C071785

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

COUNTY OF BUTTE,
Plaintiff and Appellant,
v.
DEPARTMENT OF WATER RESOURCES,
Defendant and Respondent;
STATE WATER CONTRACTORS, INC., et al.,
Real Parties in Interest and Respondents.

COUNTY OF PLUMAS, et al.,
Plaintiffs and Appellants,
v.
DEPARTMENT OF WATER RESOURCES,
Defendant and Respondent;
STATE WATER CONTRACTORS, INC., et al.
Real Parties in Interest and Respondents.

Appeal from Judgment Entered on June 8, 2012
Yolo County Superior Court, Case No. CV09-1258
[Butte County Consolidated Cases, No. 144283, 144282]
Trial Judge: The Honorable Daniel P. Maguire (Dept. 15)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF FRIENDS OF THE RIVER AND THE CALIFORIA SPORTFISHING PROTECTION ALLIANCE SUPPORTING PLAINTIFFS AND APPELLANTS

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APPLICATION TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f),[1] Friends of the River and The California Sportfishing Protection Alliance request leave to file the accompanying brief in support of Plaintiffs, the Counties of Butte and Plumas. Amici are familiar with the arguments and believe the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICI CURIAE

Friends of the River (Friends) was founded in 1973 and is incorporated under the non-profit laws of the State of California, with its principal place of business in Sacramento, California. Friends has more than 3,000 members dedicated to the protection, preservation, and restoration of California's rivers, streams, watersheds, and aquatic ecosystems. Friends' members and staff include individuals who visit streams, rivers and riparian areas throughout California, who have recreational, aesthetic, health, and spiritual interests in the scenery, habitats

[1] Pursuant to California Rule of Court 8.520, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to rule 8.200(c)(3)(i) for Amici, Friends of the River Senior Counsel E. Robert Wright, law clerk Brittany Iles, Policy Director Ronald Stork, and California Sportfishing Protection Alliance FERC Projects Director, Chris Shutes authored this brief.

and species protected by vigorous application and enforcement of the California Environmental Quality Act (CEQA), Public Resources Code § 21,000 et seq. Friends of the River was an intervenor in the FERC relicensing of the Oroville Facilities.

California Sportfishing Protection Alliance (CSPA) is a nonprofit, public benefit fishery conservation organization incorporated under the non-profit laws of the State of California in 1983 to protect, restore, and enhance the state's fishery resources and their aquatic ecosystems. CSPA works to ensure that public fishery resources are conserved to enable public sport fishing activity. As an alliance, CSPA represents more than five hundred members that reside in California and use California waterways. CSPA is actively involved in the conservation of the San Francisco Bay - Delta estuary, Central Valley, and Sierra fishery resources, which are protected through vigorous enforcement of the California Environmental Quality Act. CSPA carries out a substantial portion of its advocacy through hydropower relicensing proceedings before the Federal Energy Regulatory Commission (FERC) and associated water-quality certification proceedings before the State Water Resources Control Board (SWRCB or State Water Board). CSPA was an intervenor in the FERC relicensing of the Oroville Facilities.

An appellate opinion holding that CEQA is preempted or that the Department of Water Resources' (DWR) Environmental Impact Report

(EIR) is not subject to judicial review would be harmful to the interests of the amici in preserving water quality, endangered species, habitats, as well as full participation in proceedings affecting them. The experiences of the amici will provide the Court with a valuable perspective with regard to the issue of whether a CEQA claim can be brought against DWR's EIR in state court.

INTRODUCTION

This case concerns DWR's Final EIR for the Oroville Facilities Relicensing – FERC Project No. 2100 (EIR). DWR certified this FEIR in July, 2008. The plaintiffs, Counties of Butte and Plumas, brought a CEQA challenge to the EIR. The EIR functioned as the decision-making document for the SWRCB's Water Quality Certification (certification) associated with the proposed relicensing of the Oroville Facilities. Pursuant to § 401 of the federal Clean Water Act, such certification is required before FERC can issue a new project license.

On April 11, 2016, the Court of Appeal, Third Appellate District, ordered briefing by the parties on "what may be a threshold jurisdictional issue, whether the relicensing process, which is governed by the FPA [Federal Power Act] and implementing regulations (e.g. 18 C.F.R. §§ 4.34, 385.602), is subject to CEQA challenge in state court." (April 11, 2016 Order at p. 1). At p. 2 of the Order, the Court clarifies its concern in this way: "The conditions set forth in the certificate are binding and must be set

forth as license conditions. However, the certificate does not appear to be reviewable in state courts as part of the license conditions … .”

DWR now claims that the relicensing process at issue is governed by Federal Energy Regulatory Commission (FERC) regulations under the FPA and therefore state court review is preempted. Furthermore, DWR now argues that this issue is not reviewable in state court because the State Board § 401 certification itself is not being challenged. However, the Court should find that there is no federal preemption of state law in this case. The FPA does not preempt DWR’s discretionary decisions in connection with its FERC license application. There has been no federal action or decision on the part of FERC that would indicate conflict between the state action being challenged and any federal action. Further, it has not been established that the FPA has exclusive jurisdiction over the issue in question.

Indeed, the “cooperative federalism” that is embodied in the federal Clean Water Act (CWA) provides specific roles for state agencies within the specific context of a FERC-licensing process to certify compliance of a FERC-licensed project with state laws relating to water quality. Though the window for such certification opens only during licensing or licensing-amendment proceedings, the authority of the state, once the window is opened, is broad. The operation of such certification by a state agency is separate from the FERC-licensing process *per se*, and necessarily operates according to state law. CEQA is a foundational element of that operation.

It is DWR's EIR and not "the relicensing process" that is appropriately under challenge before the state court in this case. It does not follow that because the water quality certification must eventually be incorporated into the FERC license, the requirements that attach to certification under state law are limited substantively or truncated procedurally. Moreover, absent the ability of state courts to review both procedural and substantive compliance with state law, the authority delegated to the states such as by the CWA would be unenforceable.

The Court should determine that federal law does not preempt CEQA review and challenge in this case and should proceed to rule on the merits. DWR had discretion as to *what* to apply for in terms of alternatives. That being the case, DWR had to comply with CEQA. DWR prepared an EIR claiming it did comply with CEQA. It would make no sense to have a CEQA process untethered to the availability of judicial review in state court to review whether the EIR prepared satisfies the requirements of CEQA.

ARGUMENT

I. DWR'S EIR IS SUBJECT TO CEQA CHALLENGE IN STATE COURT

A. Federal law does not preempt state law in this case.

Whether federal law preempts state law fundamentally is a question of congressional intent. (*People v. Rinehart* (2016) 1 Cal.5th 652, 661 (*Rinehart*); *County of Amador v. El Dorado County Water Agency* (1999)

76 Cal.App.4th 931, 957 (*County of Amador*); *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 312, 318.)

In its April 11th, 2016 order, this Court notes that, in this case, it appears that state law may be preempted because the FPA has occupied the field of license reissuance. But the FPA preemption cases cited in this Court's supplemental briefing order all involve regulation under sole authority of state law (as opposed to regulatory activity in connection with the exercise of state authority under a federal statute) of hydropower projects operated by private parties licensed under the FPA. (See *First Iowa Hydro-Electric Cooperative v. Federal Power Com.* (1946) 328 U.S. 152; *California v. FERC* (1990) 495 U.S. 490; *Sayles Hydro Ass'n v. Maughan* (9th Cir. 1993) 985 F.2d 451; *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd.* (2010) 183 Cal.App.4th 330.) None of these cases addresses the authority of a state or local agency to decide whether to apply for a FERC license or license amendment and how to propose that the project will be operated. The issue of FPA preemption in the context of a state or local agency as project applicant has been addressed by this Court, however. In *County of Amador*, this Court, noting the informational purposes of CEQA, rejected the argument that the FPA preempts a CEQA challenge to an EIR prepared in connection with a local agency's decision to take over a FERC-licensed hydropower project. (*County of Amador,* 76 Cal.App.4th at p. 961.)

Preemption exists only where Congress has intended to exclusively occupy a particular field. (*County of Amador*, 76 Cal.App.4th at 957.) *County of Amador* states that, although there is a broad delegation of power to FERC, this "hardly determines the extent to which Congress intended to have the Federal Government exercise exclusive powers, or intended to preempt concurrent state regulation of matters affecting federally licensed hydroelectric projects." (*Id*.) Extending the occupation-of-the-field preemption that applies to state law regulation of private entities to decisions by a state agency or local agency as project applicant would make no sense. Federal preemption does not bar a public agency from applying for a FERC license, and the public agency as project applicant needs to decide what project to propose. This action necessarily is discretionary. Because a state or local agency as project applicant has discretion and must consider environmental impacts in the exercise of that discretion, there is no reason to assume that a state law process designed to assure adequate consideration of environmental impacts are part of public agency decision making, is preempted.

Additionally, because FERC has yet to take any actions,[2] there can be no question of actual conflict between state actions and federal licensing decisions. In *County of Amador*, this Court determined that state law was

[2] A FERC license has yet to be issued for Project #2100 as a biological opinion pursuant to the federal Endangered Species Act is still being awaited by FERC.

not preempted, in part because the state law in question "[did] not interfere in any way with FERC licensing procedures." (*County of Amador,* 76 Cal.App.4th at 961.) The petitioners in this case are challenging the adequacy of the EIR used by DWR and the State Board in their efforts to comply with CEQA. Though the Court is correct in stating that the FPA has exclusive jurisdiction with regards to federal relicensing, no federal action is being challenged in this case. Rather, the petitioners are challenging the adequacy of the final EIR as certified by DWR. There is no question about veto power over FERC actions as there has yet to be FERC approval or action with regards to the license.

Furthermore, in the most recent California Supreme Court decision on preemption, the Court ruled against preemption noting, and following, the U.S. Supreme Court's trend to disfavor preemption where the state has an established regulatory role. (*Rinehart*, 1 Cal.5th at 661.) *Rinehart* reinforces the importance of the responsibility of the State of California in the protection of waters and wildlife within the state; the same responsibility that exists in this case. (*Id*.)

B. Section 401 of the Clean Water Act gives power to the states to determine whether a project should be certified.

Even if DWR's approval as project applicant and project operator did not distinguish this case from those finding FPA preemption, the need for CEQA as part of the State Board's approval does. In its April 11, 2016

Order, the court correctly notes that this case is subject to § 401 of the Clean Water act, which applies to certification procedures where there is an application for a federal license for an activity that may result in a discharge to waters of the United States.

In its April 11th, 2016 order, the court also asks if state law is preempted because the FPA occupies the field of "the relicensing process." This latter construct misconstrues the relation of the process for water-quality certification pursuant to CWA § 401 and the FERC-licensing process. While the FERC-licensing process triggers a certification or waived certification requirement when the licensing reaches a defined point in that FERC process, the water-quality certification process takes place *in a separate proceeding*, in which FERC plays no role. This separation exists regardless of the particular process by which the FERC licensing is carried out; specifically, the Alternative Licensing Process in no way incorporates within it the state's certification proceeding. Indeed, while State Water Board staff participated in the Oroville licensing processes in an advisory role, the State Water Board did not sign the Oroville Settlement. State Water Board chair Arthur Baggett, who also participated in the Oroville licensing process, signed the Settlement as an individual, and was recused from the Oroville water quality certification proceeding in order to preserve the separation of the processes.

Specifically, section 401(d) states:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and *with any other appropriate requirement of State law* set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section. (33 U.S.C. § 1341(d) (emphasis added).)

This language requires applicants to provide FERC with a certification that the project in question has complied with applicable state law, providing the States with power to enforce those applicable state laws. (*S.D. Warren Co. v. Maine Bd. of Environmental Protection* (2006) 547 U.S. 370, 386.)

The state agency to whom the Clean Water Act delegates the authority to issue a § 401 certification makes findings and determinations, and ultimately issues, waives, or denies a certification, limiting FERC's role to deferring to the final decision of the state. (*City of Tacoma, Washington v. FERC* (D.C. Cir. 2006) 460 F.3d 53.)

In California, this federal authority to certify in the context of FERC-licensing and amendment proceedings is delegated to the State Water Board. As a state agency, the State Water Board is subject to requirements of state law, and its certification proceeding is an operation of state law. This operation does not change because of the federal delegation.

Pursuant to CEQA, the State Water Board must base its decision on a determination that the certification it issues will not have significant

impacts on the environment if reasonable alternatives or mitigations could eliminate those impacts; otherwise, it must make a notice of overriding consideration that the proposed project is in the public interest despite such significant impacts.

When DWR prepared its EIR, DWR never disputed that its proposed project was subject to CEQA. On the contrary, in order to comply with CEQA, DWR acted as lead agency and produced and certified the EIR. The State Water Board, acting as a responsible agency, in turn relied on that EIR in issuing the certification. In the EIR, DWR as lead agency made the Oroville Settlement Agreement the Proposed Project under CEQA. DWR, at pp. 7-8 of its August 19, 2016 Responsive Supplemental Brief per Court's April 12, 2016 Order, seeks to confound this specific CEQA function with the FERC-licensing context in which the Settlement was initially developed. ("Thus, in this case, petitioners' CEQA claims are directed at an EIR that is an integral part of the Alternative License Process, and for which FERC regulations provide an administrative remedy."). The logic fails. There is no question that one function of the EIR was to serve as the environmental review for certification. (DWR August 19, 2016 Brief, p. 8; DEIR, p. ES-3, incorporated by reference into FEIR at p. 1-2). Any additional function that may attach to the Alternative Licensing Process does not subject the CEQA function *for certification* to any FERC administrative remedy.

In delegating federal authority to the states, the Clean Water Act does not make the jurisdictional state agencies into federal agencies, even temporarily, or limit them to federal procedure. Any claim to the contrary misconstrues the cooperative federalism that the Clean Water Act embodies.

NEPA does not apply to state agencies: "NEPA imposes only procedural requirements *on federal agencies* with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." (*S.D. Warren*, 547 U.S. at 13 fn 8 [quoting *Department of Transportation* v. *Public Citizen* (2004) 541 U. S. 752, 756-57] (Emphasis added).) Since NEPA does not apply to state agencies, acceptance of the inapplicability of CEQA to § 401 certifications would mean that no environmental review would attach to certification at all.

Challenges to a § 401 certification are reviewable in state court because challenges to certification decisions implicate questions of state law. (*Alcoa Power Generating Inc. v. FERC* (D.C. Cir. 2001) 643 F.3d 963, 971; *Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA* (1st Cir. 1982) 684 F.2d 1041, 1056 ("Courts have consistently agreed with the interpretation that the proper forum to review the appropriateness of a state's certification is the state court.").) CEQA, therefore, is prescribed under federal law, not preempted by it.

C. There is legal recourse available should the EIR be overturned.

After eight years of litigation, "DWR now concludes that the Court cannot order an effective remedy under CEQA because the FPA governs the Settlement Agreement and its role in this licensing process." (DWR August 19, 2016 Brief, p. 8). State Water Contractors, in their August 12, 2016 Supplemental Brief of Real Parties in Interest State Water Contractors et al., Per Court's Order of April 11, 2016, go to the extreme of suggesting at p. 25: "Plaintiffs expressly seek to enjoin the entire FERC relicensing process by raising challenges to the environmental review process that Congress has expressly delegated to FERC."

Should the court hold that the EIR is deficient under CEQA, there are straightforward procedural remedies available to the court completely within the confines of state law and consistent with Federal law. The court can order DWR to revise or reissue the EIR and circulate a revised or replacement draft EIR. Following normal CEQA procedure for comment, response, and modification, DWR must certify the revised or new EIR. At this point, the State Water Board must reopen its certification proceeding and determine whether changes in the EIR require changes in the certification. If the answer is affirmative, then pursuant to ¶G12 of the certification, "The State Water Board shall provide notice and an opportunity for hearing in exercising its authority to add or modify any of

the conditions of this certification." If the Board acts to modify the certification before the FERC license has issued, the new certification must be incorporated into the license. (*American Rivers, Inc. v. F.E.R.C.* (2d Cir. 1997) 129 F.3d 99, 107-111.) If the Board acts after the FERC license has issued, FERC must conduct its own license amendment proceeding, but must nonetheless incorporate the State Water Board's modifications to the certification into the license. (*Id*.)

The argument by DWR and SWC that a state court has no available remedy ignores the fact that by its own terms, the State Water Board can amend a certification even after license issuance. This is explicitly contemplated in the certification. At ¶G8, the certification reads: "This certification is subject to modification upon administrative or judicial review … ." At ¶s G9 through G11, the certification describes additional circumstances that may require amendment, and at ¶G12, as quoted *supra*, the certification describes procedural measures that attach to any such amendment.

DWR did not file legal challenge to these provisions, and such challenge is now time-barred.

In short, the substantive remedy is a new, legally valid EIR, and substantively that is as far as plaintiffs ask this court to go. The *application* of the remedy is not a matter for FERC, nor is it in the purview of the court

as such. Rather, it is a matter for the responsible agency, the State Water Board to apply as it is authorized by § 401.

D. State Water Contractors arguments based on Niagara Mohawk fail.

Relying on New York cases, especially *Niagara Mohawk Power Corp. v. New York State Dept. of Environmental Conservation* (1993) 82 N.Y.2d 191, cert. denied (1994) 511 U.S. 1141 (*Niagara Mohawk*), SWCs suggest that CEQA is preempted, even as applied to water quality certification. SWC's Supplemental Brief at pp. 12–15. These New York cases, which are not followed in other states, adopt the view that state authority under § 401 of the Clean Water Act must be construed narrowly to avoid potential conflicts with the comprehensive scheme of federal regulation under the Federal Power Act. (*Niagara Mohawk,* 82 N.Y.2d at 196.) In *Niagara Mohawk*, the New York Court of Appeals rejected the argument that a state's authority to apply "any other appropriate requirement of State law" as part of the certification (33 U.S.C. § 1341(d)) includes authority to apply water quality related procedures such as the state's environmental review process. (*Niagara Mohawk,* 82 N.Y.2d at 199-200.) The New York Court of Appeals expressed its disagreement with the opinion of the Washington Supreme Court in a case then pending before the United States Supreme Court that state authority under § 401 of the Clean Water Act should be interpreted broadly. (*Id.* at 198-99 [discussing *State,*

Dept. of Ecology v. Public Utility Dist. No. 1 of Jefferson County (1993) 121 Wash.2d 179, aff'd sub nom. *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700].) The New York cases should not be followed for several reasons.

First, the New York Cases ignore the requirement in § 401 of the Clean Water Act that the state establish its own procedures for processing requests for water quality certification. (33 U.S.C. § 1341(a)(1).) CEQA is part of the California's state procedure for processing applications, including applications for water quality certification. (See Cal. Code Regs. tit. 23, § 3836, subd. (c); SWRCB Order WQ 92-03 at p.5 http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1992/wq1992_03.pdf ["Before issuing a water quality certification, the State Water Board must evaluate the potential environmental impacts of a proposed project in accordance with the requirements of CEQA. (Public Resources Code Section 21000 et seq.)"]. See also State Water Board webpage that lists CEQA proceedings for § 401 proceedings, primarily proceedings relating to FERC licensing processes: http://www.swrcb.ca.gov/waterrights/water_issues/programs/water_quality_cert/ceqa_projects.shtml.) Second, the New York cases are contrary to the express authorization in § 401 of the Clean Water Act for the state to apply "any other appropriate requirement of State law." (33 U.S.C. § 401(d).)

More fundamentally, the New York cases are inconsistent with the reasoning of the United States Supreme Court, on an issue of interpretation of a federal statute. Affirming the Washington Supreme Court, in the case on which the New York Court of Appeals expressed its disagreement with the Washington court, the Supreme Court rejected arguments that § 401 should be interpreted narrowly to avoid potential conflicts with Federal Power Act licensing. (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 721-23; see also *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 340 fn. 6 [quoting from Regional Water Quality Control Board explanation as to why the state's broad authority under § 401 of the Clean Water Act should not be viewed as inconsistent with earlier cases giving preemptive effect to the Federal Power Act].)

E. Once triggered, the reach of § 401 Certification is broad.

Both DWR and SWC take a separate tack in proposing that the substantive issues raised in Plaintiffs' respective complaints are outside the scope § 401. These arguments must be rejected as back-door attempts to re-write the well-settled law of *Jefferson PUD No. 1*.

Jefferson PUD No. 1 at pp. 711 is clear on the breadth of § 401's application:

> Section 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate requirement of State law." Although the dissent asserts that this interpretation of §401(d) renders §401(a)(1) superfluous, *infra*, at 4, we see no such anomaly. Section 401(a)(1) identifies the category of activities subject to certification - namely those with discharges. And §401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied. (*Jefferson PUD*, 511 U.S. at 711).

However, DWR's August 19, 2016 Brief argues at pp. 11-12

> Finally, none of petitioners' claims here are directed at the 401 certification. Instead, their claims challenge DWR's adoption and implementation of the Settlement Agreement by questioning the project description, project baseline, adequacy of the analysis of the no project alternative, the analysis of the feasible alternatives, analysis and impacts of climate change, recreation, transportation, traffic air quality, governmental services, socioeconomic effects, and project impact mitigation. All of petitioners' claims in this case relate to the matters addressed in the FERC licensing process. They are not directed at the State Board's 401 certificate or its adoption.

The State Water Contractors, for their part, make virtually identical arguments at pp. 20-21 of their August 12, 2016 Supplemental Brief, summarizing at p. 1: "Plaintiffs' claims address issues far broader than the limited scope of authority delegated pursuant to CWA § 401." DWR and SWCs ask the court to pre-judge the breadth of § 401 and to take that judgment out of the hands of the responsible agency, the State Water Board, on the apparent grounds that the project description, project baseline, analysis of feasible alternatives, *could not possibly affect* the

application of water-quality laws in certification. Perhaps most remarkably, they argue that climate change is outside the scope of certification, in spite of the fact that plaintiffs' central concerns revolve around changes to hydrology under changing climate conditions (which would affect water temperature, water quantity, timing of runoff and reservoir inflow, algal blooms, and numerous other matters directly regulated by the Porter-Cologne Act and other state water-quality laws). Filtered through the hydrological analyses that inform them, hydrology directly informs the evaluation of potentially conflicting uses. This is at the very center of what is at stake in certification. In addition, recreation is a recognized beneficial use under the Central Valley Basin Plan (another aspect of applicable state law), and turns extensively on hydrological conditions.

SWCs further take the offensive by turning the meaning of the central admonition of this court in *Karuk v. Regional Board* on its head. At pp. 19-20 of their August 12, 2016 Supplemental Brief, SWCs quote *Karuk* at p. 360:

> [T]he crucial points are (1) that it is Congress that determines what is the extent of state input, and (2) that input takes place within the context of FERC licensing procedures as specified in the FPA. It is only when states attempt to act outside of this *federal* context and this *federal* statutory scheme under authority of independent state law that such collateral assertions of state power are nullified. (*Karuk*, 183 Cal.App.4th at 360).

Remarkably, SWCs conclude from this at p. 20:

> As CEQA was not promulgated under § 303 or any other section of the CWA, and in light of this Court's prior application of § 401's limited exception to federal preemption in *Karuk*, Plaintiffs' reading of *PUD-1* to have triggered full application of state law collaterally related to water quality is not credible.

As stated above in *Karuk*, this Court defined the *threshold* at which the state could exercise authority under state law in enforcing water quality as cases where FERC licensing actions control water operations. That threshold is that state input is limited to occasions when FERC licensing (including license amendment) is taking place, the very circumstances of this case. The "context" in question is whether or not the *Karuk* threshold has been met. It does not mean, and has never meant, that *once the threshold is triggered*, the state must then abandon applicable state legal requirements and procedures in implementing the role delegated to it by the Clean Water Act.

SWCs' overreaching reference to § 303 of the Clean Water Act is in fact a rear-guard attack on another aspect of well-settled law relating to § 401: *S.D. Warren*. The U.S. Supreme Court, in *S.D. Warren*, held that any discharge in the common meaning of the term, *not only* the discharge of a pollutant as described in CWA § 303, triggers and is appropriately regulated in a § 401 certification. As delineated in *S.D. Warren*, following *Jefferson PUD No. 1*, § 401 regulates an activity, not simply a pollutant. (*S.D. Warren,* 547 U.S. at 384, fn 8.) The idea that the CWA must

explicitly mention that which a certification can regulate is explicitly rejected in both cases. The suggestion by SWCs at p. 20 that state procedural law, and explicitly CEQA, would need to be explicitly called out in the Clean Water Act in order to be authorized or required in the states' execution of § 401carries the effort to narrow the reach of § 401 a conclusion that on its face makes no sense. Following this logic, the administrative and legal codes of every state would need to be explicitly mentioned in the CWA, or else they would be precluded. At least twice, the U.S. Supreme Court has explicitly rejected such narrowing of § 401.

Because the State Water Board's § 401 certification is not preempted, and CEQA compliance is an integral part of that process, a CEQA challenge to the EIR used as part of the State Board's § 401 certification is not preempted.

II. A RULING BY THIS COURT THAT STATE LAW IS PREEMPTED WOULD UPSET WELL-SETTLED LAW AND PROCEDURE

A. A ruling of preemption would restrict environmental review.

The EIR is the 'heart of CEQA,' and is used to indicate that an agency has properly taken environmental implications under consideration, so that the agency might make a fully informed decision; "the EIR process protects not only the environment but also informed self-government." (*County of Amador,* 76 Cal.App.4th at 944.) Furthermore, an EIR serves the purpose of

alerting the public to environmental changes so that the public may comment before any irreversible changes to the environment have been made. (*Id*.)

State agencies and governments subject to CEQA have long undertaken § 401 certifications in this delegated context. Their environmental reviews have been and are subject to CEQA, not NEPA. CEQA's requirements, though similar, are not identical and can be more rigorous than required by NEPA.

Thus, a ruling of pre-emption at best would make CEQA compliance a discretionary action; more likely, environmental reviews would no longer accompany applications for water-quality certifications in this context, depriving decision makers and the public of information important to the actions of certifying agencies and governments.

B. A ruling of preemption would leave the Clean Water Act unenforceable because it would eliminate challenge and review in state court.

The state's power to apply state law would be of no effect if questions of compliance with state law were not reviewable in state courts. (See *City of Tacoma*, 460 F.3d at 67.) If the EIR in this case was not reviewable in state court, DWR would not be subject to state law compliance and the provisions of section 401 of the Clean Water Act that

require compliance with applicable requirements of state law would become meaningless.

CONCLUSION

The question at issue here is essentially whether a CEQA claim can be brought before a state court when dealing with a federal relicensing program. This court should not assume preemption in cases such as this, where states have been afforded regulatory power. There is no clear evidence that Congress intended for the FPA to have full and exclusive jurisdiction over these environmental issues. Additionally, § 401 of the CWA specifically calls for compliance with state laws. When questions of state law are involved, those issues should be reviewable in state court. In this case, the petitioners are challenging the adequacy of DWR's EIR; this is clearly a question of compliance with CEQA and therefore a question of state law. Petitioners in this case are in no way challenging an issue that would give the state veto power over federal actions; they are asking for an opportunity for state court review of the adequacy of an EIR required under state law. Since there is no conflict with federal law or federal action, this challenge should be reviewable in state court.

DATED: October 19, 2016.

Respectfully submitted,

E. ROBERT WRIGHT

By /s/ E. Robert Wright

E. ROBERT WRIGHT

Attorney for Amici Curiae
Friends of the River and the
California Sportfishing Protection
Alliance

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF FRIENDS OF THE RIVER AND CALIFORNIA SPORTFISHING PROTECTION ALLLIANCE IN SUPPORT OF THE COUNTIES OF BUTTE AND PLUMAS is proportionately spaced, has typeface of 13 points or more, and contains 5,451 words.

DATED: October 19, 2016.

By /s/ E. Robert Wright
E. ROBERT WRIGHT

PROOF OF SERVICE

I, **E. Robert Wright**, hereby declare under penalty of perjury as follows: I am over the age of 18 years and am not a party to the within action. My business address is 1418 20th Street, Sacramento, California 95811.

On October 19, 2016 I served the following document:

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF FRIENDS OF THE RIVER AND THE CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

on parties to the within action via the court's electronic filing system portal, TrueFiling, pursuant to LCvR 5(k).

Executed on October 19, 2016, at Sacramento, California.

/s/ E. Robert Wright