**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*.

# ANSWER TO PETITION FOR REVIEW

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

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STATE WATER CONTRACTORS, INC.

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Respondents and Real Parties in Interest State Water Contractors, Inc., et al. (collectively "State Water Contractors") respectfully submit this Answer to the Petition for Review ("Petition") filed by Petitioners-Appellants County of Butte ("Butte"), County of Plumas and Plumas County Flood Control and Water Conservation District (collectively "Plumas") (collectively "Petitioners") in accordance with California Rules of Court, rule 8.500(a)(2).

## I. Introduction and Summary of Reasons Why Review Should Be Denied

Congress enacted the Federal Power Act to comprehensively address the national interest in developing electrical power for the benefit of the country. (16 U.S.C. § 791 et seq.) The United States Supreme Court has repeatedly held that in enacting the Federal Power Act, Congress intended to occupy the field concerning regulation of hydroelectric facilities. Petitioners seek to use the excuse of self-governance, applicable only where a state operates in a proprietary capacity, to overturn this long-established program of cooperative federalism that governs hydroelectric facilities. This Court, following its decision in *Friends of the Eel River* recognizing the principals of cooperative federalism, should decline that invitation.

Petitioners contend Supreme Court review is warranted because the Court of Appeal's decision presents two important and unsettled issues of law. But neither issue presented by Petitioners is truly part of this dispute.

First, Petitioners argue that application of the California Environmental Quality Act (Public Resources Code §§ 21000 et

seq.) ("CEQA") to the decision of the Department of Water Resources ("DWR") to pursue relicensing falls within the power of the state to govern its subdivisions, and is not preempted. But Petitioners approach to preemption is flawed. They start from an assumption that application of CEQA to a project conducted by a state is always self-governance, failing to determine whether the activities in question here were intended to be free from federal regulation under the applicable federal statute, as in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677. But *Friends of the Eel River* addressed application of CEQA in a very different statutory context, involving deregulated activities subject to the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). Petitioners forego any similar analysis of Congressional intent under the Federal Power Act and the dispositive 1986 amendments.

CEQA is preempted where it invades the authority of a federal agency. Here, the Federal Power Act imposes a highly-regulated federal regime governing hydroelectric facilities, and, other than the narrow exceptions pursuant to Section 401 and for proprietary water rights, grants to the Federal Energy Regulatory Commission ("FERC") the exclusive power to balance environmental considerations and to set the terms and conditions of licenses.

In order to argue their requested remedy is not encroaching on FERC's regulatory domain, Petitioners misrepresent the nature of the relief they were seeking. Petitioners ignore their demand to halt the relicensing and that DWR withdraw its

application pending state-level environmental review pursuant to CEQA, including the imposition of enforceable mitigation measures, as stated in their own petitions for writ of mandate and briefing to both the trial court and the Court of Appeal. Because the Federal Power Act contains unmistakably clear language preempting state environmental review of federal hydroelectric licenses, no unsettled or important issue of law is presented in Issue No. 1.

Second, Petitioners also seek to challenge, under state law, the action of the State Water Resources Control Board ("Water Board") under the federal Clean Water Act. Petitioners argue the Federal Power Act does not preempt a state-law CEQA challenge to the environmental review supporting 401 certification under the Clean Water Act (33 U.S.C. § 1341). While Petitioners concede federal law governs relicensing, the 401 certification process represents a narrow exception to federal jurisdiction in which authority is delegated to the states to certify that the hydroelectric project complies with state water quality standards. Petitioners conveniently ignore that the fact that they never challenged the state agency action in question, which occurred two years after Petitioners' writ petitions were filed. As the Court of Appeal found, this case does not involve issues concerning the powers of the State under Section 401 of the Clean Water Act or the scope of environmental review in support of a 401 Certificate. In fact, Petitioners failed to challenge the Water Board's 401 Certificate for the Oroville Facilities. Instead, Petitioners' CEQA claims challenge the relicensing process itself,

and the terms of the proposed license, which is set forth in the FERC Settlement Agreement. As the Court of Appeal concluded, "[Petitioners] cannot challenge the environmental sufficiency of the Settlement Agreement in the state courts because jurisdiction to review the matters lies with FERC." (Opinion, p. 6, 32) Because, 401 certification is not at issue in this proceeding, there is no important or unsettled issue involving a CEQA challenge to the environmental impact report supporting a Clean Water Act certificate presented by this case warranting review in Issue 2.

In sum, neither issue raised by Petitioners presents an unsettled or important issue of law warranting review by this Court. The Court of Appeal correctly determined that Petitioners' claims are preempted by federal law under well-established case law. The Petition for Review should be denied. (Cal. Rules of Court, rule 8.500(b).)

## II. Petitioners' Issues for Review

Petitioners raise two issues for review, neither of which support granting review in this case:

1. "Does the Federal Power Act contain an unmistakably clear statement preempting California's sovereign authority to require compliance with the California Environmental Quality Act before the Department of Water Resources may approve the terms under which it will pursue relicensing of its Oroville Facilities?"

2. "Where the federal Clean Water Act requires state certification to show compliance with state water quality laws, does Federal Energy Regulatory Commission jurisdiction over future dam relicensing preempt a CEQA challenge to the environmental impact report supporting that state certification?"

## III. Factual and Procedural Background

### A. The Decision of the Court of Appeal After Transfer.

In its April 10, 2019 order granting review and transferring the matter back to the Court of Appeal, this Court directed the Court of Appeal to "vacate its decision and reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677." On September 5, 2019, the Court of Appeal issued its new decision. In its new opinion, the Court of Appeal once again dismissed the appeal for lack of subject matter jurisdiction, concluding that Petitioners cannot challenge the environmental sufficiency of the FERC Settlement Agreement—which constitutes the proposed license before FERC—in state court, because jurisdiction to review the matter lies exclusively with FERC. (Opinion, pp. 6, 32.)

The Court of Appeal explained that, "[w]ith one relevant exception, the [Federal Power Act] occupies the field of licensing a hydroelectric dam and bars environmental review of the *federal* licensing procedure in the *state* courts." (*Id*., p. 13 [emphasis in original] citing *First Iowa Hydro-Electric Cooperative v. Federal Power Com.* (1946) 328 U.S. 152; *California v. FERC* (1990) 495 U.S. 490; *Sayles Hydro Associates v. Maughan* (9th Cir. 1993) 985 F.2d 451; *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd.* (2010) 183 Cal.App.4th 330.)

To avoid duplication between federal and state environmental reviews, the jurisdiction to review the environmental conditions of a federal license lies with FERC.

(*Id.*, p. 5.) In this case, Petitioners did not seek federal review of the Settlement Agreement before FERC, as required by 18 Code of Regulations part 4.34(i)(6)(vii)(2003), and thus failed to exhaust their federal administrative remedies. (*Id.*, pp. 6, 12, 29, 32.) As the Court of Appeal pointed out, "state laws are not part of relicensing and *cannot be used to delay relicensing by resort to the state courts*." (*Id.*, p. 19 [emphasis added].)

At this Court's direction, the Court of Appeal reconsidered the case in light of the decision in *Friends of the Eel River*, finding the decision inapplicable under the circumstances presented in this case. (*Id.*, pp. 4, 20.) As the appellate court explained, the deregulatory sweep of the Interstate Commerce Commission Termination Act ("ICCTA") at issue in that case, protected a zone of autonomy or sphere of regulatory freedom in which a state must have leave to self-govern a public project as if it were a private owner. (*Id.*, p. 22.) "Thus, in the case of the ICCTA, which purpose is to deregulate the railroad industry, CEQA is not a preempted regulation when applied to a state-owned project, but is merely an expression of self-governance." (*Ibid.*)

In contrast, under the Federal Power Act, the Court of Appeal determined there is no "zone of autonomy" because the Act was not designed with a deregulatory purpose. (*Id.*, p. 24.) "Without a zone of autonomy or sphere of regulatory freedom, application of CEQA to a public project is not merely self-governance." (*Ibid.*) Rather, the Federal Power Act occupies the field of hydropower projects, "leaving no sphere of regulatory

freedom in which state environmental laws may operate as self-governance. Instead, such laws directly encroach on the province of FERC under the [Federal Power Act]." (*Id.*, p. 26.) Moreover, the Court of Appeal determined that Congress' intent to preempt state law is unmistakably clear, as held by the U.S. Supreme Court in *California v. FERC*. (*Id.*, pp. 26-27.)

As noted by the Court of Appeal, the one relevant exception to federal jurisdiction is Section 401 of the Clean Water Act. (*Id.*, pp. 15-16.) But the Court found that "[n]either the program subject to the [Water Board] review, nor the Certificate by which [the Water Board] exercises its section 401 authority to *implement* the provisions of the [FERC Settlement Agreement] are the subject of [Petitioners'] petition." (*Id.*, p. 20.) As the court explained, "[b]ecause the plaintiffs' petition was filed in the state court two years before the SWRCB adopted the Certificate, no issue is tendered concerning the changes the Certificate makes to the program, and no action under CEQA to review the changes can be filed in a state court until *after* the license is issued and the changes implemented." (*Ibid.*) For these reasons, the Court of Appeal found that Petitioners had not tendered a federal issue over which this court has state CEQA jurisdiction. (*Id.*, pp. 20, 32.)

The Court of Appeal again, and correctly, dismissed the appeal with directions to the trial court to vacate its judgment and dismiss the action for lack of subject matter jurisdiction. (*Id.*, p. 32.)

### B. Petitioners Continue to Misstate the Factual and Procedural Background.

This Court is familiar with the facts, having granted Petitioners' first petition for review. Although the Petitioners did not seek rehearing before the Court of Appeal, their version of the factual and procedural background in their petition conflicts with the findings of the Court of Appeal and misstates the record in several important respects. We address those differences below.

#### 1. Petitioners Continue to Misstate the Project Under Review.

Petitioners continue to incorrectly assert that the project subject to environmental review is the relicensing of "the whole of the Oroville Facilities" for another half century. (See Petition, pp. 12, 14 n.1.) As explained by the Court of Appeal, however, the operation of the existing dam and facilities is *not* the project subject to relicensing or environmental review. (Opinion, pp. 2-3, 17-18, 31.) The project subject to relicensing is the FERC Settlement Agreement. (*Id.*, pp. 2-3.) More specifically, the "project" is that set forth in Appendix A of the Settlement Agreement, which contains the protection, mitigation and enhancement measures proposed as conditions to the FERC license. (Opinion, pp. 2-3, 11-12, 17; AR G000112, G000117-120, G001148-1190.) As the Court of Appeal stated, "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, and that is referred to as the New Project License." (Opinion, p. 17.)

### 2. Petitioners Purposefully Misstate or Obfuscate the Relief they are Seeking in this Case.

Petitioners also incorrectly claim that "[t]he Counties, in seeking DWR's CEQA compliance, do not propose cessation of Oroville operations, or withdrawal of DWR's pending FERC license application." (Petition, p. 31 n. 6.) As the Court of Appeal correctly found, however, Petitioners CEQA action below challenged the environmental sufficiency of the FERC Settlement Agreement, and "sought to enjoin the issuance of an extended license until their environmental claims were reviewed." (Opinion, pp. 3, 6.) This is the relief that Petitioners sought below and which is under examination in this case, not Petitioners' new spin on their complaint, devised to obtain this Court's review.

Specifically, Petitioners' prior petitions in the superior court challenged DWR's environmental review of the Settlement Agreement, and sought to enjoin or stay the licensing process, and to impose mandatory mitigation measures on the proposed federal relicensing project pursuant to CEQA. (AA1 {1} pp. 0001-28; AA1 {3} pp. 0030-43.) Butte's Petition asked the trial court to issue a writ of mandate setting aside the orders of DWR, including its certification of the Final EIR, and enjoining DWR's project, i.e. the FERC Settlement Agreement, "unless and until respondent [DWR] lawfully approves the project in the manner required by CEQA, including enforceable mitigation measures to prevent environmental and related socioeconomic harm within the County of Butte." (AA1 {1} pp. 0024; see also Opinion, p. 3

n.3.) And Plumas similarly asked the trial court to issue a writ of mandate directing DWR to vacate and set aside its certification of the EIR for the project and "to suspend all activities under the certification." (AA1 {3} pp. 0041; see also Opinion, p. 3 n.3.)

Furthermore, in their briefing below, Petitioners repeatedly reasserted their request that the license application be withdrawn pending CEQA review. (See AA5 {78} pp. 1079, 1128 [joint opening trial brief]; AA12 {106}, p. 2651 [joint reply trial brief]; Appellants' Opening Brief filed 3/27/2013, p. 89.) In fact, Butte and Plumas went so far as to ask the state trial court to "retain *jurisdiction over 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.)

But a funny thing happened on the way to this forum. Apparently, the Petitioners realized that the relief they were seeking below was exactly what this Court declared preempted in *Friends of the Eel River*. (See 3 Cal.5th at 691, 716-717.) So now Petitioners claim that Butte and Plumas only "challenged DWR's discretionary decision to adopt the Settlement Agreement as its proposed project for relicensing, and to submit the Settlement Agreement to FERC," arguing that the relicensing of the Oroville Facilities was not mandatory and that "DWR *chose* to pursue and propose terms for relicensing, and its EIR was integral to this decision-making." (*Id*., pp. 8, 20, 21, 25.) But all these "challenged" decisions of DWR occurred ***prior*** to the issuance of both the Draft and Final EIR. In other words, Petitioners' CEQA

challenge to the Final EIR for the Oroville Facilities cannot be a challenge to these decisions.

The timeline is important. DWR filed its "Notice of Intent to File Application for New License" with FERC on January 9, 2002. (AR B068710-68717.) DWR then filed its initial relicensing application on January 19, 2005. (AR G000168.) Developed under the FERC's Alternative Licensing Process, DWR and over 50 state, federal and local governmental entities, nongovernmental organizations, and private parties subsequently entered into a signed Settlement Agreement, which DWR submitted to FERC on March 24, 2006. (AR G000108; G000173-178; D000422-576 [signed settlement].) The Settlement Agreement is effectively the proposed license for the Oroville Facilities for the next 50 years of operations.[1] (AR G000108.)

It was only *after* the Settlement Agreement was submitted to FERC in March 2006 that DWR issued its Draft EIR for public comment in May 2007. (AR G000001-3.) On July 22, 2008, DWR certified the Final EIR. (A000001-28.) As such, the CEQA document at issue in these actions was not issued to support DWR's decisions that Petitioners now contend they are

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[1] Butte and Plumas refused to settle, contending in part they were entitled to over $11 million per year in damages payments for alleged costs incurred due to the presence of the Oroville Facilities in their counties. (AR E00579-584) However, reimbursement of funds is not permitted in a FERC licensing proceeding. Butte unsuccessfully sued DWR, seeking such recovery. (See *County of Butte v. FERC* (9th Cir. Aug. 2, 2011), No. 10-70140) 445 Fed.Appx. 928 [2011 WL 3290215].)

challenging, including DWR's decisions to sign the Settlement Agreement and to submit it to FERC as the proposed license.

Petitioners also argue that the Final EIR is necessary to support DWR's discretionary decision to accept the final FERC license. (Petition, pp. 20-21.) But no such discretionary decision exists for DWR. When FERC issues a final license, the only options open to an unsatisfied licensee are: (1) to seek rehearing of the FERC license under FERC regulations within 30 days, and (2) to appeal the FERC license in federal court after the rehearing decision. (16 U.S.C. § 825l; 18 C.F.R. § 385.713.) Even if a request for rehearing is filed, a license goes into immediate effect when issued, unless FERC orders otherwise. (*Ibid*.) While a typical licensee may seek to surrender or transfer a FERC license, which requires a separate proceeding and FERC approval (16 U.S.C. § 799, 18 C.F.R. §§ 6.1, 6.2), DWR is foreclosed from this option under the nonalienation mandate of Water Code Section 11464.[2] In sum, Petitioners' claim that they are only challenging DWR's discretionary decision to pursue relicensing is without support.

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[2] "No water right, reservoir, conduit, or facility for the generation, production, transmission, or distribution of electric power, acquired by the department *shall ever be* sold, granted, or conveyed by the department so that the department thereby is divested of the title to and ownership of it." (Water Code § 11464 [emphasis added].)

## IV. Reasons Why Review Should Be Denied

### A. No Unsettled or Important Issue of Law is Presented in Issue No. 1 Because the Federal Power Act Contains Unmistakably Clear Language Preempting State Environmental Review of Federal Hydroelectric Licenses.

There are no unsettled or important questions of law regarding state sovereignty warranting review in this case. Here, Petitioners challenge the environmental sufficiency of the proposed FERC license, in the form of the Settlement Agreement, and seek to interfere with the FERC Licensing Process. The relief sought by Petitioners presents a clear case of preemption.

#### 1. Congress' Intent to Vest FERC with Exclusive Authority over Environmental Issues in a Relicensing Proceeding is Clear and Unmistakable.

Petitioners criticize the Court of Appeal for failing to cite any section of the Federal Power Act exhibiting what they term "unmistakenly clear Congressional intent to preempt CEQA." (Petition, pp. 22-23.) But Petitioners refuse to recognize that the statutory language of the Federal Power Act, Congress' intent behind the Federal Power Act's provisions and the preemptive reach of the statute, are all well-established.

As repeatedly recognized in United States Supreme Court, federal court and California state court decisions, the Federal Power Act occupies the field of hydroelectric relicensing, establishing a broad and paramount federal regulatory role. (Opinion, pp. 13-15, 26-27; See *First Iowa,* 328 U.S. at 181 ["detailed provisions of the Act providing for the federal plan of

regulation leave no room or need for conflicting state controls"]; *California v. FERC,* 495 U.S. at 496-500 [Congress intended the Federal Power Act to establish "a broad and paramount federal regulatory role"]; *Sayles Hydro Associates*, 985 F.2d at 454-456 [Congress has occupied the entire field, preventing state regulation; "the only authority states get over federal power projects relates to allocating proprietary water rights"]; *Karuk Tribe of Northern California*, 183 Cal.App.4th at 342-360 [the Federal Power Act "occupies the field of hydropower regulation"].)

Without any analysis of the actual language of the Federal Power Act, Petitioners incorrectly assert that no unmistakable language exists. (Petition, pp. 20-23.) To the contrary, the Federal Power Act 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) and 803(j); see also 42 U.S.C § 4332 [NEPA].) This Congressional intent to vest FERC with environmental review authority over hydroelectric licensing was reiterated in the amendments to the Federal Power Act promulgated pursuant to the Electric Consumer Protection Act of 1986 (Public Law 99-495 (1986).

In amended Section 4(e), Congress directed FERC, as part of its licensing authority, to "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife (including

related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." (16 U.S.C. § 797(e).)

In amended Section 10(a), Congress directed FERC to set terms and conditions on a license that, in FERC's judgment, accomodate the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and other beneficial public uses, including irrigation, flood control, water supply, and recreational. (16 U.S.C. 803(a).) In making this change to Section 10(a), Congress intended that, "[i]n essence, the law will now specifically recognize those waterway values and require, where they compete, that FERC resolve those issues in a manner that takes them into account, but does not necessarily result in their equal treatment." (H.R.Rep. No. 99-934, 2d Sess., p. 22 (1986), State Water Contractors' Request for Judicial Notice, Exhibit E, p. RJN 053.)

Finally, Congress added Section 10(j) to the Federal Power Act in 1986, which further codified FERC's control over the environmental aspects of the hydropower licensing process, specifically requiring FERC to adequately and equitably protect, mitigate damage to, and enhance any fish and wildlife (including spawning grounds and habitat) affected by the development, operation, and management of hydroelectric projects through conditions on the license, based in part on recommendations from state agencies and other federal agencies, which FERC may ultimately reject in whole or part. (16 U.S.C. § 803(j).) In adding

section 10(j), Congress explained that the new provision does not give such recommending state and federal agencies "a veto, nor does it give them mandatory authority" over a project. (H.R.Rep. No. 99-934, 2d Sess., p. 23 (1986), State Water Contractors' Request for Judicial Notice, Exhibit E, p. RJN 054.) Instead, "FERC is empowered to decide license terms, but there is a guarantee that the recommendations of the agencies cannot be lightly dismissed." (*Id*.) In other words, FERC remains in control.

Together, Sections 4(e), 10(a), and 10(j) provide FERC with the paramount regulatory role to balance environmental considerations and issue a license to operate a project that, in the judgment of FERC, is in the public interest. (See *California v. FERC*, 495 U.S. at 499-500.) "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 terms inconsistent with the States' recommendations), Congress has amended the [Federal Power Act] to elaborate and reaffirm *First Iowa's* understanding that the [Federal Power Act] establishes a broad and paramount regulatory role." (*Ibid*.; see Opinion, pp. 26-27.)

Save for the limited input Congress allows from states on proprietary water rights under Section 27 of the Federal Power Act—not at issue in this case—it is well established "that California's regulatory laws do not apply to hydropower projects." (*Karuk Tribe of Northern California*, 183 Cal.App.4th at 355; see also *Sayles Hydro Associates*, 985 F.2d at 454-455; *County of*

*Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 959-962.)

In sum, nothing in the Federal Power Act provides a state agency with the authority to stay or enjoin a federal licensing process pending application of state law, or to impose mandatory conditions on a federally licensed hydroelectric project. As observed by the Ninth Circuit, "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." (*Sayles Hydro Associates*, 985 F.2d at 456.) This court recognized the same point in *Friends of the Eel River* when it held that state environmental permitting or preclearance regulations that have the effect of halting a project within the regulatory domain of a federal agency pending environmental compliance are categorically preempted. (3 Cal.5th at 691, 716-717 ["We acknowledge that, like the private owner, the state as owner cannot adopt measures of self-governance that conflict with the ICCTA or invade the regulatory provide of the federal regulatory agency"].) Because Petitioners' requested relief directly encroaches upon the regulatory domain of FERC, it is preempted. (Opinion, pp. 6, 32; *Friends of the Eel River*, 3 Cal.5th at 691.)

### 2. The Court of Appeal's Decision is Completely Consistent with this Court's Decision in *Friends of the Eel River*.

In an effort to escape preemption, Petitioners incorrectly argue that this Court's *Friends of the Eel River* "unequivocally

holds" that in situations where state law governs a subdivision's decisions about whether and how to pursue a state-sponsored project, CEQA compliance is "'not regulation but instead self-governance on the part of the state,'" and thus, not preempted. (Petition, pp. 28, 29 n.5.) The holding of *Friends of the Eel River* is not so broad.

Petitioners entirely ignore the reasoning this Court used in *Friends of the Eel River* to reach its conclusion that preemption did not apply under the specific circumstances of the case. As framed by this Court, the question presented was fundamentally one of statutory interpretation that involved consideration of the text of the ICCTA preemption clause, the overall function of the ICCTA, and the unifying and deregulatory purpose disclosed by the legislative history behind the federal law. (*Friends of the Eel River*, 3 Cal 5th at 702.) Central to the Court's analysis was a determination whether or not application of CEQA in the context of the case was regulatory or internal governance of a state subdivision. (*Id*., p. 690.)

Unlike this case, *Friends of the Eel River* did not involve an ongoing federally-regulated licensing process or a concurrent federal environmental review. (*Id.*, pp 691-699.) Instead, the decision in *Friends of the Eel River* hinged on the *deregulated scheme* of the ICCTA involving railroad operations, and the freedom of owners—private or public—within that deregulated sphere to make environmental decisions on their projects. (*Id.*, pp. 691, 723-734.)

In such a situation, the Court determined that states should have the same freedom of ownership *within that deregulated sphere* as a private owner to make environmental decisions on a project. (*Id.*) This Court reasoned that CEQA was not regulatory in such circumstances, but rather a mechanism of state self-governance: "Where owners are free from regulation, this freedom belongs to both public and private owners. When there is state ownership, we do not believe that it constitutes regulation when a state applies state law to govern how its own state subsidiary will act within the area free of [Surface Transportation Board] and ICCTA regulation." (*Id.*, p. 733.) Under these circumstances, this Court concluded that the state, as owner, enjoyed the same freedom as a private owner to apply its own environmental standards and that the ICCTA "does not preempt the application of CEQA to this project." (*Id.*, p. 691.)

The situation in this case is different. Under the Federal Power Act, there is no deregulated sphere in the regulatory regime governing the licensing of hydropower projects. Instead, the Federal Power Act provides a complex, and comprehensive regulatory scheme for relicensing hydroelectric facilities. (See 16 U.S.C. §§ 797(e), 803(a), 803(j).) The Federal Power Act occupies the *entire field* of hydropower licensing, including with regard to environmental decision-making.[3] (See *First Iowa*, 328 U.S. at

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[3] Under the Federal Power Act, certain small projects (less than 10 megawatts) and conduits are exempt from the Part 1 licensing requirements, but are still subject to federal environmental regulation concerning fish and wildlife protection. (16 U.S.C. §§ 2705, 823a; 18 C.F.R. § 4.106.)

181; *California v. FERC*, 495 U.S. at 496-500; *Sayles Hydro Associates*, 985 F.2d at 454-456; *Karuk Tribe of Northern California*, 183 Cal.App.4th at 359.)

Petitioners brush aside this critical difference, arguing that the deregulatory purpose of the ICCTA does not distinguish *Friends of the Eel* from this case. (Petition, pp. 25-27.) Petitioners claim that the Federal Power Act's language does not come close to the "clear expressions of intent to preempt state law" in the ICCTA preemption clause, or under the federal Telecommunications Act, though Petitioners provide no analysis or comparison of either the statutory language of the Telecommunications Act or the Federal Power Act. (*Ibid*.)

But the "fundamental question regarding the scope of preemption is one of congressional intent," which is a question that can only be answered with respect to the specific statute at issue, in the context of the case at hand. (*Friends of the Eel River*, 3 Cal.5th at 702; 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"].) Petitioners do not examine the statutory language of the Federal Power Act or even cite to the 1986 amendments. (Petition, pp.22-23.)

Instead, Petitioners cite several Telecommunications Act cases, arguing they cut against preemption here. (Petition, pp. 26-27.) Like this Court's analysis in *Friends of the Eel River*, however, these cases employ detailed analysis of Congress' purpose and intent in enacting particular provisions of the

statutes at issue and are distinguishable on that basis. For example, in *Nixon v Missouri*, the U.S. Supreme Court analyzed the policy objectives, purpose and intent behind Section 253 of the Telecommunications Act of 1996, specifically interpreting the phrase "ability of any entity" in the context of the case. (*Nixon v Missouri Municipal League* (2004) 541 U.S. 125, 138.) The Supreme Court found that state law prohibiting municipalities from providing telecommunication services was not preempted, based on its conclusions that the term "any entity" was ambiguous and that the application of § 253 to a governmental entity would produce farfetched results that it doubted Congress intended. (*Ibid.)*

Similarly, in *Tennessee v. Federal Communications*, the Sixth Circuit considered whether federal law preempted the state's ability to make decisions for its subdivisions providing telecommunication services that were left to providers under the Telecommunications Act. (*Tennessee v. Federal Communications Commission* (6th Cir. 2016), 832 F.3d 597.) In support of its finding of no preemption and in favor of the application of state law, the Sixth Circuit based its decision on the Congressional intent behind Section 706 of the Act and the state laws at issue. (*Id*. pp. 613-614 [acknowledging that the preemption authority does not have to be explicit merely clear].)[4]

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[4] The United States Supreme Court's recent decision in *Virginia Uranium Inc. v. Warren* (2019) 139 S.Ct. 1894, cited by Amici Friends of the River et al. in their October 29, 2019 letter, is distinguishable on the same basis. (Amicus, pp. 2, 10.) Nothing in *Virginia Uranium*, which involved statutory interpretation of

Here, the preemptive effect of the Federal Power Act is not a matter of first impression—it is well settled, a reality Appellants and their amici refuse to acknowledge. (See e.g., *California v. FERC,* 495 U.S. at 497 ["[T]he meaning of § 27 and the pre-emptive effect of the FPA are not matters of first impression."]; *Sayles Hydro Associates*, 985 F.2d at 454 ["We cannot, however, construe this statute on a blank slate"]; *County of Amador v. El Dorado County Water Agency*, 76 Cal.App.4th at 958 [same].)

Petitioners further argue the entire body of case law interpreting the Federal Power Act is inapposite because the cases involves state regulation of private parties. (Petition, pp. 28-29.) But Petitioners ignore that the cited case law, including U.S. Supreme Court precedent, turns on the intent of Congress in enacting the Federal Power Act, in particular the 1986 amendments. Accordingly, the cases provide precedential insight into whether application of CEQA here encroaches on the regulatory domain of FERC as established by Congress under the Federal Power Act.

When these authorities are applied here, it is clear the relief sought by Petitioners directly interferes with the FERC licensing process by conditioning the issuance of the license on environmental preclearance by CEQA, and by imposing

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the Atomic Energy Act, bears on the preemptive effect of the Federal Power Act. In that case, express statutory language demonstrated that Congress did not intend federal regulation to reach mining activities traditionally regulated by the State. (139 S. Ct. at 1900.)

enforceable mitigation measures and additional financial costs on the project. The application of CEQA here is not exercise of the state's internal self-governance powers, but state encroachment on the clear regulatory province of FERC under the Federal Power Act. It is preempted.

As this Court recognized in *Friends of the Eel River*, "the state as owner cannot adopt measures of self-governance that conflict with the [federal law] or invade the regulatory province of the federal regulatory agency." (*Friends of the Eel River*, 3 Cal.5th at 691.) Congress has granted FERC the paramount regulatory role in balancing environmental considerations in issuing a license to a hydropower project. (See *California v. FERC*, 495 U.S. at 499-500.) Conditioning the issuance of the FERC license on state environmental preclearance and potentially imposing enforceable mitigation measures on the Settlement Agreement directly invades the regulatory province of FERC. The Court of Appeal was correct in concluding that preemption in this case is entirely consistent with this Court's decision in *Friends of the Eel River*. (Opinion, pp. 4, 20-29.)

### 3. The Court of Appeal Decision is Also Entirely Consistent with *County of Amador*.

Petitioners further argue the Court of Appeal's Opinion "fails to confront conflicts" in its own opinion in *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931. (Petition at pp. 29-31.) The claim is surprising since *County of Amador* was authored by Justice Hull, who is also on the Third District panel that decided this case. Petitioners appear to be

arguing that *County of Amador* holds that CEQA is not preempted where the dam at issue is operating for multiple purposes, including water consumption. (*Ibid*.) But Petitioners' argument not only mischaracterizes the holding of *County of Amador*, it overlooks that proprietary water rights are not at issue in this FERC relicensing dispute.

In *County of Amador*, the proprietary water rights of a FERC-licensed project were being transferred to a different entity and for a different use – consumption instead of solely power generation. (76 Cal.App.4th at 939.) Importantly, the FERC license was *not* at issue. Because *County of Amador* involved proprietary water rights, control of which Congress expressly ceded to the states through Section 27 of the Federal Power Act (16 U.S.C. § 821), the Court made abundantly clear that its authority to hear the case and apply state law (CEQA) derived exclusively from Section 27's specific and limited delegation of authority to states over proprietary water rights. *(Id.,* pp. 960-962 [acknowledging that the Federal Power Act otherwise occupied the field of hydropower relicensing].) In fact, the court expressly distinguished the case from situations, such as those in *Sayles Hydro Associates v. Maugham* (9th 1993) 985 F.2d 451, where state law *did* impact the licensing and operating conditions of a hydropower project. (*Id*., p. 961 ["This situation therefore differs … from *Sayles*… in which the state sought to impose operating conditions beyond those required by FERC"].)

(*Ibid.*) Here, proprietary water rights are not at issue, and *County of Amador* is inapplicable.[5]

### B. No Unsettled Issue is Presented in Issue No. 2 Because the Water Board's Authority to Issue the 401 Certificate Under the Clean Water Act and Related CEQA Review is Not Part of this Proceeding.

#### 1. 401 Certification is not at Issue in this Proceeding.

Petitioners incorrectly argue that the Opinion's finding of preemption interferes with "CEQA compliance as an 'appropriate requirement' of state law informing water quality certification by the [Water Board]" under Section 401 of the Clean Water Act. (Petition, pp. 9-10.) The Court of Appeal held that Petitioners cannot challenge the environmental sufficiency of the Settlement Agreement before FERC in state court in order to delay the issuance of the FERC license, because jurisdiction to review the matter lies exclusively with FERC. (Opinion, pp. 6, 32.) No unsettled question of law exists, because the proceeding here *did not involve* the authority of the state under Section 401 of the federal Clean Water Act or the scope of environmental review in support of a 401 certificate.

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[5] Petitioners also claim in passing that *County of Amador* concluded that CEQA is only informational, and does not impose conditions or mandate how a project should be run. (Petition, p. 30.) If so, then Petitioners' requested relief that DWR's license renewal application be withdrawn and the project enjoined pending the addition of enforceable mitigation measures, are unfounded.

As the Court of Appeal held: "Neither the program subject to SWRCB review, nor the Certificate by which the SWRCB exercises its section 401 authority to *implement* the provisions of Appendix A are the subject of plaintiffs' petition."[6] (Opinion, p. 20.) Instead, this proceeding is an improper challenge under state law to the sufficiency of federal environmental review of the FERC Settlement Agreement in the relicensing proceeding. (Opinion, pp. 6, 32.)

All parties to the proceedings, and the Court of Appeal, recognized the limited exception to federal jurisdiction found in Section 401 of the Clean Water Act (33 U.S.C. § 1341), and that the Water Board's decision to issue the 401 Certificate for the relicensing required compliance with CEQA. (Opinion, pp. 7 n.9, 16; Water Code § 13160 et seq.; 23 C.C.R. § 3856(f).) Conditions in a 401 Certificate are incorporated into a FERC license. (33 U.S.C. § 1341(d).)

Petitioners, however, "did not challenge and could not challenge the SWRCB Certificate in their pleadings because it did not exist at the time this action was filed." (Opinion, p. 6.) In fact, Petitioners stipulated to the dismissal of the Water Board from this proceeding in 2009, before the 401 Certificate was even issued. (AA2 {29}, pp. 0284-0300.) The 401 Certificate for the

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[6] In its Request for Depublication, the Water Board *supported* the determination by the Court of Appeal that Petitioners challenges were preempted by federal law. (Request for Depublication, p. 1.) In fact, the Water Board agreed that "neither the Water Board's section 401 water quality certificate (issued in 2010) nor its process in issuing that approval under the Clean Water Act, were challenged" in this case. (*Id*. at 2.)

Oroville Facilities became final 30 days after its issuance, and may not now be reconsidered or redone under the strict time limits of the Clean Water Act. (Water Code §§ 13330(a), (d); 33 U.S.C. § 1341(a)(1); *Hoopa Valley Tribe v. FERC* (D.C. Cir. 2019) 913 F.3d 1099, 1105; Placer County Water Agency (Project No. 2079-081), Order Denying Rehearing, 169 FERC 61046, 2019 WL 5288297)

Thus, the Court of Appeal correctly found that neither the program subject to Water Board review nor the 401 Certificate issued by the Water Board for the Oroville Facilities is at issue in this proceeding.[7] (Opinion, p. 20.) As such, there is no important or unsettled issue involving a CEQA challenge to the environmental impact report supporting a Clean Water Act certificate presented by this case warranting review, as Petitioners incorrectly claim in Issue 2.

### 2. Petitioners Misconstrue the Court of Appeal's Opinion Regarding 401 Certification to Manufacture Uncertainty Where None Exists.

Attempting to manufacture an unsettled or important issue where none exists, Petitioners contend the Opinion contains two

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[7] Because this case does not involve issues concerning the scope of the Water Board's authority under Section 401 of the Clean Water Act, the United States Supreme Court's decision in *PUD No. 1 v. Washington Dep't Ecology* (1994) 511 U.S. 700 does not apply. *PUD No. 1* concerned the inclusion of minimum flow standards promulgated under Section 303 of the Clean Water Act (33 U.S.C. § 313) as part of a 401 Certification, which the Court held was properly within the limited scope of authority delegated to states in Section 401. (*Id*., p. 723.)

"untenable" conclusions: (1) that the "environmental predicate" to section 401 water quality certification is subject to FERC review; and (2) that CEQA water quality compliance can await a later "implementation stage." (Petition, pp. 10, 32-38.) Petitioners misconstrue the Court of Appeal's opinion in both respects.

First, the Court of Appeal did not conclude that FERC has the authority to review the basis for the Water Board's 401 Certificate or the 401 Certificate itself, as asserted by Petitioners. (Petition, pp. 32-35.) As acknowledged by the Water Board's Request for Depublication (p. 3), statements to the effect that the "environmental predicate" to the 401 Certificate is subject to FERC review refer to review of the Settlement Agreement concerning the relicensing, not the 401 Certificate issued by the Water Board, which is not at issue in this proceeding. (See Opinion, pp. 5-6, 20, 32.)

Specifically, the Court of Appeal acknowledged that preparation and certification of an EIR under the terms of CEQA and directed to the environmental effects of the state's water quality law is required *before* the Water Board can issue a 401 Certificate. (Opinion, pp. 5, 15-16.) The Court of Appeal recognized that FERC is required to incorporate into the final license conditions imposed by the 401 Certificate. (*Ibid.*) The program or "environmental predicate" subject to relicensing is the Settlement Agreement, specifically Appendix A. (*Id.*, pp. 2-3.) As the proposed license, Appendix A is also the "environmental predicate" for the issuance of the 401 Certificate. (*Id.*, p. 5) The

Opinion differentiates review of the environmental matters in Appendix A of the Settlement Agreement for purposes of the relicensing by FERC, from review "by the SWRCB as a predicate for the state's more stringent water quality conditions." (*Id*., p. 11.) Petitioners challenge the Settlement Agreement before FERC, seeking to interfere with the licensing process. (Opinion, p. 3.) In the context of the case before it, the Court of Appeal determined that the environmental sufficiency of the Settlement Agreement in the relicensing process is subject to FERC review. (Opinion, pp. 6, 32.)

Second, Petitioners are incorrect that the Court of Appeal assumed that CEQA compliance supporting a water quality certification "awaits" a subsequent implementation stage. (Petition, pp. 35-37.) Again, the Opinion clearly states that preparation and certification of an EIR under the terms of CEQA and directed to the environmental effects of the state's more stringent water quality law is required *before* the Water Board can issue a 401 Certificate. (Opinion, pp. 5, 15-16.)

In the context of the FERC relicensing process, however, the changes or conditions subsequently imposed on the license by the issued 401 Certificate do not go into effect until the license is issued. (Opinion, p. 16.) At that point, the "program" is no longer Appendix A of the Settlement Agreement, but rather an "amended" program that now also incorporates conditions imposed by the Water Board in the final 401 Certificate. (*Ibid*.) It is this future "amended program," that the Court acknowledges

may be subject to future CEQA review when implemented. (*Id.,* pp. 11-12, 19-20.)

In sum, neither of these asserted "untenable conclusions" raised by Petitioners presents an unsettled or important issue warranting review, in particular because neither conclusion impacts the Court of Appeal's conclusion that the Petitioners' challenge to the environmental sufficiency of the Settlement Agreement before FERC is preempted by the Federal Power Act.

## V. Review Should be Denied For the Further Reason that Due to Petitioners' Procedural Missteps Below, This Case is Not an Appropriate Vehicle to Address Any of the Issues They Seek to Raise.

### A. Petitioners Failed to Utilize Federal Remedies Available to them in the Relicensing Process

This matter comes to this Court following a series of missteps by Petitioners. As active participants in the extensive federal relicensing process for the Oroville Facilities before FERC, Petitioners had ample opportunity, both administratively and judicially, to challenge the federal and state regulatory actions concerning environmental issues. But Petitioners never availed themselves of their primarily federal remedies.

Nothing prevents parties concerned with the environmental impacts of a hydroelectric license from participating in the extensive consideration of environmental issues under the FERC relicensing process itself. (Opinion, p. 10.) As the Court of Appeal noted, FERC regulations provide for federal administrative review to resolve disputes over "required environmental studies." (Opinion, p. 12; 18 C.F.R. §

4.34(i)(6)(vii).) Petitioners failed to seek relief for their disputes over the environmental analysis before FERC. (Opinion, p. 12.)

Petitioners also could have challenged the biological opinions issued for the Oroville relicensing by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. But they did not. Petitioners could have brought a challenge to the FERC's environmental impact statement. But they did not. And, they could have challenged the Water Board's 401 Certificate. But they did not. Instead, Petitioners sought to use state law—CEQA—to collaterally attack the environmental sufficiency of the FERC Settlement Agreement, when federal law has been conclusively determined to preempt state law in this area. (Opinion, pp. 6, 32)

This case does not present a situation in which Petitioners, or any other stakeholders in a relicensing proceeding, are deprived of a forum in which to voice environmental concerns.

### B. Petitioners' Requested Relief Has Nothing to Do with Discretionary Decisions of DWR.

Petitioners' CEQA action below challenged the environmental sufficiency of the FERC Settlement Agreement, and "sought to enjoin the issuance of an extended license until their environmental claims were reviewed." (Opinion, pp. 3, 6.) As an attack on the FERC Settlement Agreement, Petitioners actions have nothing to do with DWR's application to FERC to pursue licensing, to enter into the Settlement Agreement, or to submit the Settlement Agreement to FERC. The challenged EIR was not issued to support any of these decisions, all of which were made *prior* to its issuance. As such, Petitioners' actions are

not an appropriate vehicle to address application of CEQA to DWR decision making in the context of hydropower relicensing.

### C. 401 Certification is not at issue in this Case, and the Deadline to Challenge the 401 Certificate Ran Long Ago.

This case is also not an appropriate vehicle to address the application of CEQA in the 401 certification process for a hydropower relicensing. As previously explained, Petitioners' requested relief in this action does not involve the 401 Certificate issued by the Water Board for the Oroville Facilities. (Opinion, p. 20.)

Furthermore, the 401 Certificate was issued by the Water Board in 2010 and was submitted to FERC. Under California law, the 401 Certificate is now final. (Water Code §§ 13330(a), (d) [establishing a 30-day time limit for challenges to the issued Certificate].) Further, the 401 Certificate cannot now be "reopened" or "redone," under the strict one-year time limit contained in the Clean Water Act. (See 33 U.S.C. § 1341(a)(1) [requiring State to act on an applicant's request for certification within a reasonable period of time which shall not exceed one year or else the certification requirement is waived]; *Hoopa Valley Tribe v. FERC* (D.C. Cir. 2019) 913 F.3d 1099, 1105; Placer County Water Agency (Project No. 2079-081), Order Denying Rehearing, 169 FERC 61,046, 2019 WL 5288297.) The time has long since run for any challenge to the 401 Certificate in this case, and Petitioners' attack fails for this reason alone.

### D. DWR is not Similarly Situated to Other Public Entities in the Relicensing Process.

This case is the wrong vehicle to address challenges to the FERC license for another reason—DWR's position as an applicant for a FERC license is not the same as other public agencies seeking relicensing of hydropower projects in California. While other public agencies may exercise discretion whether to apply for a new license or accept or reject a license once issued by FERC, DWR has no such discretion. Under Water Code Section 11464 (quoted at footnote 2 above), DWR is specifically prohibited from divested itself of any facility for the generation of electric power, under the so-called nonalienation mandate. Under this mandate, DWR may not reject a FERC license, which would divest it of a facility for the generation of hydroelectric power. Thus, DWR is not like other agencies, which retain the right to surrender or transfer a FERC license, subject to FERC approval. (16 U.S.C. § 799, 18 C.F.R. §§ 6.1, 6.2.)

In short, this case is not an appropriate vehicle to address application of CEQA to a public agency's decision whether to accept, reject or surrender a FERC license once issued.

## VI. Conclusion

The Petition for Review should be denied.

Dated: November 4, 2019

Respectfully submitted,

**DUANE MORRIS LLP**

By: /s/ Thomas M. Berliner
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*Real Parties in Interest and Respondents*
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## CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d), I certify that this Answer to Petition for Review contains 8120 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: November 4, 2019

/s/ Thomas M. Berliner
Thomas M. Berliner

**STATE OF CALIFORNIA**
Supreme Court of California

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