaldiversity.org | e-Serve | 10-16-2020 10:30:15 AM |
| Center for Biological Diversity | | 0b883ed1-7701-4b16-929f-075483ba2ed0 | |
| Aimee Feinberg | Aimee.Feinberg@doj.ca.gov | e-Serve | 10-16-2020 10:30:15 AM |
| California Dept of Justice, Office of the Attorney General | | 53a649af-0046-43cc-b9b4-94069b854946 | |
| Ellison Folk | folk@smwlaw.com | e-Serve | 10-16-2020 10:30:15 AM |
| Shute, Mihaly & Weinberger LLP | | 743efe52-9fe6-4360-b7bf-5f940ff537ca | |
| E. Wright | bwrightatty@gmail.com | e-Serve | 10-16-2020 10:30:15 AM |
| Sierra Club California | | c37e5721-b637-4ee5-a9d6-8cf22817cfb8 | |
| Victoria Domantay | VCDomantay@duanemorris.com | e-Serve | 10-16-2020 10:30:15 AM |
| Duane Morris | | fff6107c-c561-468c-b460-3c61b00f3a1d | |
| Paul Killion | PJKillion@duanemorris.com | e-Serve | 10-16-2020 10:30:15 AM |
| Duane Morris LLP | | e5621578-ed61-4ef2-b7e2-9b2f8090175a | |
| Adam Keats | adam@keatslaw.org | e-Serve | 10-16-2020 10:30:15 AM |
| Law Office of Adam Keats, PC | | 7890781e-4420-4884-9157-651165070300 | |
| Courtney Covington | courtney.covington@doj.ca.gov | e-Serve | 10-16-2020 10:30:15 AM |
| Office of the State Attorney General | | 74af6519-e9b7-4d37-9386-060e5055e6f3 | |
| R. Settlemire | csettlemire@countyofplumas.com | e-Serve | 10-16-2020 10:30:15 AM |
| Office of the County Counsel | | 966a93be-f86b-4039-bdc7-9444342728e8 | |

TrueFiling created, submitted and signed this proof of service on my behalf through my agreements with TrueFiling.
The contents of this proof of service are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

10-16-2020
Date

/s/Paul Killion
Signature

Killion, Paul (124550)
Last Name, First Name (Attorney Number)

Duane Morris
Firm Name

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **BUTTE, COUNTY OF v. DEPARTMENT OF WATER RESOURCES (STATE WATER CONTRACTORS)**
Case Number: **S258574**
Lower Court Case Number: **C071785**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **PJKillion@duanemorris.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

| Filing Type | Document Title |
|---|---|
| BRIEF | SWC CONSOLIDATED RESPONSE TO AMICUS CURIAC BRIEFS |

Service Recipients:

| Person Served | Email Address | Type | Date / Time |
|---|---|---|---|
| Laura Hirahara<br>California State Association of Counties<br>314767 | lhirahara@counties.org | e-Serve | 10/16/2020 10:33:18 AM |
| Jennifer Henning<br>California State Association of Counties<br>193915 | jhenning@counties.org | e-Serve | 10/16/2020 10:33:18 AM |
| E. Wright<br>Friends of the River<br>51861 | bwright@friendsoftheriver.org | e-Serve | 10/16/2020 10:33:18 AM |
| David Aladjem<br>Downey Brand LLP<br>152203 | daladjem@downeybrand.com | e-Serve | 10/16/2020 10:33:18 AM |
| Roger Moore<br>Law Office of Roger B. Moore<br>159992 | rbm@landwater.com | e-Serve | 10/16/2020 10:33:18 AM |
| Thomas Berliner<br>Duane Morris LLP<br>83256 | tmberliner@duanemorris.com | e-Serve | 10/16/2020 10:33:18 AM |
| Edward Schexnayder<br>Shute Mihaly & Weinberger LLP<br>284494 | schexnayder@smwlaw.com | e-Serve | 10/16/2020 10:33:18 AM |
| Bruce Alpert<br>Office of County Counsel<br>075684 | balpert@buttecounty.net | e-Serve | 10/16/2020 10:33:18 AM |
| Joshua Patashnik<br>Office of the Attorney General<br>295120 | josh.patashnik@doj.ca.gov | e-Serve | 10/16/2020 10:33:18 AM |
| Russell Hildreth | russell.hildreth@doj.ca.gov | e- | 10/16/2020 |

| | | | |
|---|---|---|---|
| Office of the Attorney General<br>166167 | | Serve | 10:33:18 AM |
| Matthew Goldman<br>Office of the Attorney General<br>113330 | Matthew.Goldman@doj.ca.gov | e-Serve | 10/16/2020 10:33:18 AM |
| Carolyn Rowan<br>Office of the Attorney General<br>238526 | Carolyn.Rowan@doj.ca.gov | e-Serve | 10/16/2020 10:33:18 AM |
| Jolie-Anne Ansley<br>Duane Morris LLP<br>221526 | JSAnsley@duanemorris.com | e-Serve | 10/16/2020 10:33:18 AM |
| John Buse<br>Center for Biological Diversity<br>163156 | jbuse@biologicaldiversity.org | e-Serve | 10/16/2020 10:33:18 AM |
| Aimee Feinberg<br>California Dept of Justice, Office of the Attorney General<br>223309 | Aimee.Feinberg@doj.ca.gov | e-Serve | 10/16/2020 10:33:18 AM |
| Ellison Folk<br>Shute, Mihaly & Weinberger LLP<br>149232 | folk@smwlaw.com | e-Serve | 10/16/2020 10:33:18 AM |
| E. Wright<br>Sierra Club California | bwrightatty@gmail.com | e-Serve | 10/16/2020 10:33:18 AM |
| Victoria Domantay<br>Duane Morris | VCDomantay@duanemorris.com | e-Serve | 10/16/2020 10:33:18 AM |
| Paul Killion<br>Duane Morris LLP<br>124550 | PJKillion@duanemorris.com | e-Serve | 10/16/2020 10:33:18 AM |
| Adam Keats<br>Law Office of Adam Keats, PC<br>191157 | adam@keatslaw.org | e-Serve | 10/16/2020 10:33:18 AM |
| Courtney Covington<br>Office of the State Attorney General<br>259723 | courtney.covington@doj.ca.gov | e-Serve | 10/16/2020 10:33:18 AM |
| R. Settlemire<br>Office of the County Counsel<br>96173 | csettlemire@countyofplumas.com | e-Serve | 10/16/2020 10:33:18 AM |

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/16/2020

Date

/s/Paul Killion

Signature

Killion, Paul (124550)

Last Name, First Name (PNum)

Duane Morris

Law Firm