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KATZ, J., concurring. I agree with the majority that the Federal Power Act (act), 16 U.S.C. § 791a et seq., preempts the town of New Milford's (town) zoning regulation to preclude the defendant, J.L.G. Properties, LLC, from maintaining the recreational structure (deck) as authorized by Northeast Generation Company (Northeast) on a hydroelectric power project licensed by the Federal Energy Regulatory Commission (commission). I write separately, however, for two reasons. First, I wish to emphasize the anomaly of the broad scope of the preempted field under the act that the majority sets forth, given the well established "presumption against finding pre-emption of state law in areas traditionally regulated by the [s]tates and . . . the assumption that the historic police powers of the [s]tates were not to be superseded by the [f]ederal [a]ct unless that was the clear and manifest purpose of Congress." (Internal quotation marks omitted.) *California* v. *Federal Energy Regulatory Commission*, 495 U.S. 490, 497, 110 S. Ct. 2024, 109 L. Ed. 2d 474 (1990). In this regard, the majority's broad approach to the issue of preemption, if applied uniformly to other federal laws, could be problematic because it could divest Connecticut administrative agencies and courts of jurisdiction over areas that we traditionally have regulated, even when the state law or local regulation[1] at issue is only marginally related to the federal scheme. Cf. *English* v. *General Electric Co.*, 496 U.S. 72, 85, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) (concluding, in more narrow application of field preemption to another federal act, that "for a state law to fall within the pre-empted zone, it must have some *direct and substantial effect* on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels" [emphasis added]). Second, deciding this case on implied field preemption grounds seems unwise, given the ambiguity in the two seminal Supreme Court cases relied upon by the majority as to whether the court was applying field preemption or conflict preemption. In light of these concerns, I would determine the issue in this case under the narrower ground of conflict preemption. See *State* v. *DeLoreto*, 265 Conn. 145, 170, 827 A.2d 671 (2003) (*Katz, J.*, concurring and dissenting) (court should apply narrower constitutional ground when applicable).

The majority opinion sets forth the facts in some detail. I emphasize the following facts for purposes of this discussion. Pursuant to 16 U.S.C. § 797 (e) of the act, the commission issued a license to the company to generate hydroelectric power on Northeast's property at Candlewood Lake. Northeast thereafter granted permission to the defendant to construct a deck for recreational purposes on a portion of the property encompassing the lake. The deck is located entirely

below the "440 foot contour line" or a line demarcating the boundary, above water level, of land used for a federal hydroelectric power project. The town's zoning regulations call for a fifty foot setback from the property line for structures such as the deck. The shore, however, is only approximately ten to twenty feet wide. The defendant never obtained a zoning permit before commencing construction of the deck. The town thereafter denied the defendant's application for a zoning permit and a building permit was never issued.

As always in cases of preemption under the supremacy clause; U.S. Const., art. VI; the ultimate question is whether Congress manifested an intent for federal legislation to preempt state and local law. *Cox Cable Advisory Council* v. *Dept. of Public Utility Control*, 259 Conn. 56, 62, 788 A.2d 29, cert. denied, 537 U.S. 537, 123 S. Ct. 95, 154 L. Ed. 2d 25 (2002). As the majority recognizes, state or local law may be preempted by federal legislation in three ways: expressly; impliedly; or by means of a conflict. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372–74, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). If the preemption is express, Congress will make "its intent known through explicit statutory language . . . ." *English* v. *General Electric, Co.*, supra, 496 U.S. 79. "Even without an express provision for preemption, [the Supreme Court has] found that state law must yield to a congressional [a]ct in at least two circumstances. When Congress intends federal law to occupy the field, state law in that area is preempted. . . . And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. . . . [There is] preemption where it is impossible for a private party to comply with both state and federal law . . . and where under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . . ." (Citations omitted; internal quotation marks omitted.) *Crosby* v. *National Foreign Trade Council*, supra, 372–73.

These categories, however, are not "rigidly distinct." *English* v. *General Electric Co.*, supra, 496 U.S. 79 n.5. Indeed, "[b]ecause a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, field pre-emption may be understood as a species of conflict pre-emption . . . ." (Internal quotation marks omitted.) *Crosby* v. *National Foreign Trade Council*, supra, 530 U.S. 372 n.6. Similarly, within a broader preempted field, a particular provision of state law and a particular provision of federal law actually may conflict with each other. See

NE Hub Partners, L.P. v. *CNG Transmission Corp.*, 239 F.3d 333, 348 (3d Cir. 2001) ("[w]e therefore hold that state regulatory process may be preempted by conflict with federal law, as well as by field occupation").

The text of the pertinent provisions under the act is the starting point for our inquiry.[2] Under the act, Congress vested the commission with the authority to issue licenses for hydroelectric power projects[3] to private entities "for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works . . . ." 16 U.S.C. § 797 (e). In issuing such licenses, however, the commission expressly is required to "give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife . . . *the protection of recreational opportunities*, and the preservation of other aspects of environmental quality." (Emphasis added.) 16 U.S.C. § 797 (e). Before the commission may issue a license, the applicant must provide "[s]atisfactory evidence that [it] has complied with the requirements of the laws of the [s]tate . . . within which the . . . project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter." 16 U.S.C. § 802 (a) (2). As a condition of a license, a licensee is required to develop a "comprehensive plan" for the "adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and *for other beneficial public uses*, *including* irrigation, flood control, water supply, and recreational and other purposes . . . ." (Emphasis added.) 16 U.S.C. § 803 (a) (1). In determining whether the plan meets those requirements the commission must consider "[t]he recommendations of . . . [s]tate agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the [s]tate in which the project is located . . . ."[4] 16 U.S.C. § 803 (a) (2) (B). The act also preserves expressly certain authority to the states in a savings clause: "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective [s]tates 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 also 16 U.S.C. § 823c (a) (discontinuing commission's authority over small hydroelectric projects in Alaska when Alaska has in place a plan that, inter alia, protects recreational opportunities).

These provisions speak to a broad role for the commission in determining and evaluating numerous

aspects of hydroelectric power projects, including the protection and provision of recreational opportunities. By contrast, the savings clause does not reserve expressly any authority to the states to regulate uses on property owned by hydroelectric power plants. None of these provisions alone, however, expressly addresses whether Congress intended to preempt local zoning regulations. *California* v. *Federal Energy Regulatory Commission*, supra, 495 U.S. 496–97 (although scheme set forth by Congress is quite broad, that "broad delegation of power to the predecessor of [the commission], however, hardly determines the extent to which Congress intended to have the [f]ederal [g]overnment exercise exclusive powers, or intended to pre-empt concurrent state regulation of matters affecting federally licensed hydroelectric projects"). Indeed, there is nothing in the statute that would indicate that the development or "protection" of recreational opportunities could not occur in harmony with local zoning regulations, particularly in view of the directive to consider the recommendations of state agencies exercising administration over recreation.

In answering this question, we do not write on a blank slate. The United States Supreme Court already has interpreted the act and its legislative history in the context of the preemption question. Although I agree with the majority that two cases are of particular significance, in my view, these cases do not require us to decide this question on the grounds of field preemption.

In *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 157, 66 S. Ct. 906, 90 L. Ed. 1143 (1946), the plaintiff challenged the decision of the commission's predecessor, the Federal Power Commission, dismissing the plaintiff's application for a license to build an earthen dam, a reservoir and a diversion canal to a power plant that would have created two additional reservoirs. The Federal Power Commission had dismissed the application on the ground that the plaintiff failed to submit evidence of its compliance with Iowa law requiring a permit from the state's executive council to build the dam. Id., 163. The Iowa law specifically required the executive council to consider certain aspects of the "construction, operation, or maintenance" of the project in granting a permit—particularly those relating to diversion of water within the state. Id., 165–66.

In construing the act, the court applied a mixture of field and conflict preemption principles. Id., 167–76. It determined that the act had created a dual system of authority between the federal government and the states, but permitted no concurrent authority in any area. Id., 167–68. Because the court concluded that the federal government has exclusive authority over licensing hydroelectric power projects, it determined that requirements of Iowa law could not act as a condition

precedent to a federal permit unless the federal government expressly added those specific requirements to federal statutes or regulations. Otherwise, such a condition precedent could permit the state to veto a federal project and thereby conflict with federal requirements.[5] Id., 164, 166–67. The court dismissed reliance on the act's reference to the applicant's submission of information regarding compliance with state laws under 16 U.S.C. § 802: "It does not itself require compliance with any state law. Its reference to state laws is by way of suggestion to the Federal Power Commission of subjects . . . which [it] may wish some proof submitted to it of the applicant's progress." Id., 177–78.

The court went on to conclude, however, that the act left to the states their "traditional jurisdiction . . . ." Id., 171. It noted that the act included a savings clause; 16 U.S.C. § 821; which serves as the "*primary, if not exclusive reference*" to state proprietary rights over the "control, appropriation, use or distribution of water [used] in irrigation or for municipal or other uses . . . ." (Emphasis added.) *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, supra, 328 U.S. 175–76. "[The savings clause] strengthens the argument that, in those fields where rights are not thus 'saved' to the [s]tates, Congress is willing to let the supersedure of state laws by federal legislation take its natural course." Id., 176. In light of these statements, it seems unclear whether the savings clause is the exclusive or merely primary measure of state authority under the act, or whether the other questions of preemption unrelated to such proprietary rights would be left to another case. Id.

The Supreme Court again took up the issue of preemption under the act in *California* v. *Federal Energy Regulatory Commission*, supra, 495 U.S. 493. Therein, the Supreme Court considered conflicting state and federal requirements for minimum stream flow requirements for the maintenance of fish associated with a stream located near a hydroelectric power project. The court again focused on the savings clause but indicated that it would not be inclined to interpret the clause as narrowly were it not bound by prior precedent: "Were this a case of first impression, [the plaintiff's] argument based on the statute's language could be said to present a close question. As [the plaintiff] argues, California's minimum stream flow requirement might plausibly be thought to relat[e] to the control, appropriation, use, or distribution of water used . . . for . . . other uses, namely the generation of power or the protection of fish. This interpretation would accord with the presumption against finding pre-emption of state law in areas traditionally regulated by the [s]tates and with the assumption that the historic police powers of the [s]tates were not to be superseded by the [f]ederal [a]ct unless that was the clear and manifest purpose of Congress." (Internal quotation marks omitted.) Id., 497. The

court then went on to say, however, that it was not free to abandon its precedent and therefore declined to revisit the narrow interpretation it had given to the savings clause in *First Iowa Hydro-Electric Cooperative*. California's requirements for minimum stream flow did not fit within that narrow scope.[6] Id., 498–99. In language that appears to conflate conflict and field preemption, it concluded: "[T]he California requirements for minimum instream flows cannot be given effect and allowed to supplement the federal flow requirements. A state measure is pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. . . . Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination." (Citations omitted; internal quotation marks omitted.) Id., 506.

As the majority notes, on the basis of these cases, some federal courts have interpreted the impliedly preempted field under the act broadly, determining all aspects of the project to fall within the preempted field, except those expressly reserved to the states in the savings clause. See, e.g., *Sayles Hydro Associates* v. *Maughan*, 985 F.2d 451, 455–56 (9th Cir. 1993); *Springfield* v. *Environmental Board*, 521 F. Sup. 243, 248–49 (D. Vt. 1981). As the Supreme Court recognized in *California* v. *Federal Energy Regulatory Commission*, supra, 495 U.S. 497, however, this interpretation can be at odds with the assumption under preemption jurisprudence that, in areas traditionally left to the states, Congress must manifest a clear intent to preempt state law; a presumption that the Supreme Court and this court have applied in other cases. See, e.g., *Bates* v. *Dow Agrosciences, LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005) ("[b]ecause the [s]tates are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action" [internal quotation marks omitted]); *Serrano* v. *Serrano*, 213 Conn. 1, 6, 566 A.2d 413 (1989) ("[t]he United States Supreme Court has repeatedly held that, because the field of domestic relations has traditionally been regulated by the states, the standard for demonstrating a preempting conflict between federal law and a state domestic relations provision is high"); *Times Mirror Co.* v. *Division of Public Utility Control*, 192 Conn. 506, 512, 473 A.2d 768 (1984) ("[c]ourts should not readily infer that Congress has deprived states of the power to act on interests deeply rooted in local feeling and responsibility which only peripherally concern an area controlled by nonconflicting federal legislation" [internal quotation marks omitted]). Therefore, to the extent that the majority has

endorsed the conclusion of other federal courts that "the act demonstrates Congress' intent to create a complete scheme of national regulation . . . for all aspects of hydroelectric power projects, including recreational uses within the project"; (citation omitted; internal quotation marks omitted); that conclusion, absent a clear manifestation of such intent by Congress, should be understood as an anomaly in preemption jurisprudence because of its inconsistency with the presumption that preserves the traditional authority and historic police power of the states. *Poneleit* v. *Dudas*, 141 Conn. 413, 417, 106 A.2d 479 (1954) ("[i]t is well established that the enactment of zoning regulations is the exercise of police power").

In view of this inconsistency, I am disinclined to make such a sweeping determination about the boundaries of the preempted field, particularly when there is a real question about whether the Supreme Court has explicitly determined the field to be so broad. Both *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, supra, 328 U.S. 152, and *California* v. *Federal Energy Regulatory Commission*, supra, 495 U.S. 490, dealt with circumstances wherein the federal and state requirements actually conflicted. Both cases involved state requirements that dealt in a direct way with the construction and operation of a hydroelectric power project. Although I acknowledge that a few other courts have interpreted these decisions as setting forth a broad preempted field; see, e.g., *Sayles Hydro Associates* v. *Maughan*, supra, 985 F.2d 455–56; other courts raise the question of whether, in the absence of a conflict, more peripheral local legislation, such as zoning regulations applicable to dry land within territory licensed by the commission, would be preempted. See *Wisconsin Valley Improvement Co.* v. *Meyer*, 910 F. Sup. 1375, 1382 (W.D. Wis. 1995) (noting that *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, supra, 152, and *California* v. *Federal Energy Regulatory Commission*, supra, 490, might be read to hold that field preemption applies only when state exercises veto power over federal project, but ultimately concluding that, either way, state statute at issue was preempted); *Amador* v. *El Dorado County Water Agency*, 76 Cal. App. 4th 931, 959, 91 Cal. Rptr. 2d 66 (1999) ("*California* v. [*Federal Energy Regulatory Commission*, supra, 490] did not clearly indicate whether its decision was based on an 'occupy the field' or 'conflict' theory of preemption"). Given the facts in the present case, we need not resolve this ambiguity.

In the present case, the disputed zoning regulation requires a fifty foot setback from the property line. The shore of the lake is at most twenty feet wide. Thus, as the trial court concluded, it would be impossible to build the deck as authorized by a federal license and still comply with the local zoning regulation.[7] See *Crosby* v. *National Foreign Trade Council*, supra, 530 U.S. 372

(state law may be preempted when "it is impossible for a private party to comply with both state and federal law"). Thus, I would let the result in the present case rest on this narrower ground of conflict preemption and save the question of the breadth of the field for another day.

Accordingly, I respectfully concur.

[1] "For the purposes of the [s]upremacy [c]lause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County* v. *Automated Medical Labs*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985).

[2] Although the majority does not cite to the act's text in its analysis, in my view, in the absence of clear textual evidence, it seems counterintuitive to suppose that federal law addressing hydroelectric power would preempt a local zoning authority from regulating recreational use of property that in no way impacts hydroelectric power.

[3] The " 'project' " that the commission is charged with regulating broadly is defined as: "complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit . . . ." 16 U.S.C. § 796 (11).

[4] "The [commission] may reject a state agency's recommendation as inconsistent with the [act] only after attempting to resolve the inconsistency, giving due weight to the recommendations, expertise and statutory responsibilities of state agencies. 16 U.S.C. § 803 (j) (2). If, after such an attempt, the commission does not adopt a recommendation of a state agency in whole or in part, it must publish findings that adoption of such recommendation is inconsistent with the purpose and requirements of the [act] or other applicable laws and that the conditions selected by the commission comply with the statute's requirements for fish and wildlife protection." *Wisconsin Valley Improvement Co.* v. *Meyer*, 910 F. Sup. 1375, 1378 (W.D. Wis. 1995).

[5] In the present case, the parties and the majority focus on the commission's regulation at 18 C.F.R. § 2.7 (2007), which provides in relevant part: "The [c]ommission will evaluate the recreational resources of all projects . . . and seek . . . the ultimate development of these resources . . . . The [c]ommission expects the licensee to assume the following responsibilities . . .

"(e) To cooperate with local, [s]tate, and [f]ederal [g]overnment agencies in planning, providing, operating, and maintaining facilities for recreational use of public lands administered by those agencies adjacent to the project area.

"(f) (1) To comply with [f]ederal, [s]tate and local regulations for health, sanitation, and public safety, and to cooperate with law enforcement authorities in the development of additional necessary regulations for such purposes. . . ."

Because this regulation does not prescribe the specific requirements under the town's zoning regulation, it would seem to present a similar situation to that in *First Iowa Hydro-Electric Cooperative* in that, although state and local laws may be relevant to a determination of the commission, they cannot be a vehicle through which the state could, in effect, veto a federal decision as to some aspect of a hydroelectric power project, nor may they be permitted to supplant federal law and regulations in the event of a conflict.

[6] Specifically, the court concluded that *First Iowa Hydro-Electric Cooperative* had limited the savings clause to issues of "control, appropriation, use or distribution of water in irrigation or for municipal or other uses *of the same nature*." (Emphasis in original.) *California* v. *Federal Energy Regulatory Commission*, supra, 495 U.S. 498. Thus, if the state law did not fit within the savings clause, and it conflicted with the federal requirements, it could not stand. See id., 498, 506–507.

[7] As the amicus curiae point out, "the defendant's 'deck' is not one of the 'recreational enhancements' to be provided by [the] [l]icensee as set forth

in the license to [Northeast] from [the commission]." Even if we were to assume that the company was not acting on authority conferred by the commission, however, under these circumstances the commission would have no option to approve the deck because it would be impossible to comply with any such approval of the commission and the local regulation. Much like in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, supra, 328 U.S. 164, wherein the plaintiff had not submitted evidence of compliance with Iowa law, requiring evidence of actual compliance with the state law "would vest in the [state] a veto power over the federal project."