In the Supreme Court of the State of California

COUNTY OF BUTTE, et al.,

Plaintiffs and Appellants,

v.

DEPARTMENT OF WATER RESOURCES,

Defendant and Respondent.

STATE WATER CONTRACTORS, et al.,

Real Parties in Interest and Respondents.

Case No. S258574

Third Appellate District, Case No. C071785
Yolo County Superior Court, Case No. CVCV091258
The Honorable Daniel P. Maguire, Judge

ANSWER BRIEF ON THE MERITS OF THE DEPARTMENT OF WATER RESOURCES

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ISSUE PRESENTED

1. To what extent does the Federal Power Act preempt application of the California Environmental Quality Act when the state is acting on its own behalf, and exercising its discretion, in deciding to pursue licensing for a hydroelectric dam project?

2. Does the Federal Power Act preempt state court challenges to an environmental impact report prepared under the California Environmental Quality Act to comply with the federal water quality certification under section 401 of the federal Clean Water Act?

INTRODUCTION

The Federal Power Act does not categorically preempt the California Environmental Quality Act in the circumstances of this case. The State, through CEQA, has required the Department of Water Resources (Department) to consider environmental effects in deciding whether and under what terms it will accept a new license for its hydroelectric dam from the Federal Energy Regulatory Commission. As this Court held in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, and as the U.S. Supreme Court recently confirmed in *Murphy v. National Collegiate Athletic Association* (2018) 584 U.S. ___, 138 S.Ct. 1461, preemption may occur where federal and state law operate on and control private actors; it does not apply to a State's *non-regulatory* acts. The State's prerogative to require that the Department's decision be environmentally informed is not regulatory. It is instead analogous to a corporate act, similar to what private dam operators might choose to do and

therefore a form of "market participation"; more importantly, it is also a non-regulatory act of state internal self-governance. Preemption thus does not apply.

While a federal law might in theory require or prohibit certain actions on the part of all federally regulated entities that would include the *non-regulatory* actions of a State, attempted federal control over a State's internal self-governance is of such constitutional concern that it will not be read into federal law in the absence of an unmistakably clear statement. Here, nothing in the Federal Power Act suggests—let alone makes clear—that Congress intended to prohibit States from engaging in environmental review of their own projects.

The result does not change simply because CEQA also required the State Water Resources Control Board (Water Board) to participate in the Department-led Environmental Impact Report process as a responsible agency, and to consider the information gained in that process in carrying out its water quality certification duties under section 401 of the Clean Water Act. The Water Board's actions under CEQA are additional acts of state self-governance for the same state-owned and operated project, which the Federal Power Act does not reach. But even if this case involved a privately operated dam project, there would be no preemption of CEQA in the section 401 context. Section 401 specifically authorizes States to impose water-quality related regulatory conditions on federally licensed projects, including hydroelectric projects subject to FERC licensing under the Federal Power Act. That authority includes States' ability to

require concomitant environmental review procedures and to subject compliance with those procedures to state-court review.[1]

The Department agrees with appellants Butte County and Plumas County (Counties) that the Court of Appeal erred in concluding that the trial court lacked jurisdiction to consider their CEQA claims against the Department. This Court should reverse that ruling so that the Department may defend on appeal the adequacy of the 2008 EIR, as it did successfully before the trial court.[2]

LEGAL BACKGROUND

A. The Federal Power Act

The Federal Power Act regulates the construction and operation of hydroelectric dams and other similar facilities in the United States and serves to promote the comprehensive development and regulation of water resources, in particular hydroelectric power. (16 U.S.C. §§ 791a-823g; 66th Cong., Ch. 285, 41 Stat. 1063 [June 10, 1920]; see generally *Fed. Power Com. v. Union Elec. Co.* (1965) 381 U.S. 90, 99.) The Act generally

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[1] The Water Board has reviewed this brief, particularly those parts that relate to the Water Board's section 401 certification authority and its CEQA responsibilities in that context. It agrees with the conclusion that CEQA is not preempted here, and with the reasoning supporting that conclusion.

[2] As discussed below (*post*, pp. 32-33), the Counties' CEQA claims do not involve the Water Board, which is not a party to this case, and the Counties elected not to bring a direct challenge to the Water Board's section 401 certification during the time allowed by law.

requires a license, issued by the Federal Energy Regulatory Commission, to construct, operate, or maintain a hydroelectric project. (16 U.S.C. § 797; see generally *Cal. Or. Power Co. v. Super. Ct.* (1955) 45 Cal.2d 858, 861-863.)

FERC regulations prescribe various procedures for pursuing a license for a hydropower facility. Under what is known as the Alternative Licensing Process, applicants and stakeholders engage in a collaborative process to narrow disputes and reach agreement on issues raised by the hydropower proposal. (18 C.F.R. § 4.34(i).) The process encourages the sharing of information among stakeholders about resource impacts and mitigation and enhancement proposals. (See *id.* § 4.34(i)(2).) If successful, the process may culminate in a settlement agreement among stakeholders that serves as the basis for a license or relicense application to FERC. (*Id.* § 4.34(i)(2)(iv), (v).)

In deciding whether to issue a license, FERC must consider development-related objectives, such as power generation, as well as environmental objectives, including energy conservation, fish and wildlife preservation, and the protection of recreational opportunities. (16 U.S.C. § 797(e).) Every license FERC issues under the Act "shall include conditions for protection, mitigation, and enhancement" of fish and wildlife based on recommendations from state and federal fish and wildlife agencies. (*Id.* § 803(j)(1); see also *id.* § 803(j)(2) [authority for FERC to decline to adopt such recommendations].) FERC may accept a license application as proposed, or it may condition a license on the applicant's acceptance of additional or different terms. (E.g., *id.* § 803(g).) A

license issued by FERC is "conditioned upon acceptance by the licensee of all of the terms and conditions" described in the Federal Power Act "and such further conditions, if any, as [FERC] shall prescribe in conformity with" the Act. (*Id.* § 799.) These further "terms and conditions and the acceptance thereof shall be expressed in [the] license." (*Ibid.*)

The maximum duration of a hydropower operating license is fifty years. (16 U.S.C. § 799.) Toward the end of the license period, the facility operator may apply for a new license. (*Id.* § 808(b), (c).) Processing the application may take time. While the application for a new license is pending, the existing license continues on an interim annual basis by operation of law. (18 C.F.R. § 16.18.)

The Federal Power Act recognizes various roles for States. It acknowledges that States themselves may own and operate licensed hydroelectric facilities. (16 U.S.C. § 797(e).) In addition, the statute requires FERC to consult with and consider recommendations of various state agencies in connection with FERC's decision whether to license a project and under what conditions. For example, FERC must consider recommendations of state and federal agencies with responsibility for flood control, irrigation, recreation, and other matters, and must solicit recommendations from them regarding terms and conditions that should be included in a license. (*Id.* § 803(a)(2)(B), (a)(3).) And any FERC license must include any conditions imposed by States to protect water quality pursuant to section 401 of the federal Clean Water Act. (See *post*, pp. 19-20.)

The Federal Power Act contains no express preemption provision, but the U.S. Supreme Court has construed it to impliedly preempt certain state regulation of federally licensed hydroelectric facilities. (E.g., *Cal. v. FERC* (1990) 495 U.S. 490, 496-497, 503.) At the same time, the Act expressly preserves state regulatory jurisdiction over certain aspects of hydropower facility construction and operation. For instance, it maintains States' traditional authority regarding "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; see *Cal. v. FERC*, *supra*, 495 U.S. at pp. 497-498.) The Act similarly preserves state authority to regulate rates and services (16 U.S.C. § 812) and to impose liability on the operator for property damage resulting from "the construction, maintenance, or operation of the project works" (*id.* § 803(c)).

B. The Clean Water Act

The federal Clean Water Act is designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) The Act creates a federal scheme to regulate water pollution, but one that relies significantly on state participation and support, in light of States' "primary responsibilit[y]" in our federal system to "prevent, reduce, and eliminate pollution" in the nation's waters. (*Id.* § 1251(b).) Congress sought to "preserve[] and protect" this critical state function. (*Ibid.*)

Section 401 of the Clean Water Act requires "[a]ny applicant for a Federal license or permit to conduct any activity" that "may

result in any discharge" to waters of the United States to obtain certification from the relevant state agency that the project will comply with state water quality laws. (33 U.S.C. § 1341(a)(1), (d); see *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology* (1994) 511 U.S. 700, 707-708, 711.) This certification authority "requir[es] that an applicant for any federal license comply with state water quality procedures." (*Karuk Tribe of N. Cal. v. Cal. Regional Water Quality Control Bd.* (2010) 183 Cal.App.4th 330, 359-360.) Federally licensed hydroelectric dams are among the types of projects that require state certification under section 401 before a federal license may issue. (*S.D. Warren Co. v. Me. Bd. of Envtl. Protection* (2006) 547 U.S. 370, 373.) Section 401 allows each State to designate an agency responsible for reviewing and approving or denying water quality certification requests. (33 U.S.C. § 1341(a)(1).) In California, the Water Board is the agency with certification authority. (Wat. Code, § 13160; Cal. Code Regs., tit. 23, §§ 3830-3838, 3855-3861, 3867-3869.)

Under section 401, the state certification agency may certify water quality compliance based on a license or permit application as submitted, deny certification outright, or certify subject to additional limitations and conditions designed to ensure compliance with state water quality laws. (See 33 U.S.C. § 1341(a), (d).) If the state agency denies certification, the federal agency cannot approve the project. (*Id.* § 1341(a)(1) ["No [federal] license or permit shall be granted if certification has been denied by the State."].) If the state agency issues a certification, the certification must "set forth any effluent limitations and other

limitations, and monitoring requirements necessary to assure" that the project complies with federal water quality requirements "and with any other appropriate requirement of State law." (*Id.* § 1341(d).) These conditions of certification become conditions of the federal permit or license. (*Ibid.*)

C. The California Environmental Quality Act

The California Environmental Quality Act "ensure[s] that governmental agencies and the public are adequately informed about the environmental impact of public decisions." (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 943; see generally Pub. Resources Code, § 21000 et seq.) To achieve that objective, CEQA mandates an environmental review process for projects carried out or approved by state and local public agencies. (Pub. Resources Code, §§ 21001.1, 21002.1, 21080.) The Act "requires a lead agency to prepare an environmental impact report (EIR) before approving a new project that 'may have a significant effect on the environment.'" (*San Mateo Gardens*, *supra*, 1 Cal.5th at p. 943, quoting Pub. Resources Code, § 21151, subd. (a).) The lead agency is "the public agency which has the principal responsibility" for either "carrying out" a project itself, "or approving a project . . . ." (Pub. Resources Code, § 21067.) The EIR requirement applies both to "projects to be carried out by public agencies" and to "private projects required to be approved by public agencies." (*Id.* § 21001.1; see *id.* § 21065.)

An EIR must "provide public agencies and the public in general with detailed information about the effect which a

proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (Pub. Resources Code, § 21061; see *id.* §§ 21100, 21100.1.) "The EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR." (*In re Bay-Delta Programmatic EIR Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162 (*Bay-Delta*).)

CEQA counteracts any "incentive to ignore environmental concerns," especially where "the public agency prepares and approves the EIR for its own project." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1989) 47 Cal.3d 376, 395.) The EIR requirement ensures the government's "accountability" to the public and "protects . . . informed self-government." (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512; see also *Laurel Heights*, *supra*, 47 Cal.3d at p. 392.) The "public, being duly informed, can respond accordingly to action with which it disagrees." (*Laurel Heights, supra,* 47 Cal.3d at p. 392.) And an agency's ultimate decision must reflect what is learned through the EIR process; the agency must consider and implement feasible mitigation measures and design changes to reduce or eliminate significant environmental effects. (*City of Marina v. Bd. of Trustees of Cal. State University* (2006) 39 Cal.4th 341, 361.)

The Department's decision whether to accept a FERC-issued license for the continued operation of the Orville Facilities is a discretionary project subject to CEQA. (See Pub. Resources Code,

§ 20165, subd. (a).) CEQA also applies to the Water Board's issuance of a certification pursuant to section 401 of the Clean Water Act, unless an exemption applies. (See *id*. § 21065, subd. (c); Cal. Code Regs., tit. 23, § 3856, subd. (f).) When a private party seeks the Water Board's section 401 certification of its project, the Water Board generally is the "lead agency" for purposes of CEQA, meaning it has responsibility to prepare the appropriate CEQA document in the first instance. (See Pub. Resources Code, § 21067.) When a public agency seeks section 401 certification for a public project, that agency generally will be designated the lead agency and will prepare the CEQA document, and the Water Board will be designated a "responsible agency." (See *id*. § 21069; see also *id*. § 21165 [single EIR prepared for "project"]; Cal. Code Regs., tit. 14, §§ 15378, subd. (c), 15381].) When acting as a responsible agency, the Water Board responds to requests for consultation from the lead agency preparing the CEQA document and relies on the CEQA document prepared by the lead agency in making its certification decision. (Pub. Resources Code, §§ 21080.4, subds. (a), (b), 21104, subds. (a), (c); Cal. Code Regs., tit. 14, § 15096, subds. (a), (b); see generally *RiverWatch v. Olivenhain Municipal Water Dist*. (2009) 170 Cal.App.4th 1186, 1201-1202 [discussion of responsible agency role].)[3]

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[3] The Water Board's subsequent reliance on an EIR prepared by a lead agency in making its water quality certification decision for the underlying project does not extend the time for bringing a challenge to the adequacy of that EIR.

(continued…)

If a trial court determines that a public agency's CEQA document is inadequate, it "shall enter an order that includes one or more" prescribed remedies. (Pub. Resources Code, § 21168.9, subd. (a).) The court may order the public agency to "take specific action as may be necessary" to bring the agency's action into conformity with the statute. (*Id.*, subds. (a)(2), (a)(3).) CEQA "give[s] the trial courts some flexibility in tailoring a remedy to fit a specific CEQA violation," and courts rely on "traditional equitable principles" in determining whether to allow a project to proceed pending revision of the EIR or other remedial action. (*San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1103-1104.)

FACTUAL AND PROCEDURAL BACKGROUND

A. The Oroville Facilities

The Department owns and operates the Oroville Facilities, located on the Feather River in Butte County. (AA 11:95:2369.)[4] The Facilities' principal features include the Dam and Reservoir,

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"An action or proceeding alleging that an environmental impact report does not comply with [CEQA] shall be commenced within 30 days from the date of the filing of the notice [of determination] . . . *by the lead agency*." (Pub. Resources Code, § 21167, subd. (c), italics added; see *Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1099, fn. 8 ["For purposes of the [CEQA] statute of limitations, the date on which the responsible agency certified the EIR is immaterial."].)

[4] Citations to the Appellants' Appendix (AA) appear as AA [volume]:[tab numbers]:[page numbers]. Where an AA citation refers to an entire document, the page numbers may be omitted.

as well as the Edward Hyatt Powerplant, the Ronald B. Robie Thermalito Pumping-Generating Plant, the Feather River Fish Hatchery, and associated infrastructure. The Department operates the Oroville Facilities primarily for water supply, with the additional purposes of providing power generation and flood management, as well as water quality improvement in the Sacramento-San Joaquin Delta, recreation, and fish and wildlife protection. (See generally AR G000113-115, G000191-193, G000278-281.)[5]

The Oroville Facilities are an essential water storage and delivery component of the State Water Project. (AA 11:95:2369.) With a capacity of more than 3.5 million acre-feet, Oroville is one of the largest reservoirs in the State and accounts for much of the State Water Project's storage. (AR G000201, G000259.) Approximately two-thirds of Californians rely on State Water Project water. (AR G001150.) The State Water Project also irrigates over 750,000 acres of California farmland. (*Ibid.*)[6]

More than two dozen water agencies (referred to collectively as the State Water Contractors) contract with the Department to receive water from the Oroville Facilities to deliver to California homes, business, and farms. (AR G000939-940.) The water

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[5] Citations to the Administrative Record (AR) include the letter corresponding to the relevant section, as well as page numbers.

[6] These statistics date to 2006. Current statistics are similar. (See Department of Water Resources, State Water Project <https://water.ca.gov/Programs/State-Water-Project> [as of June 8, 2020].)

agencies pay a significant portion of the State Water Project's capital and operating costs. (AR G000939.) The water agencies, in turn, deliver water directly to agricultural and urban water users and to water wholesalers and retailers, with the amount of water delivered in any given year depending on hydrological conditions and other factors. (*Ibid.*)

The Oroville Facilities serve a variety of other important state objectives apart from water supply. (AR G000184.) The Oroville Dam produces hydroelectric power, much of which is used to run the State Water Project. (AR E000058, G000189-190; AA 11:95:2369.) The facilities play a central role in flood management along the Feather and Sacramento Rivers downstream of Oroville Dam, having prevented more than $1 billion in flood damage during the winter of 1997 alone. (AR G000163.) In addition, the Lake Oroville State Recreation Area supports a wide variety of recreational opportunities. (AR G000115-16.)

The Oroville Facilities include features designed to safeguard the environment and mitigate the unavoidable environmental effects of the Dam. Oroville Dam impacts spawning areas in the upper portion of the Feather River. (AR G000115; AA 11:95:2369.) To mitigate that effect, the Department built, and continues to fund and operate, the Feather River Fish Hatchery. (See *ibid.*) Water releases from Oroville support salmon and steelhead spawning and other environmental uses on the Feather and Sacramento Rivers, and improve water

quality in the Delta by lowering salinity levels there. (AR G000113-115, G000192-193.)

B. The Department's Application to the Federal Energy Regulatory Commission for a New Hydroelectric Facility License

In 1957, the Department obtained a license from FERC to construct and operate the Oroville Facilities for fifty years, through January 31, 2007. (AA 11:95:2369; AR G001105.) In 1999, the Department provided notice that it was beginning the process of preparing its application for a new license to operate the existing facilities. (AR G001036.) In 2001, FERC approved the Department's request to use the Alternative Licensing Process for its new license application. (AR A000020.) In January 2005, consistent with the timelines prescribed in the Federal Power Act, the Department filed its relicensing application with FERC, which contemplated further proceedings leading to a settlement agreement that would serve as the basis for the license. (See AR G000168; see 18 C.F.R. § 4.34(i).)

As part of the Alternative Licensing Process, the Department convened several work groups and additional work group subcommittees that involved hundreds of individuals participating in more than a thousand public meetings. (See generally section B of the administrative record [CDs 2 and 3].) Participants included representatives from federal, state, and local governments (including the Counties); resource agencies; Indian tribes; nongovernmental organizations; local organizations; and local residents. (AR G000163-164, G000168.) Butte County participated in the Plenary Group and every work

group. (AR B066149-66153.) Plumas County was a participant in the Engineering and Operations Work Group, and had the opportunity to participate in all the other work groups. (AR B066150.) The procedure yielded numerous technical studies and hundreds of proposals for environmental protection and mitigation measures to be included in the new license. (AR G001150-1190.)

The settlement negotiations concluded in March 2006, and culminated in a Settlement Agreement signed by more than 50 parties (but not by the Counties). (AR D000422-576.) The agreement includes the proposed terms and conditions for the Department's operation of the Oroville Facilities upon relicensing. (AR G000108.) The Department submitted the Settlement Agreement to FERC on March 24, 2006. (*Ibid*.) Appendix A of the agreement identifies the measures that the Department proposes FERC include in the new license to benefit environmental, recreational, cultural, land use, and engineering and operational resources. (AR G001150-1190.) Appendix B identifies certain measures that would not be included in the license terms because they are beyond FERC's jurisdiction, but which the Department nonetheless agreed to undertake. (AR G001191-1208.)

The measures the Department agreed to implement under the Settlement Agreement are wide-ranging and substantial. The environmental protection and mitigation measures include habitat expansion (particularly for Central Valley spring-run Chinook salmon and Central Valley steelhead), Lower Feather

River habitat improvement, and increased protection and improvement of terrestrial habitat (AR G000118-119), as well as new operating criteria designed to improve water temperatures for fish (AR G000212-214, G000217-218) and research and monitoring programs (AR G000226-230). The Department also pledged to make sport fishery improvements, and enhance existing recreational facilities. (AR G000118-119, G000222-223, G000233-244.)

The Department's relicensing application remains pending. Since the expiration of the Department's original 50-year license in 2007, the Department's license to operate the Oroville Facilities has been renewing by operation of law on an interim annual basis. (See 18 C.F.R. § 16.18; AR G000158.)

C. The Department's 2008 Environmental Impact Report

Pursuant to CEQA, to inform its decision-making process, the Department undertook an analysis of the environmental impacts of implementing the Settlement Agreement. (AR A000007, G000004, G000110, G000134.) For purposes of CEQA, the Department defined the Proposed Project as "the SA [Settlement Agreement] that was submitted to FERC on March 24, 2006, as supplemental information to support the license application that DWR filed in January 2005 for consideration as future license conditions for the Oroville Facilities for the next 50 years." (AR G000108; see also AR G000117 [project is "the continued operation of the Oroville Facilities under a new FERC License pursuant to the terms of the [Settlement Agreement]"].)

The Department considered two alternatives to the Proposed Project. As required by CEQA, the Department evaluated a "No Project" alternative under which the Department would continue operating the Oroville Facilities under the terms of its existing license. (AR G000116-117.) The Department analyzed this no-project alternative in order to "allow decision-makers to better understand the environmental consequences of continuing to operate the project under the terms and conditions of its existing FERC license" and to compare those consequences with alternatives. (AR G000116.) The Department also evaluated a "FERC Staff Alternative," which contained a different set of proposed terms and conditions identified by FERC staff to govern the Department's operation of the Oroville Facilities. (AR G000122-123.)

The Department issued its draft EIR for public review in March 2007. The Department sent more than 900 notice letters and 230 electronic copies of the draft EIR to interested stakeholders. (AR H000015.) It received over 50 comment letters from state, regional, and local governmental entities (including the Counties); non-governmental organizations and interest groups (including the State Water Contractors); and interested members of the public. (AR H000015-17, H000199-362 [Butte County comments and Department's response], H000363-383 [Plumas County comments and Department's response], H000425-29 [State Water Contractors' comments and Department's response].) The Water Board participated as a responsible agency under CEQA and submitted comments

suggesting ways in which the draft EIR should be modified to facilitate the Water Board's eventual section 401 water quality certification. (AR H000181-95.) The Department also received extensive comments at a public hearing in Oroville. (AR G001808-1863.)

In June 2008, after addressing the comments as required by CEQA, the Department finalized the EIR (AR H004699-4701) and filed its notice of determination on July 22, 2008 (AR A000011). The notice explained that the final EIR was intended to inform the Department's decision regarding whether and on what terms to accept a new FERC license. (AR A000008.) The decision document accompanying the final EIR recognized that, "[w]hen FERC issues a new license, DWR will have 30 days to decide whether to accept the license and license conditions." (*Ibid.*) If FERC offered a license under the terms proposed in the Settlement Agreement and analyzed in the EIR, "no further decision under CEQA would be required and the DWR Director may accept the license." (*Ibid.*) Similarly, if FERC proposed a license consistent with the terms of the FERC Staff Alternative, which was also considered in the EIR, "no additional analysis under CEQA is required and the DWR Director may accept the license." (*Ibid.*) If FERC, however, issued a new license "with terms and conditions not included in the Proposed Project or FERC Staff Alternative," additional CEQA review and consideration by the Department could be required. (*Ibid.*)

D. The Water Board's Certification of the Project Under Clean Water Act Section 401 in Reliance on the 2008 EIR

On December 15, 2010, the Water Board certified that the project described in the June 2008 EIR complied with state water quality requirements under section 401 of the Clean Water Act. (AA 11:95:2369-2421.) As a responsible agency rather than the lead agency, the Water Board relied on the final EIR that the Department had prepared and certified in July 2008. (AA 11:95:2385.) The Water Board was required to—and did—assume that the Department's EIR satisfied CEQA's requirements, even though the Counties had filed a CEQA petition against the Department. (Pub. Resources Code, § 21167.3, subd. (b); Cal. Code Regs., tit. 14, §§ 15096, 15231.) The Water Board's approval "constitute[d] permission to proceed with the project at the [Department's] risk pending final determination of" this lawsuit. (Pub. Resources Code, § 21167.3, subd. (b).) The Water Board issued its own CEQA notice of determination on the following day, December 16, 2010. (See AA 11:95:2385.)[7]

As part of that certification, the Water Board required the Department to comply with a variety of conditions—many of which were laid out in the Settlement Agreement—to ensure that the project would comply with state water quality laws. (See AA

[7] The Water Board's notice of determination is available at <https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/oroville_ferc2100/121510/nod.pdf> [as of June 8, 2020].

11:95:2385.) Among other things, the Water Board's certification required the Department to "develop a comprehensive Lower Feather River Habitat Improvement Plan" (AA 11:95:2386); to make certain improvements to side channels to support salmon spawning and rearing (AA 11:95:2388-2390); to develop a riparian and floodplain improvement program (AA 11:95:2394-2395); to continue the operation of the Feather River Fish Hatchery (AA 11:95:2395-2396); to adhere to certain minimum flow and water temperature requirements (AA 11:95:2399-2403); and to implement a "comprehensive water quality monitoring program" (AA 11:95:2405).

STATEMENT OF THE CASE

A. The Counties' CEQA Challenge Against the Department and Trial Court Proceedings

In August 2008—after the Department certified the June 2008 EIR and made its decision to accept a FERC license reflecting the terms of the Settlement Agreement, but before the Water Board relied on the EIR to issue its section 401 water quality certification—Butte County and Plumas County each timely filed a petition for writ of mandate alleging that the Department violated CEQA. (AA 1:1 [Butte County petition], 1:3 [Plumas County petition].) Both named the Department as the sole defendant and identified numerous other entities—including, as relevant here, the Water Board and the State Water Contractors—as real parties in interest. (AA 1:1:1-2, 1:3:30-31.) Among other allegations, the petitions generally asserted that the Department's EIR failed to adequately analyze the Proposed

Project's environmental and socioeconomic impacts and failed to adequately assess climate change and the protection of beneficial uses. (See AA 1:1:3-6, 1:3:34-41.)

The Counties requested a writ of mandate setting aside the Department's approval of its project and certification of the EIR, and an injunction prohibiting the Department from proceeding with the project pending issuance of a revised EIR. (AA 1:1:24, 1:3:41.) They also sought a court order requiring the Department to withdraw its FERC relicensing application, payment of an "annual mitigation fee" to Butte County, and attorneys' fees. (AA 5:78:1128.)

In April 2009, pursuant to stipulation, the cases were consolidated and transferred to Yolo County Superior Court. (AA 1:18:138.) In December 2009, again pursuant to stipulation, the parties agreed to dismiss the Water Board and a number of other entities and individuals from the case. (AA 2:29:284-287.) The parties agreed that the Water Board was not a "necessary" or "indispensable" party to the proceeding. (AA 2:29:286.)

In May 2012, after full briefing and a three-day hearing, the trial court issued a statement of decision denying the Counties' petitions on the merits, holding that the EIR prepared by the Department satisfied the requirements of CEQA. (AA 14:128.) The court concluded, among other things, that the EIR appropriately addressed the risks of climate change (AA 14:128:3192-3194), possible changes to the operation of the State Water Project (AA 14:128:3194-3195), and the protection of beneficial uses (AA 14:128:3195-3196). The court also rejected

the Counties' argument that the EIR failed to adequately assess the "local public health, and negative fiscal and socioeconomic impacts on Butte County." (AA 14:128:3196-3197.)

B. Court of Appeal Proceedings

The Counties appealed the judgment in favor of the Department. After the parties' initial round of briefing on the merits of the Counties' CEQA challenge, the Court of Appeal *sua sponte* directed the parties to brief a new issue that no party had previously raised either in the trial court or in the Court of Appeal: whether the Federal Power Act preempts CEQA. (Order [Apr. 11, 2016], pp. 2-3.) The Court of Appeal then held that CEQA was preempted in this context. (*County of Butte v. Dept. of Water Resources* (2018) 30 Cal.App.5th 630.) The court reasoned that 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," which the court believed "include[d] the CEQA document in Appendix A of the [Settlement Agreement]." (*Id.* at pp. 637-638.)

In April 2019, this Court granted the Counties' petition for review and transferred the case, directing the Court of Appeal to vacate its decision and reconsider the matter in light of this Court's decision in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677. (*County of Butte v. Dept. of Water Resources* (2019) 245 Cal.Rptr.3d 411 [mem.].) On remand, the Department argued that under *Eel River*, the application of CEQA to the Department's consideration of the Oroville Facilities relicensing was not preempted because it was

an "'act of self-governance'" rather than state regulation, though the Department noted that any CEQA remedies that "affirmatively conflict with federal law" would be preempted. (Supplemental Opening Brief, p. 19, quoting *Eel River*, *supra*, 3 Cal.5th at p. 691.)

In September 2019, the Court of Appeal "h[e]ld once again" that, notwithstanding *Eel River*, it had "no jurisdiction because federal law preempts CEQA under the circumstances presented." (Petition for Review, Ex. A (Opn.) p. 20.) The court reasoned that "the plaintiffs cannot challenge the environmental sufficiency of the [Settlement Agreement] in the state courts because jurisdiction to review the matter lies with FERC and plaintiffs did not seek federal review[.]" (*Id.* at p. 6.) The court further determined that "the plaintiffs did not challenge and could not challenge the [Water Board's 401] Certificate in their pleadings because it did not exist at the time this action was filed." (*Ibid.*)

The court first held that *Eel River* did not disturb its earlier determination that the Federal Power Act preempts CEQA as applied in the context of the relicensing of a state-operated hydroelectric facility. In the court's view, it was "[c]ritical" to this Court's decision in *Eel River* that the Interstate Commerce Commission Termination Act (ICCTA), which was at issue in that case, had a "deregulatory" purpose. (Opn. 22.) "By contrast, there is no deregulatory feature" in the Federal Power Act, which created a "broad[]" and "active federal oversight role in hydropower development[.]" (*Id.* at p. 23.) Thus, this Court's emphasis in *Eel River* on the State's ability to "self-govern"

within the "zone of autonomy" created by ICCTA did not apply in a case involving the Federal Power Act, because the "the field of hydropower licensing is highly regulated" at the federal level. (*Id.* at p. 24.) And the Act "expressly authorizes FERC to consider environmental protection when issuing licenses." (*Id.* at p. 25.)

The Court of Appeal rejected the rules of construction applied by this Court in *Eel River*. While the court acknowledged that a federal statute should not be read to "deprive a state of its sovereign authority over its internal governance without a clear statement of intent[,]" it reasoned that "[t]he [Federal Power Act] has occupied the field of regulating hydropower projects, leaving no sphere of regulatory freedom in which state environmental laws may operate as self-governance." (Opn. 22, 26.) On that basis, it concluded that the clear-statement rule "is not applicable to this case." (*Id.* at p. 27.) And while the court recognized that a State's participation in the marketplace "does not constitute regulation subject to preemption[,]" it held that "[t]he CEQA laws are not narrow and focused actions consistent with the behavior of other market participants[,]" but rather "regulatory acts pure and simple[.]" (*Id.* at pp. 28-29.)

In addition, the Court of Appeal characterized the Counties' claims as a challenge to the "environmental predicate" for the Water Board certificate issued pursuant to section 401. (Opn. 7, fn. 9.) It stated that "[t]he challenge cannot succeed because the Certificate did not exist at the time the case was filed and the program required by the Certificate cannot be challenged until it

is implemented by the DWR." (*Ibid.*; see also *id.* at pp. 20, 32.) Thus, "the parties have not tendered a federal issue over which this court has state CEQA jurisdiction." (*Id.* at p. 32.)

This Court granted the Counties' second petition for review, directed the Reporter of Decisions not to publish the opinion below, and ordered the parties to brief the two issues set forth above (*ante*, p. 13).

SUMMARY OF ARGUMENT

The Federal Power Act does not categorically preempt the application of CEQA to inform the Department's decision whether to accept the terms contained in a FERC license for operation of a state-owned and operated hydropower project. For preemption purposes, there is a difference between a State's regulation of private actors' conduct on the one hand, and a State's non-regulatory actions on the other, including control over its own internal decision-making processes. The traditional framework that applies to determine whether federal law preempts state regulation does not apply where non-regulatory state action is at issue. And federal law will not be read to divest a State of its non-regulatory prerogative over matters of internal self-governance without an unmistakably clear intent to do so.

Granted, the Federal Power Act preempts certain state law requirements that would regulate the operation of private hydropower facilities or conflict with the federal regulatory scheme. But the Act reflects no congressional intent—and certainly not an unmistakably clear intent—to preclude California from imposing on its own public agencies a process for

environmentally informed decision-making for considering whether and under what circumstances to accept a FERC license for a state-owned and operated project.

The fact that the Water Board participated in the Department-led CEQA process as a responsible agency, and considered the information learned in that process in issuing its water quality certification, does not change the result. Rather, the Water Board's compliance with CEQA, as distinct from its certification action, in the circumstances of this case, reflects an additional act of state self-governance related to the same state-owned and state-operated project.

Beyond that, Congress specifically authorized States to exercise *regulatory* authority under section 401 of the Clean Water Act with respect to any hydropower project—public or private. Nothing in the Federal Power Act or elsewhere suggests that Congress intended to preclude States, in carrying out that regulatory authority, from engaging in complementary state environmental review processes like those mandated by CEQA, subject to judicial review in state court pursuant to state law.

The Court of Appeal thus erred in holding that the trial court lacked jurisdiction to consider the Counties' CEQA challenge against the Department.

ARGUMENT

I. THE FEDERAL POWER ACT DOES NOT CATEGORICALLY PREEMPT CEQA AS APPLIED TO THE DEPARTMENT'S DECISION WHETHER TO ACCEPT A NEW FERC LICENSE FOR A STATE HYDROELECTRIC FACILITY

The Department's use of CEQA to inform its decision whether to pursue and accept a FERC license was a non-regulatory action not subject to preemption, and, more importantly, was an act of internal self-governance. The Federal Power Act does not prohibit dam operators generally from assessing the potential impacts of contemplated operations, and contains no "clear statement" of congressional intent to trench on a State's internal affairs and prevent its informed decision-making.

A. The Department's Use of CEQA to Inform Its Decision Whether to Accept a New License for the Oroville Facilities Is a Non-Regulatory Act of State Self-Governance

It is well established that whether federal law preempts a state statute is a question of Congress's intent. (E.g., *Eel River*, *supra*, 3 Cal.5th at p. 704.) A federal statute may supersede state regulatory authority expressly. (*Ibid.*; see also *Kan. v. Garcia* (2020) 589 U.S. ___, 140 S.Ct. 791, 801.) Congress's intent to preempt state law may also be implied from the statutory scheme. (*Garcia*, *supra*, 140 S.Ct. at p. 801.) "In rare cases," Congress "legislate[s] so comprehensively in a particular field that it le[aves] no room for supplementary state legislation." (*Id.* at p. 804, internal quotation marks omitted.) This category of

implied preemption—known as "field preemption"—occurs when "Congress intend[s] to foreclose any state regulation in the area, irrespective of whether state law is consistent or inconsistent with federal standards." (*Eel River*, *supra*, 3 Cal.5th at pp. 704-705.) A federal statute may also preempt state law under principles of "conflict" preemption. (*Ariz. v. United States* (2012) 567 U.S. 387, 399-400.) Conflict preemption may occur either where compliance with both state and federal law is impossible or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Ibid.*, internal quotation marks omitted; see also *Eel River*, *supra*, 3 Cal.5th at p. 705.)

As this Court recognized in *Eel River*, however, preemption—a specific application of the Supremacy Clause—is concerned with the intersection of state and federal *regulation*. (*Eel River*, *supra*, 3 Cal.5th 736.) In considering whether a state statute must yield to federal law, the U.S. Supreme Court and this Court have consistently drawn a distinction between state regulation of private actors on the one hand, and States' non-regulatory actions on the other. (See *ibid.*)

The U.S. Supreme Court recently confirmed this approach in *Murphy v. National Collegiate Athletic Association* (2018) 584 U.S. ___, 138 S.Ct. 1461, 1480. There, the Court explained that traditional preemption analysis involves circumstances in which the federal government and States both are regulating private actors. The Court recognized that all three forms of preemption (express, field, and conflict) "work in the same way: Congress

enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." (*Ibid.*; see also *Garcia*, *supra*, 140 S.Ct. at p. 804.)

There are at least two circumstances that indicate that a State is not acting in a regulatory capacity, both of which are present here.

First, the Supreme Court and this Court have presumed that preemptive federal statutes do not reach actions a State undertakes when it is not regulating private actors but instead is acting as a participant in the marketplace. (*Eel River*, *supra*, 3 Cal.5th at p. 705; *Building & Const. Trades Council of Metropolitan Dist. v. Associated Builders & Contractors* (1993) 507 U.S. 218, 226.) For example, when a State owns and manages property, it must decide the terms on which it will obtain goods or services. (*Eel River*, *supra*, 3 Cal.5th at p. 705.) When the State sets those terms, it is not regulating others, but is acting much like any private business might. (*Id.* at pp. 734-736.) And because preempting federal statutes ordinarily supersede only *regulatory* behavior by States, courts will presume that Congress did not intend to deprive States of the same freedom to act that private market actors enjoy, absent evidence of a contrary congressional intent. (*Id.* at p. 734.)

Here, application of CEQA to the Department's decision whether to accept a FERC license for a state-owned facility is analogous to actions a private hydropower facility might take in

making its own internal decisions. (See *Eel River*, *supra*, 3 Cal.5th at p. 737.) Just as a corporation might require its subsidiary to perform studies to investigate the environmental impacts of a proposed project, consider those impacts as part of its own cost-benefit analysis, and seek stakeholder input into its decision-making, the State here instructed the Department to undertake similar procedures for making similar decisions regarding the disposition of the State's own property. (See *ibid.*) CEQA very well may mandate a more extensive or structured environmental review than what a private company might choose to undertake in deciding to make a similar decision regarding whether to operate a FERC-licensed facility. But the distinction between regulation and market-participant conduct does not turn on the content of the required procedures but rather on whether those procedures extend beyond the agency's own internal decision-making to dictate action by private parties. (See *id.* at p. 731; compare Opn. 28-29.) The Department's application of CEQA here did not address the conduct of any third-party hydropower operator, but involved only its own consideration of whether and on what terms to continue operating a state-owned hydropower facility. Application of CEQA in such circumstances reflects "an expression of how the state, as proprietor, directs that a state enterprise will be run—an expression that can be analogized to private corporate bylaws and guidelines governing corporate subsidiaries." (*Eel River*, *supra*, 3 Cal.5th at p. 737.)

Second, the Supreme Court and this Court have also recognized that States do not act as regulators when they

exercise their sovereign authority over matters concerning internal self-governance. As the U.S. Supreme Court has explained, a "State is entitled to order the processes of its own governance." (*Alden v. Maine* (1999) 527 U.S. 706, 752; see also, e.g., *Ariz. State Leg. v. Ariz. Independent Redistricting Com.* (2015) 135 S.Ct. 2652, 2673 ["[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes."]; see also *Murphy*, *supra*, 138 S.Ct. at p. 1476 [Congress has no "power to issue direct orders to the governments of the States"].) Given the constitutional dimension of federal efforts to constrain state internal affairs, courts have thus "treated with great skepticism" federal legislation that "threaten[s] to trench on the States' arrangements for conducting their own governments." (*Nixon v. Mo. Municipal League* (2004) 541 U.S. 125, 140.) Before a court will construe a federal statute to purport to impinge on the ability of States to exercise sovereign control over their own internal affairs, an "unmistakably clear" statement in "the language of the statute" itself is required. (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 460; see also *Eel River*, *supra*, 3 Cal.5th at p. 705 [same].) As this Court noted in *Eel River*, "it is error to "suggest[] that just because Congress has power to assert preemptive control over an area of commerce, the existence of such power means that it necessarily has preempted control even as to areas of traditional state sovereignty"; federal law "does not trench on essential state sovereignty and self-governance without unmistakably clear language to that effect." (*Supra*, 3 Cal.5th at p. 733.)

The Department's decision to undertake environmental review under CEQA, as part of its determination of whether and under what circumstances to renew a FERC license, is an act of internal self-governance under this Court's decision in *Eel River*. There, this Court considered whether the federal ICCTA preempted application of CEQA to a state agency evaluating whether to resume freight service on a state-owned railroad line. (*Eel River*, *supra*, 3 Cal.5th at p. 690.) Explaining that ICCTA preempts only state regulation of rail projects, the Court considered whether application of CEQA to the state agency in that context constituted such "regulation." (*Id.* at pp. 723-724.) The Court held that it did not, because "when the state or a subdivision of the state is itself the owner of the property and proposes to develop it," CEQA "operates as a form of self-government." (*Id.* at p. 723.) In that context, adherence by a state entity to CEQA is not "classic *regulatory* behavior" (*ibid.*, original italics) but is instead "an internal guideline governing the processes by which state agencies may develop or approve projects that may affect the environment" (*id.* at p. 724).

Here, similarly, CEQA required the Department to undertake an environmental review as part of its consideration of whether and on what terms to seek and accept a new license from FERC to operate the existing Oroville Facilities. The CEQA review was designed to allow the Department to evaluate and obtain public input on the specific license conditions that FERC could impose—in particular, those set forth in the Settlement Agreement and those in the FERC Staff Alternative. (AR

A000007-8.) The information developed through the CEQA process allowed the Department to assess the consequences of operating under those different possible terms. (*Ibid.*) Thus, just as in *Eel River*, CEQA here operated as an internal guideline for a state agency to make decisions about developing and operating its own development project. (See *Eel River*, *supra*, 3 Cal.5th at p. 730.)[8]

The fact that the Department's duty to comply with CEQA may be enforced in a state court action also does not undermine the conclusion that CEQA operates as a method of self-governance. In *Eel River*, the Court explained that "CEQA's substantive provisions and citizen-suit provisions are intertwined." (*Supra*, 3 Cal.5th at p. 730.) CEQA requires agencies to gather specified information, make certain findings, weigh mitigation measures, and consider alternatives, among other requirements. (*Ibid.*) The statute's allowance for private actions is simply the mechanism the State has chosen to enforce

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[8] In its answer to the Counties' petition for review, the State Water Contractors contended (at p. 18) that under the non-alienation mandate in Water Code section 11464 the Department lacks discretion to decline a FERC-offered license. That is not correct. Section 11464 limits the Department's ability to divest itself of ownership of electricity production facilities. (Wat. Code, § 11464 ["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."].) It does not compel the Department to accept a federal license and continue operating a hydroelectric facility under any terms that the federal government may require.

those requirements—"again as a matter of self-governance." (*Ibid.*) The application of CEQA here, including its judicial enforcement mechanism, reflects the State's chosen approach for guiding the internal decision-making of its own agencies; it is not regulation.

B. The Federal Power Act Does Not Suggest—Let Alone Clearly State—Congressional Intent to Divest the State of Its Ability to Impose Internal Self-Governance Rules Like CEQA

Because CEQA as applied to the Department's decision to pursue relicensing is non-regulatory, the Federal Power Act's preemptive force as to state regulation is largely beside the point. And because CEQA's non-regulatory application in this context also constitutes internal self-governance, the Federal Power Act cannot prohibit it in the absence of an unmistakably clear statement of congressional intent. No such statement can be found in the Act.

While the Federal Power Act comprehensively regulates hydropower projects in the United States it does not purport to prohibit all state action related to hydroelectric facilities—contrary to the suggestion of the Court of Appeal. (See Opn. 26-27.) The Act requires operators to obtain a federal license to construct and run a hydroelectric facility and empowers FERC to set the terms and conditions under which those facilities may be operated. (*Ante*, pp. 15-17, 20.) At the same time, the Act also explicitly preserves state authority "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; see *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.* (2d Cir. 2012) 673 F.3d 84, 94-95.) This statutory structure establishes a "dual system" of authority that allows States to regulate property rights in water, such as determining users' rights to access or control water supplies, but that generally preempts other state regulation of the operation of hydroelectric facilities. (*Cal. v. FERC*, *supra*, 495 U.S. at pp. 493, 497, 502.)

The case law about the Federal Power Act's effect on state law, accordingly, focuses on its preemptive effect on state regulation of private parties. Thus, in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (1946) 328 U.S. 152, the U.S. Supreme Court held that the Act preempted a state requirement that a private dam operator secure a state permit as a condition of obtaining a federal license. (*Id.* at p. 164.) The Court determined that allowing States to condition the operation of a facility on receipt of a state permit would give them "veto power over [a] federal project." (*Ibid.*) Likewise, the U.S. Supreme Court in *California v. FERC*, *supra*, 495 U.S. 490 concluded that a State could not impose minimum stream-flow levels on a federally licensed private hydropower project. (*Id.* at pp. 506-507.) The Court reasoned that the state requirement did not fall within States' reserved powers to regulate property rights in water and instead "disturb[ed] and conflict[ed] with" the flow requirements set by FERC. (*Id.* at p. 506.)

As the above cases reflect, in adopting the Federal Power Act, Congress sought to centralize the *regulation* of hydropower facility operations and avoid duplicative and potentially inconsistent state *regulatory* decisions. (See, e.g., *First Iowa*, *supra*, 328 U.S. at pp. 167-168.) The Act created a comprehensive federal regulatory scheme for addressing competing uses of the nation's water resources, including navigation, irrigation, and hydropower. (*Fed. Power Com. v. Union Elec. Co.*, *supra*, 381 U.S. at p. 99.) Thus, the Act comprehensively addresses "*the regulatory authority* of the States and the Federal Government" over hydropower operations. (*Cal. v. FERC*, *supra*, 495 U.S. at p. 497, italics added; see also *First Iowa*, *supra*, 328 U.S. at p. 181 ["federal plan of regulation leave[s] no room or need for conflicting state *controls*," italics added]; *Niagara Mohawk Power v. Hudson River-Black River*, *supra*, 673 F.3d at p. 96 [statute "preempts only those laws that affect the federal regulation of hydroelectric projects"]; *Karuk Tribe*, *supra*, 183 Cal.App.4th at p. 356 [noting "federal supremacy in the field of regulating hydropower projects"].)

The relevant provisions of the Federal Power Act relate to preemption of state regulation, and do not address the very different subject of States' non-regulatory actions, including those actions that are analogous to those of other private dam operators. (See *Eel River*, *supra*, 3 Cal.5th at pp. 737-738 ["We see little reason to suppose that when Congress forbade states to regulate rail transportation, it meant to prevent states, as owners of railroad lines, to have the freedom of action we believe would

be retained by private businesses under the ICCTA"].) Such non-regulatory actions also include state rules for internal self-governance, which CEQA is in this context, as it governs how the Department should go about deciding whether to become, or continue to be, a federally licensed and regulated operator itself. And under the clear-statement rule, the Act's silence cannot serve to divest California of its ability to require a public agency to comply with CEQA for a state-owned and operated hydroelectric project. (See *Eel River*, *supra*, 3 Cal.5th at pp. 730 ["We see no unmistakably clear indication in the language of [ICCTA] that would direct us to the surprising conclusion that a state must operate without its usual tools and guidelines when it becomes an owner-participant in the railroad industry."].)

The Court of Appeal's analysis of the effect of the Federal Power Act in this case suffers from a fundamental flaw: It fails to distinguish the Federal Power Act's preemptive effect on state regulation from any potential congressional intent to prohibit state non-regulatory action. For example, the Court of Appeal concluded that the requirement of an unmistakably clear statement "is not applicable to this case," because, in the court's view, "[t]he exceptions to the [Federal Power Act]'s preemptive effect are limited and are specified by statute[,]" and "[t]here is no exception for the application of a state's environmental laws[.]" (Opn. 27.) But here the question is not whether the Federal Power Act preempts conflicting state environmental regulation of private hydropower facilities, but rather whether it divests California of its authority over matters concerning its own

internal self-governance. Again, an unmistakably clear statement is required before any federal statute will be read to strip a State of that sovereign authority. (*Ante*, p. 43; see also *Bond v. United States* (2014) 572 U.S. 844, 857-859.)[9]

The Court of Appeal's other various attempts to avoid the rules of construction set out in *Eel River* must be rejected. The court purported to distinguish the Federal Power Act from ICCTA—the statute at issue in *Eel River*—on the ground that it lacks that statute's "deregulatory purpose." (Opn. 24.) The court suggested that it could ignore the analytical framework of *Eel River* because the Federal Power Act "occupie[s] the field of regulating hydropower projects, leaving no sphere of regulatory freedom in which state environmental laws may operate as self-governance." (Opn. 26.) This was error in at least two respects.

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[9] Even with respect to state regulation, the Supreme Court has not held that general interpretive canons disfavoring preemption never apply under the Act. To the contrary, in *Federal Power Commission v. Niagara Mohawk Power Corp.* (1954) 347 U.S. 239, the Court declined to adopt a reading of the Act that would broadly extinguish certain state property rights where there was no "clear authorization" or "convincing explanation of that purpose" in the Act. (*Id.* at pp. 249, 253.) Furthermore, *California v. FERC*, *supra*, 495 U.S. at p. 497 did not reject application of the presumption disfavoring preemption that applies in cases involving state police power regulation of private parties, as the Court of Appeal suggested. (Opn. 27.) Rather, the Court declined to decide the applicability or effect of any such presumption in light of its earlier, controlling precedent in *First Iowa*, which had already addressed the preemptive effect of the Act. (See *Cal. v. FERC*, *supra*, 495 U.S. at p. 497.)

First, the Court of Appeal's reasoning again conflates preemption of state *regulation* with federal prohibition of a state's *non-regulatory* actions. The fact that the Federal Power Act has a significant preemptive sweep says nothing about congressional intent to prohibit state action that is non-regulatory.[10]

Second, the court's reasoning ignores the context of this Court's statement about ICCTA. The Court in *Eel River* explained that ICCTA's "deregulatory purpose" left all railroad owners with a sphere of autonomy to adopt "internal corporate rules, policies and bylaws to guide [their] market-based decisions," such as whether to "undertake significant capital expenditures," free from either federal or state control. (*Supra*, 3 Cal.5th at pp. 691, 723-724.) Granted, the Federal Power Act does not have a deregulatory purpose, but neither does the statute suggest that dam owners are constrained from adopting internal rules and procedures to guide their decisions about whether and under what conditions to seek and accept a FERC license. And any such attempt at constraint, as applied to the State, would still be subject to the clear-statement rule.

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[10] The court's characterization of preemption of state regulation painted with too broad a brush. Although the Act impliedly preempts conflicting state regulation of private hydropower facilities, it does not reflect a congressional intent "to preempt absolutely everything else." (*Niagara Mohawk Power Co.*, *supra*, 673 F.3d at p. 97; see also *Cal. Or. Power*, *supra*, 45 Cal.2d at p. 867.)

The Court of Appeal further asserted that CEQA in the relicensing context "directly encroach[ed] on the province of FERC" and the Act's requirements that FERC review and weigh the environmental impacts of a proposed hydropower project. (Opn. 25-26; see also, e.g., 16 U.S.C. §§ 797(e), 803(a); 803(j).) This too was error. The Department's review under CEQA of the environmental impacts of the Settlement Agreement was part of its *own* internal decision-making process and does not intrude on any aspect of the *federal* licensing process. Complying with CEQA's requirements to gather information, consult the public, make findings supported by substantial evidence, and weigh alternatives (see, e.g., *Bay-Delta*, *supra*, 43 Cal.4th at pp. 1161-1163) does not interfere with FERC's licensing proceeding, substitute the State's judgment concerning the environmental impacts of the project for FERC's, or purport to compel FERC to include any term in the federal license. As applied by a state agency to its own consideration of whether to become or continue as a federally licensed hydropower operator of a state-owned project, CEQA governs only "the functioning of [a] subdivision of the state." (*Eel River*, *supra*, 3 Cal.5th at p. 690.) That is not a matter that the Federal Power Act purports to address.

It is, of course, possible that some particular remedy for a CEQA violation could in fact interfere with the federal licensing procedure in such a way as to raise Supremacy Clause concerns. The Counties appear to acknowledge this as well. (OBM 36, fn. 5.) Here, because the trial court rejected the Counties' CEQA claims on the merits, it had no need to consider the issue of

remedy. If, upon consideration of the merits of the Counties' CEQA claims, the Court of Appeal were to hold the CEQA document inadequate, the trial court would have the discretion and responsibility to tailor any remedy to avoid intrusion into the federal regulatory process. For example, an order simply requiring the Department to cure any inadequacy in its final EIR would not interfere with FERC's licensing proceeding. In contrast, a state court remedy that purported to require any specific terms or conditions to be included in a FERC license or to compel the Department to act in ways contrary to the Federal Power Act would be impermissible. (See, e.g., *Cal. v. FERC supra*, 495 U.S. at pp. 506-507.) But the fact that a hypothetical remedy based on a hypothetical violation of CEQA could infringe upon FERC's regulatory prerogatives does not support the Court of Appeal's broad conclusion that the Federal Power Act categorically divests California of the authority to require its agencies to comply with CEQA when considering whether to seek and accept a federal license for a state-owned and operated project.

Reading the Federal Power Act to strip the State of that authority would raise significant federalism concerns that the Court should construe the statute to avoid. As explained above, before a court will interpret a federal law as prohibiting States from adopting rules for their own internal self-governance, there must be an "unmistakably clear" statement from Congress. (*Eel River*, *supra*, 3 Cal.5th at p. 705; *Gregory*, *supra*, 501 U.S. at p. 460.) An interpretation of the Federal Power Act that precluded

the application of CEQA under the circumstances at issue here would effectively tell the State that it cannot "adopt general precepts governing its own development schemes in the sphere in which private owners would have freedom of action." (*Eel River*, *supra*, 3 Cal.5th at pp. 729-730.) It would "leave the state, as owner, without the tools necessary to govern" its own agencies. (*Ibid.*) And it would deny the State "the ability to make decisions that would carry out the goals the state embraced concerning development projects." (*Ibid.*) Those results reflect the kind of serious intrusion into state sovereign authority that should not unnecessarily be read into a federal statute. (*Id.* at p. 705.)

The Court of Appeal thus erred in declining to require an unmistakably clear statement from Congress before reading the Federal Power Act to preclude the application of CEQA to this state-owned and operated project.

II. THE FEDERAL POWER ACT DOES NOT PREEMPT STATE COURT REVIEW OF AN EIR PREPARED IN CONNECTION WITH STATE CERTIFICATION UNDER SECTION 401 OF THE CLEAN WATER ACT

The Federal Power Act also does not preempt CEQA or state court review of the Department's EIR in the context of the Water Board's section 401 water quality certification. As an initial matter, the Water Board's compliance with CEQA here, and its reliance on the Department's EIR as a responsible agency, reflect an additional act of state self-governance related to the same state-owned and state-operated project. But beyond that, Congress specifically authorized States to exercise *regulatory* authority under section 401 of the Clean Water Act with respect

to any hydropower project—public or private. Nothing in the Federal Power Act or elsewhere suggests that Congress intended to preclude States, in carrying out that regulatory authority, from engaging in complementary state environmental review processes like those mandated by CEQA, subject to judicial review in state court pursuant to state law.

A. The Water Board's Compliance with CEQA Here Is a Further Non-Preempted Act of State Self-Governance

For many of the same reasons that the Federal Power Act does not preempt the State's decision to require the Department to comply with CEQA in connection with its decision to pursue relicensing of the Oroville Facilities, it does not preempt the State's decision to require the Water Board to participate in the Department-led process leading to the 2008 EIR, and to consider the information gained during that process in issuing a section 401 certification for that relicensing project.[11] CEQA

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[11] To be clear, the Counties are not pursuing CEQA claims against the Water Board. As noted above (*ante*, pp. 32-33), the Counties' CEQA challenge named only the Department as respondent and did not address those parts of the 2008 EIR that informed the Water Board's 401 certification decision. The Counties never sought any relief as against the Water Board (see, e.g., AA 1:1:24, 1:3:41), and the Water Board is no longer a party to this case. Although the Counties initially named the Water Board as a real party in interest, they agreed to dismiss the Water Board from the case in December 2009. (AA 2:29:285-287.) Accordingly, any CEQA claims specific to that part of the 2008 EIR addressing water quality certification, or the Water Board's duties as a responsible agency, have been waived and are barred

(continued…)

applies as a matter of self-governance to state agencies not only when they own or operate projects themselves, but also when they act in a permitting or certification capacity for a state-owned and operated project. (See Cal. Code Regs., tit. 14, § 15378.) As the regulations make clear, "[t]he term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (*Id.*, subd. (c).)

When the Water Board issues a section 401 certification for a single, unitary project owned and operated by the State, CEQA requires the Board as a responsible agency to follow certain procedures and take into consideration environmental effects—just as a private corporation operating a hydroelectric project might require one division of the company (say, risk management) to review and sign off on project plans before another division (say, operations) begins construction. (Cf. *Eel River*, *supra*, 3 Cal.5th at pp. 737-738 [analogizing state self-governance to the internal decision-making structure of a "private corporate conglomerate"]; *In re Yuba County Water Agency*, Corrected State Water Board Order 2008-0014 (May 20, 2008) 2008 WL 2370162, at *22 [explaining why the "market participant" exception from federal preemption applies to the Water Board's actions in this setting].) In the circumstances of

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by CEQA's statute of limitations. (See Pub. Resources Code, § 21167.)

this case, both the Department's and the Board's compliance with CEQA are non-regulatory and are matters of state self-governance, and thus do not fall within the Federal Power Act's preemptive scope.

B. Section 401 Authorizes States to Impose Water Quality-Related Regulatory Conditions on Hydroelectric Dams and Preserves State Authority to Engage in Complementary Environmental Review

There is a separate, independent reason that CEQA compliance in the context of section 401 certification is not preempted by the Federal Power Act. Section 401 of the Clean Water Act expressly authorizes States to regulate federally licensed projects, including FERC-regulated hydropower projects, through the water-quality certification process. Congress did not intend to foreclose States, in carrying out that authority, from implementing the sort of common, long-established complementary environmental review procedures like those mandated by CEQA. Congress likewise did not intend to preclude state courts from entertaining challenges under state laws such as CEQA to section 401 certifications issued by state agencies.

1. Federal Law Does Not Preclude States from Establishing Their Own Environmental Review Requirements as Part of the Section 401 Certification Process

Although the Federal Power Act generally preempts state regulation of federally licensed hydroelectric dams, Clean Water Act section 401 establishes an important exception.[12] Section 401 requires an applicant for a FERC license to obtain "state certification that [state] water protection laws will not be violated" by the operation of the dam. (*S.D. Warren Co.*, *supra*, 547 U.S. at p. 373; see 33 U.S.C. § 1341(a)(1).) And in issuing a certification, the State may impose conditions on the operations of the dam—conditions that FERC is obligated to incorporate into the federal license. (*PUD No. 1*, *supra*, 511 U.S. at pp. 707-708; see 33 U.S.C. § 1341(d).) The U.S. Supreme Court, moreover, has declined to construe FERC's comprehensive authority over hydropower licensing to impliedly limit the scope of state authority to issue section 401 certifications. (*Id.* at p. 723.)

Where state regulation of a hydroelectric facility is permissible under an exception to Federal Power Act preemption (such as the exception for section 401 certification), the Act does not preempt California's requirement that public entities comply with CEQA in carrying out their regulatory duties. (See *County of Amador v. El Dorado County Water Agency* (1999) 76

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[12] As discussed above, there are several other exceptions to Federal Power Act preemption that likewise allow state regulation, including the exception preserving state authority over water rights. (*Ante*, pp. 18, 46-47; 16 U.S.C. § 821.)

Cal.App.4th 931, 961-962 [holding that CEQA applied to state regulation permissible under the exception for state regulation of the diversion or use of water for irrigation, municipal or other non-hydropower use, 16 U.S.C. § 821].) Both the text and purpose of section 401 confirm that States may establish certain environmental review procedures, like those CEQA mandates, to be followed by state agencies in carrying out their certification authority. And nothing in the Federal Power Act suggests those procedures cannot be applied in the context of a section 401 certification issued for a FERC-licensed hydroelectric project.

Under section 401, an applicant for a federal hydropower license must obtain certification that operation of the facility will comply not only with federal Clean Water Act requirements, but also "with any other appropriate requirement of State law." (33 U.S.C. § 1341(d).) CEQA and similar state laws requiring an environmental analysis of a project's impacts readily fit that description. The Supreme Court has interpreted the statutory phrase "any other appropriate requirement of State law" broadly to allow States to impose conditions that protect the aquatic environment—such as minimum instream-flow requirements—even where those conditions do not relate to discharges of pollutants. (*PUD No. 1*, *supra*, 511 U.S. at pp. 713-714.) Thus, States routinely employ environmental review procedures in carrying out their section 401 certification authority. (See, e.g., *State, Dept. of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County* (1993) 121 Wash.2d 179, 184, 192 [state agency conducted environmental study in connection with section 401 certification],

aff'd, 511 U.S. 700; *Chostner v. Colo. Water Quality Control Com.* (Colo.App. 2013) 327 P.3d 290, 295 [state agency conducted review of project's environmental effects, including "antidegradation reviews of certain . . . stream segments"].)[13] Because state environmental review assists the state agency in carrying out its Clean Water Act responsibilities, these state courts have noted the presence and contribution of such review without discussion of potential preemption.[14]

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[13] See also, e.g., *Nat. Wildlife Fed. v. Korleski* (Ohio App. 2013) 995 N.E.2d 1261, 1271 [state agency "reviewed extensive environmental studies" of water quality conditions and impacts of project before issuing section 401 certification]; *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. Va. State Water Control Bd.* (2008) 52 Va.App. 807, 814 [state agency required various "studies and plans" for section 401 certification including "a habitat evaluation procedure study; a detailed final wetland mitigation plan for the required mitigation; an ecomonitoring plan to include fish spawning and nursery grounds and vegetative composition and distribution; and a salinity monitoring plan"].

[14] Although some New York cases have held that the Federal Power Act preempts state environmental review in certain circumstances not present here, those case are outliers and are in considerable tension with U.S. Supreme Court precedent. At one time, New York's high court adopted the view that section 401 of the Clean Water Act should be interpreted narrowly based on FERC's comprehensive licensing authority. (*Niagara Mohawk Power Corp. v. N.Y. State Dept. of Envtl. Conservation* (1993) 82 N.Y.2d 191, 194.) Based on this reasoning, New York's lower courts held the state's State Environmental Quality Review Act (SEQRA) was preempted, at least where such review entailed "consideration of environmental interests beyond the limited bounds of water quality standards." (*Erie Blvd. Hydropower, L.P. v. Stuyvesant Falls Hydro Corp.* (N.Y. App. Div. 2006) 30 A.D.3d 641, 644-645.) The United

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Other textual clues in section 401 point in the same direction. Section 401 requires each State to establish "procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." (33 U.S.C. § 1341(a)(1).) This provision sets no express requirements or limitations on what information States may require or what procedures they may follow in considering section 401 certifications. And although this language does not, by its terms, specifically direct the sort of environmental review mandated by CEQA, it underscores that Congress envisioned that States would design procedural mechanisms to facilitate the section 401 certification process. CEQA is one such mechanism: It "serves an informational purpose, … explain[ing] the effects of the project, reasonable alternatives, and possible mitigation measures[.]" (*County of Amador*, *supra*, 76 Cal.App.4th at p. 961.)

Apart from the statutory text, application of CEQA in the context of state water quality certification comports with the

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States Supreme Court later rejected the sort of narrow interpretation of section 401 that New York courts has adopted. (*PUD No. 1*, *supra*, 511 U.S. at p. 723.) New York courts do not appear to have reconciled their holdings regarding preemption of state environmental review with the Supreme Court's broad interpretation of section 401 in *PUD No. 1*. (See *Erie Blvd.*, *supra*, 30 A.D.3d at pp. 644-645; *Eastern Niagara Project Power Alliance v. State Dept. of Envtl. Conservation* (N.Y. App. Div. 2007) 42 A.D.3d 857, 861-862.)

fundamental purpose of section 401. Congress enacted section 401 because it recognized that "[s]tate certifications . . . are essential in the scheme to preserve state authority to address the broad range of pollution"—authority that long predates the federal licensing and regulation of hydroelectric dams. (*S.D. Warren Co.*, *supra*, 547 U.S. at p. 386.) As a result of the state certification requirement, "'[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards.'" (*Ibid.*, quoting 116 Cong. Rec. 8984 (1970) [Sen. Muskie].) Because States are the "prime bulwark in the effort to abate water pollution," Congress reserved to them the power to regulate, or even "to block, for environmental reasons, local water projects that might otherwise win federal approval." (*Alcoa Power Generating Inc. v. FERC* (D.C. Cir. 2001) 643 F.3d 963, 971.)

In granting that authority to States, there is no reason to suppose Congress would have simultaneously wanted to *deny* them the power to require environmental review as part of section 401 certification. On the contrary, procedures such as those mandated by CEQA facilitate sound and well-reasoned agency decision-making, furthering the overall objectives of state certification under section 401.

Nor does the application of CEQA in connection with section 401 certification conflict with the Federal Power Act. FERC must incorporate the terms of the state section 401 certification into the federal license it issues. (See 33 U.S.C. § 1341(d); *PUD No. 1*, *supra*, 511 U.S. at pp. 707-708.) From FERC's perspective, it is

immaterial whether, or to what extent, the terms of the section 401 certification are informed by or result from the CEQA process, as opposed to state water quality laws or other state statutes or regulations. CEQA "does not interfere in any way with FERC licensing procedures." (*County of Amador*, *supra*, 76 Cal.App.4th at p. 961.) It "does not impose conditions or mandate how a project should be run," "does not implicate the licensing or operating of hydroelectric power resources," and does not "vest states with veto power over a federal project"—at least, no more than section 401 already does by its own terms. (*Ibid*.) Moreover, in circumstances where CEQA imposes substantive requirements under state law—such as requiring project proponents to mitigate or avoid significant environmental effects (see Pub. Resources Code, § 21002.1, subd. (b))—those substantive requirements are no different, as far as FERC is concerned, from any other section 401 conditions imposed to satisfy state law. Like such conditions, they are permissible as long as they are "necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of state law.'" (*PUD No. 1*, *supra*, 511 U.S. at pp. 713-714, quoting 33 U.S.C. § 1341(d).)

2. State Court Review of an Environmental Impact Report Is Not Preempted

Just as the Federal Power Act does not preempt the application of CEQA in the context of section 401 certification, neither does it preempt state court review of CEQA claims arising in that context. As the Supreme Court recently

emphasized, it is an "extraordinary step" for Congress to "strip[] state courts of jurisdiction to hear their own *state* claims"—a step Congress does not "take . . . by implication." (*Atlantic Richfield Co. v. Christian* (2020) 590 U.S. ___, 140 S.Ct. 1335, 1351, original italics.) A federal law precluding state court review of a state agency's compliance with state environmental review requirements would undermine institutional arrangements the State has established for oversight and accountability and interfere with the State's ability to set its own rules for self-governance. (*Ante*, pp. 42-45.) There is no reason to believe Congress intended that result here.

State courts routinely entertain challenges under state law to section 401 certifications by state agencies. (See *ante*, pp. 59-60 & fn. 13; see also, e.g., *In re Clyde River Hydroelectric Proj.* (2006) 179 Vt. 606, 606; *Port of Seattle v. Pollution Control Hearings Bd.* (2004) 151 Wash.2d 568, 579.)[15] The U.S. Supreme Court has decided cases arising from state supreme court

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[15] To be clear, the Counties have not challenged the Water Board's section 401 certification under Water Code section 13330. As discussed above (*ante*, pp.32-33, fn. 11), they agreed to dismiss the Water Board as a real party in interest, and since then they have repeatedly maintained that the Water Board's section 401 certification is not at issue in this lawsuit—going so far as to oppose judicial notice of the certification in the Court of Appeal. (Opp. to Request for Judicial Notice [July 30, 2013], pp. 2-3 [arguing that the certification "may not properly be relied upon in addressing the merits of this action"].) A challenge to the section 401 certification would at this point be untimely. (See 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"].)

decisions involving state court review of section 401 certifications. (*PUD No. 1*, *supra*, 511 U.S. at p. 710; *S.D. Warren*, *supra*, 547 U.S. at p. 375.) No court has suggested that the Federal Power Act precludes state courts from considering such challenges. On the contrary, because FERC has no discretion to reject section 401 certification conditions (see 33 U.S.C. § 1341(d)), state court is the *only* place where parties can raise state law challenges to a section 401 certification. (See *City of Tacoma v. FERC* (D.C. Cir. 2006) 460 F.3d 53, 67; *American Rivers, Inc. v. FERC* (2d Cir. 1997) 129 F.3d 99, 110-112; *Roosevelt Campobello Internat. Park Com. v. U.S. E.P.A.* (1st Cir. 1982) 684 F.2d 1041, 1056.)[16] The availability of state court review of section 401 conditions is an essential part of the statutory scheme Congress designed, since it is the principal mechanism by which applicants may obtain assurance that such conditions are within "a state's authority under § 401." (*American Rivers*, *supra*, 129 F.3d at p. 112.) And permitting state court review is consistent with the respect for state authority embodied in the Clean Water Act. (See 33 U.S.C. §§ 1251(b), 1370.)[17]

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[16] FERC may review whether, as a matter of federal law, the state certification agency has "compli[ed] with the terms of section 401," such as its public-notice requirement. (*City of Tacoma*, *supra*, 460 F.3d at p. 68.) But FERC may not review the conditions of the certification themselves, or other state law issues. (See *ibid.*)

[17] Congress has expressly provided in the Clean Water Act that a federal permitting or licensing agency's responsibilities

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Because Congress has not foreclosed state courts from entertaining state law challenges to section 401 certification, it likewise has not foreclosed state court challenges to an environmental document prepared to comply with state requirements in connection with section 401 certification. From the standpoint of federal preemption, there is no meaningful difference between a state court challenge to section 401 conditions under state water quality laws and a CEQA challenge to an EIR prepared in connection with section 401 certification. In either case, a plaintiff alleges that the state agency has failed to follow relevant provisions of state law in issuing a section 401 certification. Neither the Clean Water Act nor the Federal Power Act authorize federal permitting and licensing agencies to review a State's compliance with its own environmental review procedures. And nothing in section 401 or in the Federal Power Act suggests that Congress sought to preclude state court review of such claims. Indeed, it would be quite anomalous to conclude that the application of CEQA itself is not preempted in the section 401 context (see *ante*, pp. 58-62) but that state court review of an EIR prepared to comply with CEQA *is* preempted.[18]

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under the National Environmental Policy Act do not provide a basis for the federal agency to review the adequacy of the state's water quality certification. (33 U.S.C. § 1371(c)(2).)

[18] To the extent the Court of Appeal's opinion suggests that the proper time for a CEQA challenge to an EIR prepared in connection with a section 401 certification is after the "program required by the Certificate . . . is implemented" by the applicant (Opn. 7, fn. 9), that is mistaken. (See also *id.* at p. 20 ["[N]o
(continued…)

The Clean Water Act's time limit for state certification does not alter that conclusion. Section 401 specifies that a state certifying agency must "act on a request for certification[] within a reasonable period of time (which shall not exceed one year)." (33 U.S.C. § 1341(a)(1).) States may take action to ensure state environmental review is completed in this time period. Alternatively, parties may pursue other options for satisfying the one-year requirement of section 401. To date, for example, States have denied certification requests without prejudice while the review remains pending.[19] And the one-year requirement applies only to the issuance of certification by the state agency responsible for certification not any additional period for administrative appeals or judicial review. (See *FPL Energy Me. Hydro LLC v. Dept. of Envtl. Protection* (Me. 2007) 926 A.2d 1197,

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action under CEQA to review the changes can be filed in state court until *after* the license is issued and the changes implemented."].) CEQA challenges must generally be filed within 30 days of the filing of a notice of determination, which occurs when a project is *approved*, not when it is implemented. (See Pub. Resources Code, § 21167, subd. (c); § 21108, subd. (a).)

[19] U.S. EPA recently posted for "pre-publication" amended regulations governing section 401 certifications; the regulations will be effective 60 days after publication in the Federal Register. (See Pre-publication Notice, Clean Water Act 401 Certification Rule (June 1, 2020) <https://www.epa.gov/sites/production/files/2020-06/documents/pre-publication_version_of_the_clean_water_act_section_401_certification_rule.pdf> [as of June 8, 2020].) Nothing in the amendments purports to preempt state court review of the certifying agency's compliance with state law, including environmental review requirements, in issuing certification.

1201-1203.) Accordingly, the one-year time limit does not reflect a congressional desire to preclude state court challenges to EIR-type documents, nor does such judicial review interfere with the congressional scheme.

While the Court of Appeal did not directly address the question of whether the Federal Power Act preempts state court review of an EIR prepared in connection with section 401 certification (see *ante*, pp. 35-37), certain statements in the court's opinion might be read to imply that FERC's own consideration of environmental issues renders state court review of an EIR superfluous. (E.g., Opn. 18 [suggesting that the "new license terms and conditions" outlined in the EIR are "reviewable before FERC as general conditions for the operation of the dam"].) That is incorrect. FERC is tasked with evaluating the environmental impacts of hydroelectric facilities as part of its licensing procedure (e.g., 16 U.S.C. § 803(a)(1)), but that review is in addition to, not in place of, state certification under section 401. (See *S.D. Warren Co.*, *supra*, 547 U.S. at pp. 385-386; *PUD No. 1*, *supra*, 511 U.S. at pp. 721-722.) FERC's own environmental review, governed by federal law, neither conflicts with nor displaces the processes mandated by CEQA when the Water Board issues a section 401 certification.

CONCLUSION

The Court should reverse the judgment of the Court of Appeal and remand for the court to consider the merits of the Counties' CEQA challenge to the Department's EIR.

Dated: June 9, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS OF THE DEPARTMENT OF WATER RESOURCES uses a 13-point Century Schoolbook font and contains 13,970 words.

Dated: June 9, 2020

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Attorney General of California

/s/ *Joshua Patashnik*

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DECLARATION OF ELECTRONIC SERVICE

Case Name: **County of Butte, et al. v. Department of Water Resources**
No.: **S258574**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. Participants who are registered with TrueFiling will be served electronically.

On June 9, 2020, I electronically served the attached **ANSWER BRIEF ON THE MERITS OF THE DEPARTMENT OF WATER RESOURCES** by transmitting a true copy via this Court's TrueFiling system to the participants listed below:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 9, 2020, at Sacramento, California.

A. Cerussi	*/s/ A. Cerussi*
Declarant	Signature

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **County of Butte, et al. v. Department of Water Resources**
No.: **S258574**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 9, 2020, I served the attached **ANSWER BRIEF ON THE MERITS OF THE DEPARTMENT OF WATER RESOURCES** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, 20th Floor, Oakland, CA 94612, addressed as follows:

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State of California
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914 Capitol Mall, Fourth Floor
Sacramento, CA 95814

Case No. C071785

Hon. Daniel P. Maguire, Judge
Yolo County Superior Court
1000 Main Street
Woodland, CA 95695

Case No. CVCV091258

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 9, 2020, at Oakland, California.

Debra Baldwin
Declarant

Debra Baldwin
Signature

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.

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

6/9/2020

Date

/s/Joshua Patashnik

Signature

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State of California Department of Justice

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