S258574

S_____

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF BUTTE, COUNTY OF PLUMAS et al.,
Petitioners and Appellants,
v.
DEPARTMENT OF WATER RESOURCES
Respondent.

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

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

Appeal from the Yolo County Superior Court, Case No. CVCV091258
The Honorable Daniel P. Maguire, Judge Presiding

PETITION FOR REVIEW

*Roger B. Moore (SBN 159992)
Law Office of Roger B. Moore
337 17th Street, Suite 211
Oakland, California 94612
Telephone: (510) 548-1401
rbm@landwater.com
Attorney for Plaintiffs and Appellants COUNTY OF BUTTE and COUNTY OF PLUMAS et al.

Ellison Folk (SBN 149232)
Edward T. Schexnayder (SBN 284494)
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Folk@smwlaw.com
Schexnayder@smwlaw.com
Attorneys for Plaintiff and Appellant COUNTY OF BUTTE

R. Craig Settlemire (SBN 96173)
County of Plumas, County Counsel
520 Main Street, Room 302
Quincy, California 95971
Telephone: (530) 283-6240
Facsimile: (530) 283-6116
CSettlemire@countyofplumas.com
Attorney for Plaintiff and Appellant COUNTY OF PLUMAS et al.

Bruce Alpert (SBN 75684)
County of Butte, Office of County Counsel
25 County Center Drive
Oroville, California 95965
Telephone: (530) 538-7621
Facsimile: (530) 538-6891
balpert@buttecounty.net
Attorney for Plaintiff and Appellant COUNTY OF BUTTE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

California Cases

Federal Cases

Other State Cases

California Statutes

Federal Statutes

California Regulations

Federal Regulations

Other Authorities

ISSUES PRESENTED FOR REVIEW

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

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

GROUNDS FOR REVIEW

Petitioners and Appellants County of Butte, County of Plumas, and Plumas County Flood Control and Water Conservation District (collectively, "Counties") respectfully petition for review of the published opinion by the Court of Appeal, Third District in *County of Butte et al. v. Department of Water Resources et al.* (September 5, 2019, C071785) ("Opinion"), attached as Exhibit A.

The Opinion, which follows this Court's unanimous grant of review and transfer, is the second in this case that fails to follow *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677. Instead, the Opinion concludes that the Federal Power Act preempts the Department of

Water Resources' ("DWR") obligation to comply with the California Environmental Quality Act ("CEQA," Pub. Resources Code § 21000, et seq.) for its decision to pursue relicensing of hydroelectric facilities at Oroville Dam. Review is necessary to address important issues of law and restore uniformity concerning the scope of California's sovereign authority to govern its subdivisions, including those controlling state water resources. (Cal. Rules of Court, rule 8.500(b)(1).)

When this Court granted review earlier this year, it instructed the appellate court to reconsider its preemption holding in light of *Friends of the Eel River*. After transfer, DWR agreed with the Counties that *Friends of the Eel River* forecloses preemption here and requested the appellate court to adjudicate the merits of the case. Without mentioning DWR's new position, the Opinion draws essentially the same conclusions as before, arguing that *Friends of the Eel River* is inapplicable to preemption under the Federal Power Act.

In doing so, the Opinion conflicts with at least three lines of authority, all defeating CEQA preemption. *First*, the Opinion continues to contravene *Friends of the Eel River*. The Opinion's overly broad reading of the Federal Energy Regulatory Commission's ("FERC") Alternative Licensing Process and preemption under the Federal Power Act wipes away California's power to require its agencies to comply with CEQA in decisions about how to use state water resources and facilities—including

whether to seek relicensing for the largest state-owned dam.

Friends of the Eel River requires that this preemption analysis start with the "presumption that Congress would not alter the balance between state and federal powers without doing so in *unmistakably clear* language." (3 Cal.5th at 705, italics added; internal citations omitted.) This presumption "protect[s] against undue federal incursions into the internal, sovereign concerns of the states." (*Id.*) Abandoning this protection, the Opinion attempts to craft a separate preemption rule for the Federal Power Act, which lacks the required unmistakably clear statement of preemptive intent. This result improperly circumscribes California's sovereign authority to govern DWR's decisions regarding the Oroville Facilities.

Second, the Opinion conflicts with *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931. There, the Third District highlighted CEQA's critical informational role and held that the Federal Power Act does not preempt CEQA for publicly owned hydroelectric facilities that serve consumptive water uses. Without citing *County of Amador*, the Opinion reaches a contrary conclusion, even though Oroville Dam is also a keystone of the State Water Project's water storage and delivery system and serves multiple uses.

Third, the Opinion interferes with CEQA compliance as an "appropriate requirement" of state law informing water quality certification by the State Water Resources Control Board ("State Board"), authority that

Congress reserved solely to states under Clean Water Act section 401. (33 U.S.C. § 1341(d); *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 712-22 ("*Jefferson County*").)

To aid this outcome, the Opinion maintains two untenable conclusions from the first appellate opinion: (1) that the "environmental predicate" to section 401 water quality certification is subject to FERC review, and (2) that CEQA water quality compliance can await a later "implementation" stage. (See e.g., Opinion at 5, 6, 11-12, 19-20, 32.) Remarkably, the Opinion ignores that the State Board, the agency responsible for 401 certifications, previously concluded both of these positions were "incorrect as a matter of law" and "will mislead future litigants." (State Board letter requesting depublication (Feb. 15, 2019) at 2-3 ("Request for Depublication").) Further, although the Opinion recognizes a water quality certificate "did not exist" within the timeframe for challenging DWR's Environmental Impact Report ("EIR") (Opinion at 32), it fails to apply black-letter law meant to ensure consistent adjudication of state environmental review in a single action against the lead agency, rather than multiple actions against lead and responsible agencies.

Without review, the Opinion casts substantial uncertainty over environmental review of state agency decisions to relicense California's many dam projects and deters full consideration of environmental impacts. Review is necessary to resolve these important issues and restore

uniformity in the law.

STATEMENT OF THE CASE

A. Background: the Oroville Dam and DWR's Relicensing Efforts

DWR owns and operates the Oroville Facilities on the Feather River in Butte County, a keystone of the State Water Project's storage and delivery system. Built between 1961 and 1968, Oroville Dam is the "largest earthen dam in the United States," and its facilities are "operated for power generation, water quality improvement in the Sacramento-San Joaquin Delta, recreation, fish and wildlife enhancement, and flood management." (Opinion at 7.) The dam "blocks access to 66.9 miles of high-quality habitat for anadromous fish," including salmon and steelhead. (*Id*. at 4.) Its operation impairs regional water quality (Administrative Record ("AR") G002440) and imposes ecological and economic costs on Butte County (AR G002549-93).

DWR acts as both project proponent and CEQA lead agency for the Oroville Facilities relicensing project. DWR's 50-year federal license to own, operate, and maintain the Oroville Dam (FERC Project No. 2100) expired on January 31, 2007. (AR B035070.) Since then, the Oroville Facilities have operated on temporary annual licenses. No decision has been made on a new federal license.

In 2001, FERC granted DWR permission to utilize FERC's

Alternative Licensing Process, 18 C.F.R., section 4.34(i), which authorizes certain "alternative procedures for pre-filing consultation and the filing and processing of an application" for a new license. (AR B000617-18.) Neither state nor federal agencies anticipated that the Alternative Licensing Process would supersede CEQA's application to DWR's relicensing decisions.

Instead, DWR proceeded with the environmental review required by state law. In 2001, DWR issued an initial NEPA/CEQA scoping notice. (AR C000027.) In 2003, DWR issued an amended NEPA/CEQA notice recognizing that an EIR may be required, both for decision-making by the State Water Resources Control Board "over Section 401 Water Quality Certification" *and* "to support decision-making by DWR." (AR C001739.) The notice recognized "all the requirements of NEPA and CEQA must eventually be satisfied." (AR C001740.) DWR undertook the role of "Lead Agency in preparing the EIR for the relicensing of the Oroville Facilities and for use by the SWRCB in issuing Section 401 Water Quality Certification." (*Id*.) The State Board agreed to review the project as a CEQA responsible agency. (AR E000792, F003271.)

In January 2005, DWR applied to FERC to renew its license for another 50 years. (AR B066039-50.) Butte and Plumas Counties expressed concern about extensive project impacts that would accompany operating the Oroville Facilities for another half-century. (AR C001817-19.)

In March 2006, DWR filed a proposed Settlement Agreement with

FERC (AR D000422), which replaced DWR's 2005 application and became the proposed project under CEQA. Butte and Plumas Counties were unable to reach an agreement with DWR, and were excluded from final discussions culminating in the Settlement Agreement. (AR F002488-96.) The Settlement Agreement recognized that "several regulatory and statutory processes are not yet complete." (AR G001109.) It stated that before issuance of a new project license, "each Public Agency shall participate in the relicensing proceeding, including environmental review and consideration of public comments, as required by applicable law." (AR G001111.)

In May 2007, DWR issued its Oroville Facilities Project Draft EIR. (AR G000004, G000130.) DWR planned to "use the FEIR and any supplemental CEQA documents to make all necessary decisions for acceptance and implementation of the new FERC Project License" and implementation of the Settlement Agreement. (AR G000134.) DWR recognized that beyond generating hydroelectric power, its project objectives over the proposed license term also required DWR to meet multiple other commitments and requirements analyzed in the EIR, including decisions affecting water supply, flood control, and protection of

Delta water quality and fisheries. (AR G000128, G000190-91.)[1] DWR's EIR also confirmed its role as the sole environmental review document informing the State Board's section 401 water quality certification, as well as other decisions of responsible and trustee agencies. (AR G000134; see also AR G000110.)

The Counties submitted detailed EIR comments, identifying significant unaddressed environmental impacts and deficient assessment of alternatives and mitigation. (AR G002406-813.) The Counties and other interested parties criticized DWR's decision to test project performance only under a portion of the past century's range of hydrologic conditions, noting that leading scientists, including DWR's own, had discredited this assumption due to the wider range of flood and drought conditions expected in the new century.[2] DWR's Final EIR refused further study, and

---

[1] Although in one passage, the Opinion portrays DWR's project as simply a set of measures "to further mitigate the loss of habitat caused by the construction of the dam" (Opinion at 17), the project includes DWR's proposed terms and conditions for relicensing the whole of the Oroville Facilities (AR A000015). To meet the project's "water and power" objectives (Opinion at 3), DWR needed to show it could continue generating electric power while complying with multiple "statutory, contractual water supply, flood management, and environmental commitments," as well as fishery, water quality, and other obligations (AR A000013; see also AR G000128, G000158, G000160-63 [describing project objectives]).

[2] Butte County's EIR comments, among others, criticized DWR for slighting the risk of "catastrophic flooding in and downstream of Oroville" from a "failure or uncontrolled spill" at Oroville dam. (AR H000235.)

perpetuated many of the errors identified in EIR comments.

In July 2008, DWR certified the Final EIR and issued its decision approving the Oroville Facilities project. (AR A000003-102.) DWR's Decision Document clarified that DWR's exercise of discretion over the project would not usurp the still-unmade FERC decision on the proposed project license. After considering the EIR and other pertinent information, "the Director will determine whether to approve the Proposed Project." (AR A000007.) Although approval "will not lead to immediate implementation" of the Settlement Agreement, once FERC issues a new license, "DWR will have 30 days to decide whether to accept the license and license conditions." (*Id*.) If FERC's license is for the proposed project or for the FERC staff alternative analyzed in DWR's EIR, "no additional analysis under CEQA is required and the DWR Director may accept the license." (*Id*.)

B. After the Trial Court Decides the Merits, the Court of Appeal Rules, Sua Sponte, that the Federal Power Act Preempts this Case.

In August 2008, the Counties filed CEQA petitions for writ of mandate in Butte County Superior Court, which were consolidated and transferred to Yolo County Superior Court. (Appellants' Appendix ("AA") 1-28 (Butte County petition), 30-43 (Plumas County petition).) The trial court adjudicated the merits of CEQA compliance in DWR's favor in June 2012. (AA 3046-63.)

Through merits briefing in the trial court and on appeal, DWR and real parties in interest State Water Contractors, et al. ("SWC") defended the necessity and adequacy of the EIR without questioning state court jurisdiction to adjudicate DWR's CEQA compliance.[3] However, in April 2016, the Third District Court of Appeal directed the parties, sua sponte, to brief whether the proscription on state "veto power" over projects subject to the Federal Power Act, and DWR's Settlement Agreement under FERC's Alternative Licensing Process, preempted the Counties' CEQA challenge. (April 11, 2016 Order at 2-3.)

In its since-vacated December 20, 2018 Opinion, the Third District held that Federal Power Act preemption barred the Counties from challenging the Oroville Facilities EIR, or the project decisions it supported, and dismissed the appeal ("2018 Opinion").

C. This Court Grants the Counties' Petition for Review and Instructs the Court of Appeal to Reconsider Its Ruling in Light of *Friends of the Eel River*.

The Counties petitioned for review on January 29, 2019. Their petition argued that the 2018 Opinion would sow uncertainty in relicensing proceedings throughout California, and was inconsistent with (1) this

[3] See, e.g., AR A000033, A000059, A000102, A000003-28, C000038, C000055-56, C001236-52, C001733-62, C001740, 0000148, 0000434, G001015, H000015, H000181, H000186, H000149-50, H004699, I001351; AA 0176-0221, 2304-65, 2444-506; SWC Respondents' Brief, May 31, 2013, at 10-13, 89; DWR Respondents' Brief, June 24, 2013, at 3, 8-15, 22, 120.

Court's holding in *Friends of the Eel River*, and (2) California's delegated authority under the federal Clean Water Act.

After consulting with DWR, the State Board requested depublication of the 2018 Opinion due to misstatements of law and fact. The State Board argued that the 2018 Opinion erroneously concluded that the "environmental predicate" to certification is subject to FERC review, and that CEQA compliance can await a later "implementation" stage. (Request for Depublication at 2-3.)[4]

DWR did not answer the Counties' petition for review, but SWC did. SWC's Answer primarily argued that because *Friends of the Eel River* involved a separate federal statute, the Interstate Commerce Commission Termination Act (or "ICCTA"), it should not alter the Third District's ruling under the Federal Power Act. (SWC Answer to Petition for Review at 20-24.) According to SWC, the ICCTA's partial deregulatory purpose distinguished it from the Federal Power Act. (*Id.* at 24-25.) SWC further suggested that preemption arose from "unmistakable language" in the Federal Power Act. (*Id*. at 21-23.)

On April 10, 2019, this Court granted the petition for review,

[4] Several amici—including the California State Association of Counties; Friends of the River, California Sportfishing Protection Alliance, and Friends of the Eel River; and California Water Impact Network and AquAlliance—submitted letters supporting the petition for review. No letters opposed review.

vacated the 2018 Opinion, and transferred the matter to the Third District with instructions to "reconsider the case in light of *Friends of the Eel River*." (*County of Butte v. Department of Water Resources* (2019) 245 Cal.Rptr.3d 411.)

D. The Court of Appeal Rejects Application of *Friends of the Eel River* and Again Concludes that the Federal Power Act Preempts this Case.

After transfer to the Court of Appeal, the Counties stated that *Friends of the Eel River* applied, and that its principles, as well as California's authority under the federal 401 certification program, removed this case from the Federal Power Act's preemptive sphere. DWR likewise argued that "the Federal Power Act should not be read to preempt the State from requiring one of its own agencies – here, DWR – to comply with CEQA in undertaking its own project." (DWR Supplemental Opening Brief at 8.) DWR asked the Court of Appeal to reach the merits of the Counties' CEQA claims. Only SWC, representing parties that did not prepare the EIR or have decision-making responsibility, continued to argue for preemption.

Drawing heavily from SWC's arguments, the new Opinion once again concludes that the Federal Power Act preempts this case. Specifically, it contrasts the ICCTA's deregulatory purpose with FERC's regulatory authority over environmental protection. (Opinion at 25-26.) It also states that the clear statement rule articulated in *Friends of the Eel River* does not extend to the Federal Power Act (*id*. at 26-27) and that

"CEQA laws . . . are regulatory acts pure and simple" (*id*. at 29). Applying preemption even to the EIR's role in informing the State Board's water quality certification, the Opinion concludes that the "environmental predicate" for certification is subject to FERC review (*id*. at 5), and that CEQA water quality compliance can await a later "implementation" stage (*id*. at 19). The Opinion does not mention the State Board's rejection of these positions.

ARGUMENT

I. The Opinion Raises an Important Issue of Whether the Federal Power Act May Interfere with California's Control of DWR Without an "Unmistakably Clear" Statement from Congress.

Both this Court and the U.S. Supreme Court have narrowly construed otherwise-broad preemption clauses where they threaten to preempt a state's control of its subdivisions. Due to the serious federalism concerns that such preemption would raise, courts may not construe a federal statute to preempt state control over subdivisions absent an "unmistakably clear statement" that this was Congress's intent.

Although the Opinion attempts to craft an exception to this rule for the Federal Power Act, nothing in the Act exhibits *any* Congressional intent to interfere with California's sovereign authority over its subdivisions. With no sound basis for interpreting the Federal Power Act differently, the Opinion directly conflicts with *Friends of the Eel River* and the U.S. Supreme Court's decision in *Nixon v. Missouri Municipal League* (2004)

541 U.S. 125.

A. California Exercises Its Sovereignty by Requiring DWR to Comply with CEQA.

"Through the structure of its government . . . a state defines itself as a sovereign." (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 460.) Thus, the "number, nature and duration of the powers conferred upon these [agencies] . . . rests in the absolute discretion of the State." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254-55 [quoting *Hunter v. Pittsburgh* (1907) 207 U.S. 161, 178-79].)

Friends of the Eel River recognized that CEQA review for public projects is an essential element of state self-governance in California. "CEQA prescribes how governmental decisions will be made when public entities, including the state itself, are charged with approving, funding—*or themselves undertaking*—a project with significant effects on the environment." (*Friends of the Eel River*, 3 Cal.5th at 712 [citing Pub. Resources Code § 21065].) Requiring compliance with CEQA goes to the very heart of California's sovereign authority over its subdivisions.

DWR's decisions were subject to CEQA because they were an exercise of governmental discretion over a public project with significant environmental effects. Relicensing Oroville Dam was not mandatory. DWR *chose* to pursue and propose terms for relicensing, and its EIR was integral to this decision-making. As DWR's FEIR Decision Document explained,

"after certification of the EIR, the DWR Director *may approve the Proposed Project* and DWR can file a Notice of Determination of this approval. . . . When FERC issues a new license, DWR will have 30 days to *decide whether to accept the license and license conditions*." (AR 000008, DWR decisions italicized.) The Settlement Agreement similarly assured that "[a]fter the . . . Settlement Agreement but prior to the issuance of the New Project License, each Public Agency shall participate in the relicensing proceeding, including environmental review and consideration of public comments, as required by applicable law." (AR G000111.)

This case is not meaningfully different than *Friends of the Eel River.* The Counties challenge DWR's discretionary decision to adopt the Settlement Agreement as its proposed project for relicensing, and to submit the Settlement Agreement to FERC for approval. In *Friends of the Eel River*, petitioners similarly challenged an agency's decision to reopen a public rail line after authorization from the Federal Railroad Administration. (*Friends of the Eel River*, 3 Cal.5th at 696.)

In that context, this Court held that the ICCTA's broad preemption of state "regulation of rail transportation" did not "sweep away a state's ability to [control] its own subsidiaries." (*Id.* at 729.) Emphasizing the importance of the state's ability to "govern *itself*," the Court concluded that "the application of CEQA to [the state agency] would not be inconsistent with the ICCTA and its preemption clause." (*Id.* at 740.) This holding

flowed from the U.S. Supreme Court's caution that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its power." (*Nixon*, 541 U.S. at 140.)

For identical reasons, CEQA fully applies to DWR's decision to proceed with relicensing and adopt the Settlement Agreement, which included the need to meet multiple, water-related commitments beyond simply operating the Oroville hydroelectric facilities. (AR A000013-15, G000128, G000158, G000160-63.) As DWR correctly concluded, "the Federal Power Act should not be read to preempt the State from requiring one of its own agencies . . . to comply with CEQA" for such decisions. (Respondent DWR Supplemental Opening Brief at 8.)

B. The Opinion Fails to Identify "Unmistakably Clear" Congressional Intent to Preempt California's Decision-making Regarding Public Dam Projects.

1. The Federal Power Act's *Savings Clause* Cannot Preempt DWR's CEQA Obligations.

The Opinion fails to cite any section of the Federal Power Act exhibiting unmistakably clear Congressional intent to preempt CEQA. Instead, the Opinion exclusively relies on U.S. Supreme Court decisions holding that the Federal Power Act preempts state efforts to regulate hydroelectric facilities. (Opinion at 26-27 [discussing *First Iowa Hydro-*

Electric Cooperative v. Federal Power Commission (1946) 328 U.S. 152 and *California v. FERC* (1990) 495 U.S. 490].) As the Opinion notes, preemption arises under the Federal Power Act only because the U.S. Supreme Court "has read the broadest possible negative pregnant into [the Act's] 'savings clause.'" (Opinion at 13 [quoting *First Iowa*, 328 U.S. at 176].)

But the savings clause does not mention preemption, much less exhibit *any* Congressional intent to preempt a state's control of its subdivisions. Rather, it exhibits Congress's desire to *preserve* state authority:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

(16 U.S.C. § 821.) A judicially crafted, negative pregnant read into this savings clause falls far short of an *unmistakably clear Congressional* statement, and cannot justify preempting DWR's state-law obligation to conduct CEQA review for its project.

2. FERC's Relicensing Authority Cannot Preempt DWR's CEQA Obligations.

The Opinion's preemption holding also relies heavily on DWR's use of FERC's Alternative License Process. (Opinion at 6, 9-10.) The Opinion asserts that "plaintiffs cannot challenge the environmental sufficiency of the

[Settlement Agreement] in the state courts because . . . plaintiffs did not seek federal review as required by [federal regulations].” (*Id.* at 6.) Lacking a clear statement of *Congressional* preemptive intent, the Opinion misapplies and improperly elevates this federal administrative procedure over California’s sovereignty.

Notably, nothing in the regulation establishing the Alternative Licensing Process supports the Opinion’s conclusion. The Alternative Licensing Process’s professed purpose is simply to “[c]ombine into a single process the pre-filing consultation process, the environmental review process under the National Environmental Policy Act and administrative processes associated with the [federal] Clean Water Act and other statutes.” (18 C.F.R. § 4.34(i)(2)(i); see also AR F002494 [ALP regulations apply to “the use of alternative procedures for pre-filing consultation”].) The regulations do not reference CEQA, and lack any, much less “unmistakably clear,” language indicating Congress intended to preempt California’s ability to require its subdivision DWR to comply with state law.

Indeed, FERC’s relicensing procedures cannot provide an independent basis for preempting state law. As the U.S. Supreme Court has observed, FERC’s delegated authority “hardly determines the extent to which Congress intended to have the Federal Government exercise exclusive powers, or intended to pre-empt concurrent state regulation of matters affecting federally licensed hydroelectric projects.” (*California v.*

FERC, 495 U.S. at 496-97.)

Regardless of the procedures for the federal Alternative Licensing Process and whether FERC considers the CEQA documents in deciding proposed relicensing conditions, DWR had an independent obligation to conduct CEQA review to inform the public and state officials of the environmental consequences of DWR's proposed project before DWR made *its* decision. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) Nothing in the Settlement Agreement remotely suggests that the Alternative Licensing Process requires otherwise. (See, e.g., AR G000111 [rejecting premise that the Settlement Agreement is "intended to, or shall be construed to, affect or limit" Parties' other legal obligations].) As the EIR's scoping document explained, "[t]he EIR is not required to be included in the FERC Application for License, but may be required under [CEQA] to support decision-making by the [SWRCB] over Section 401 Water Quality Certification and *to support decision-making by DWR*." (AR C001739-40, italics added.) FERC's alternative administrative process cannot abrogate DWR's responsibility to comply with CEQA as part of this decision-making.

3. The ICCTA's Deregulatory Purpose Does Not Distinguish *Friends of the Eel* from this Case.

The Opinion justifies the absence of any clear statement by contrasting the Federal Power Act's regulatory nature with the ICCTA's

"deregulatory" purpose. (Opinion at 23.) This position ignores the parallel language and purposes of both acts.

The ICCTA "contemplates a unified national system of railroad lines subject to federal, and not state, regulation" that "would preempt state regulation in the form of the state's imposition of environmental preclearance requirements on a privately-owned railroad." (*Friends of the Eel River*, 3 Cal.5th at 690; see also *CSX Transp., Inc. v. Georgia Public Service Com.* (N.D. Ga. 1996) 944 F.Supp. 1573, 1581 [finding it "difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority" than the ICCTA's preemption clause].) But this Court held that the ICCTA's express preemption clause, 49 U.S.C. section 10501(b)—which grants the federal Surface Transportation Board "exclusive" jurisdiction over rail transportation and improvements and "preempt[s] the remedies provided under . . . State law"—was not sufficiently clear to preempt a challenge enforcing a public rail agency's obligation to comply with CEQA. (*Friends of the Eel River*, 3 Cal.5th at 706-07, 720-25.)

Nixon and subsequent cases have similarly applied the clear statement rule in the context of another regulatory statute, the federal Telecommunications Act. (See *Tennessee v. Federal Communications Commission* (6th Cir. 2016) 832 F.3d 597.) Like the Federal Power Act, the Telecommunications Act is not deregulatory. (See *Capital Cities Cable,*

Inc. v. Crisp, 467 U.S. 691, 700 (1984) [the Act gives the FCC "broad responsibilities to regulate all aspects of interstate communication"].) Yet, even in the face of broad federal regulatory power, states retain authority to govern their subdivisions' participation in the telecommunications market. (*Nixon*, 541 U.S. at 132; *Tennessee*, 832 F.3d at 611-12.)

Nothing in the Federal Power Act comes close to the ICCTA's or Telecommunications Act's clear expressions of intent to preempt state law. Rather, the Federal Power Act's savings clause demonstrates Congressional intent to *preserve* state authority. (See 16 U.S.C. § 821.) Even if the Act contained a sweeping express preemption clause like the ICCTA or Telecommunications Act, under *Friends of the Eel River* and *Nixon*, it would not suffice to preempt DWR's obligation to comply with CEQA here.

4. Limits on State Regulation of Private Parties Cannot Undermine a State's Sovereign Control over Its Subdivisions.

In finding that the Federal Power Act preempts California's governance of DWR's relicensing efforts, the Opinion erroneously concludes that the U.S. Supreme Court has "rejected" application of the clear statement requirement to the Federal Power Act. (Opinion at 22, 26-27 [discussing *First Iowa*, 328 U.S. 152 and *California v. FERC*, 495 U.S. 490].) This rejection, which the Opinion infers from this case law, belies the Opinion's inconsistent claim to have applied the "unmistakably clear"

requirement. (Opinion at 26.) Indeed, neither *First Iowa* nor *California v. FERC* mentioned, much less "rejected," the clear-statement rule that was central in *Friends of the Eel River*, *Nixon*, and predecessor cases. (See *Gregory*, 501 U.S. 452.)

First Iowa and *California v. FERC* are inapposite precisely because they involved state regulation of *private* hydroelectric projects, not state governance of public projects like DWR's. (See 495 U.S. at 494-95; 328 U.S. at 156.) Other authority relied upon in the Opinion likewise involved regulation of private parties. (See Opinion at 25 [citing *Sayles Hydro v. Maughan* (9th Cir. 1993) 985 F.2d 451 and *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd.* (2010) 183 Cal.App.4th 330, 339-40].)

The high court held that the Federal Power Act "establishes a broad and paramount federal *regulatory* role" over hydroelectric projects, displacing state *regulatory* efforts. (*California v. FERC*, 495 U.S. at 499, italics added.) But the court did not address situations where state law governs a subdivision's decisions about *whether and how to pursue a state-sponsored project*. In those circumstances, *Friends of the Eel River* unequivocally holds that CEQA compliance is "not regulation but instead *self-governance* on the part of the state," and thus, not preempted. (3 Cal.5th at 703.)

The Opinion's assertions that "CEQA laws . . . are regulatory acts

pure and simple" (Opinion at 29) conflicts with *Friends of the Eel River's* contrary holding.[5] Review is needed to clarify the scope of California's authority over its subdivisions and resolve these legal conflicts.

II. The Opinion Conflicts with *County of Amador v. El Dorado County Water Agency*.

The Opinion also fails to confront conflicts with the Third District's decision in *County of Amador*, 76 Cal.App.4th 931. That case, which considered a narrower ambit of state authority than presented here, involved a CEQA challenge to state agencies' acquisition of a hydroelectric dam. (*Id*. at 940.) The Third District held that the Federal Power Act did not preempt this challenge because the dam was not "devoted solely to power generation," and would provide water for consumption. (*Id*. at 761.) Thus, the agencies' acquisition fell within the Federal Power Act's savings clause, which preserved California's requirement that the agencies comply with CEQA. (*Id*.)

Similarly here, generation of hydroelectric power is far from the project's sole purpose. As the EIR describes, the project will serve multiple

[5] The Opinion's rejection of the market participant doctrine (Opinion at 28-29) also directly conflicts with *Friends of the Eel River's* holding that applying CEQA to state-sponsored projects, like DWR's, is *not* regulatory (3 Cal.5th at 703). DWR's decision to use state property to produce power for the energy market for *another 50 years* is clearly a proprietary action. *Friends of the Eel River* recognizes that state laws governing such proprietary decisions, like CEQA, are preserved from preemption. (*Id.*; see also *Engine Manufacturers Assn. v. South Coast Air Quality Management District* (9th Cir. 2007) 498 F.3d 1031, 1042, 1045-46.)

non-hydroelectric functions, including providing crucial water supply for California. (See AR G000158 ["the objective of the Proposed Project is to continue generating electric power while continuing to meet existing commitments . . . pertaining to water supply, flood management, the environment, and recreational opportunities"]; G000160-63 [describing DWR's water supply objectives and commitments].) The Opinion also acknowledges that the "objective of the Project is the continued operation of the Oroville Facilities for water *and* power generation." (Opinion at 3, italics added.) The Opinion's conclusion that the Federal Power Act nonetheless preempts CEQA challenges to this multipurpose project is directly at odds with *County of Amador*.

The Opinion also conflicts with *County of Amador*'s conclusion regarding the significance of CEQA's informational role. In *County of Amador,* the Third District held that CEQA "review does not impose conditions or mandate how a project should be run. It simply explains the effects of the project, reasonable alternatives, and possible mitigation measures so that the public can help guide decision makers about environmental choices." (*County of Amador*, 76 Cal.App.4th at 961-62.) Consequently, "[re]quiring CEQA review does not implicate the licensing or operating or hydroelectric power resources. Nor does it vest states with veto power over a federal project." (*Id*.)

The Opinion reverses course from this holding. It misconstrues the

Counties' case as "California's imposition of CEQA in the FERC licensing process" (Opinion at 29), argues that "state laws . . . cannot be used to delay relicensing" (*id.* at 19), and ultimately ignores CEQA's fundamental purpose of guiding DWR's decision-making.[6] The Opinion is irreconcilable with *County of Amador*.

III. The Opinion Raises an Important Issue of Whether the Federal Power Act Preempts Enforcement of CEQA Review Supporting a Water Quality Certification.

The Opinion recognizes the "exception to federal jurisdiction" in Clean Water Act section 401, 33 U.S.C. § 1341, which requires DWR to obtain a "certificate that the project has complied with the *state law* that regulates the pollution of water." (Opinion at 15.) "Preparation and certification" of an EIR "directed to the environmental effects of the state's more stringent water law" is "required before" State Board certification, and DWR's EIR "is intended to fulfill" that requirement. (*Id.* at 16.)

The Opinion then proceeds to render CEQA's role in this process meaningless. First, the Opinion incorrectly states that CEQA review in the water quality certification process is for the benefit of FERC and subject to FERC review. (*Id.* at 18.) Second, the Opinion asserts that any challenge to the adequacy of that CEQA review can and must occur upon

---

[6] The Counties, in seeking DWR's CEQA compliance, do not propose cessation of Oroville operations, or withdrawal of DWR's pending FERC license application. (Counties' Supplemental Reply at 39.)

implementation of the conditions in the water quality certificate, after FERC issues a license. (*Id.* at 20.) In doing so, the Opinion improperly elevates FERC's pending review of the license over the State's admittedly non-preempted review of the project's impacts on state water quality. This would create an unworkable system where challenges to state environmental review supporting certification, if not foreclosed entirely, could only occur long after project decisions have been made or can be undone. This result is fundamentally inconsistent with state law requirements expressly preserved by the Federal Power Act.

A. The Opinion Conflicts with Federal Authority by Concluding that the "Environmental Predicate" to Water Quality Certification, Here Provided Solely by DWR's EIR, Is Subject to FERC Review.

The Opinion recognizes, as it must, that the Federal Power Act does not preempt California law supporting water quality certification. (*Jefferson County*, 511 U.S. at 707-08 [broadly interpreting state authority under section 401(d) to ensure compliance with "*any other appropriate requirement of State law set forth in such certification*"]; italics added.)[7] Certification must present "a reasonable assurance that the activity will be

[7] *Jefferson County* upheld a Washington Supreme Court ruling holding that section 401(d) empowers states to "consider all state action related to water quality in imposing conditions on section 401 certificates." (511 U.S. at 710 [quoting *Department of Ecology v. PUD No. 1* (1992) 121 Wash.2d 179, 182].) The state decision followed a two-year environmental study addressing water quality, hydrology, instream flows, and protection of fisheries habitat. (121 Wash.2d at 194.)

conducted in a manner which *will not violate applicable water quality standards*." (40 C.F.R. § 121.2(a)(3), italics added.) In California, the "certifying agency" is the State Board. (Wat. Code § 13160; see generally Cal. Code Regs., tit. 23, § 3855, et seq.)

The State Board requires CEQA compliance before water quality certification (Cal. Code Regs., tit. 23, § 3856(f), 3837(b)(2)), including for decisions requiring a FERC license (Cal. Code Regs., tit. 23, § 3855(b)(1)(B)(2)). If the state issues a certification on conditions, those conditions must be included in the federal permit or license. (33 U.S.C. § 1341(d).)

A water quality certification process, and the supporting EIR, are not subject to FERC review, as the Opinion posits. (See Opinion at 18, 32.) Rather, FERC *cannot* reject conditions imposed by a state through the water quality certification process, even if FERC believes the conditions are outside of the state's power or unrelated to water quality issues. (*American Rivers, Inc. v. Federal Energy Regulatory Commission* (2d Cir. 1997) 129 F.3d 99, 107 [rejecting FERC's attempts to deem requirements of state certification procedure ultra vires, contrary to the "unequivocal language" and broad reach of section 401(d)].) The State Board has relied on this federal authority to conclude that FERC "has *no* authority to review" the basis for the state agency's certification and conditions. (Request for Depublication at 3 [citing *American Rivers*, 129 F.3d 99 at

107-11].) According to the State Board, the "proper forum" for challenging that review is state court, not federal court. (Request for Depublication at 3; see also *Alcoa Power Generating, Inc. v. FERC* (D.C. Cir. 2011) 643 F.3d 963, 971.) The Opinion ignores the State Board's position, *American Rivers*, and *Alcoa.*

The Opinion's assertion that FERC has authority to review the EIR for a water quality certification also fails to apply a second, equally dispositive principle from the U.S. Supreme Court's *Jefferson County* decision. Distinguishing cases involving conflict with already-enacted federal licensing provisions, the Supreme Court concluded that "[n]o such conflict with any FERC licensing activity is presented here. *FERC has not yet acted on petitioners' license application, and it is possible that FERC will eventually deny petitioners' application altogether*." (511 U.S. at 722, italics added.)

Likewise here, because FERC has "not acted" on DWR's license application since 2008, its disposition of the new project license remains unknown. The Counties do not challenge any enacted FERC license provision, any provision on the original FERC license that expired in 2007, or any of the temporary annual licenses issued since then. Review must be granted to consider whether the Opinion improperly constrains California's water quality certification procedure requiring CEQA compliance before certification, based upon hypothetical conflict with an unmade federal

relicensing decision.

B. The Opinion Improperly Assumes CEQA Compliance Supporting a Water Quality Certification Awaits a Subsequent "Implementation" Stage.

DWR's EIR, the sole environmental document supporting water quality certification (AR G000134, G000110), was an indispensable information source for the State Board's water quality determinations and conditions of certification—areas Congress reserved for the state. It is hard to imagine a subject more centrally connected to state water quality than deficiencies in DWR's hydrologic analysis, a chief focus of the Counties' CEQA case. Nonetheless, the Opinion once again insists, without authority, that any challenge to the adequacy of the CEQA analysis supporting a water quality certification must await subsequent "implementation" of certification conditions. (See, e.g., Opinion at 6 fn. 7, 7 fn. 9, 11-12, 16, 18, 19.)

The Opinion reverses the normal CEQA process. As this Court has repeatedly held, "EIRs should be prepared as early in the planning process as possible." (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 130 [quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 395].) At a minimum, an EIR must always "be performed before a project is approved." (*Save Tara*, 45 Cal.4th at 130.) Yet here, the Opinion concludes that an EIR prepared for a water quality certification is effectively unreviewable when it is adopted by a lead

agency or relied on by the State Board. Instead, the Opinion concludes that a CEQA challenge arises, if available at all, upon project *implementation*, long after the agencies have committed to the project.

As the State Board previously argued, this conclusion is fundamentally at odds with the requirement that legal challenges to the Board's decisions, including issuance of a section 401 certificate, "be filed within 30 days." (Request for Depublication at 2 [citing Wat. Code § 13330(b)].) It is equally at odds with CEQA's requirement that challenges to the sufficiency of environmental review be filed and resolved expeditiously. (See Pub. Resources Code § 21167.) By maintaining its unsupported conclusion regarding the timing for this CEQA challenge, the Opinion fails to resolve the State Board's concern that this decision "may encourage untimely challenges to [State] Board water quality certifications, resulting in increased litigation and uncertainty." (Request for Depublication at 2.)[8]

Furthermore, as DWR's decision document confirms, there is no assurance of *any* opportunity to timely challenge EIR errors at some later

[8] Although the Opinion argues that implementation "is dependent upon" the State Board's filing of its certificate with FERC (Opinion at 7, fn. 9), and that this "has not" occurred "because of the pendency of this action" (*id.* at 20), the State Board previously dispelled these inaccuracies and clarified that the Board already filed its water quality certification with FERC (Request for Depublication at 2, fn. 1).

implementation stage. If FERC approves the proposed project or the FERC staff alternative, "no additional analysis under CEQA is required and the DWR Director may accept the license." (AR A000008; see also AR G0002010-11 [later actions offer no assurance of an opportunity for subsequent CEQA review].)

Finally, the Opinion would encourage redundant lawsuits against lead and responsible agencies despite CEQA's design to avoid such scenarios. As the agency carrying out the project, DWR correctly determined that it was a lead agency tasked with preparing an EIR before it committed to its project. (See Cal. Code Regs., tit. 14, § 15051(a); Opinion at 3.) The Counties followed well-established CEQA practice in bringing a single timely CEQA challenge to DWR's EIR, the only CEQA document for lead and responsible agencies. As courts have recognized, the Legislature intended to "expedite CEQA review" through lawsuits challenging the lead agency's CEQA documentation, instead of multiple suits against responsible agencies as well. (*City of Redding v. Shasta County Local Agency Formation Commission* (1989) 209 Cal.App.3d 1169, 1181 [interpreting Pub. Resources Code § 21167.3].) Thus, CEQA requires a responsible agency like the State Board to "assume that" DWR's challenged EIR is valid, but any "permission to proceed with the project" conferred by the responsible agency would remain "at the applicant's risk"—here, at DWR's risk—"pending final determination" of the

proceeding against the EIR. (Pub. Resources Code § 21167.3(b).)

The Opinion asserts, however, that DWR's EIR is reviewable following action by the State Board, a responsible agency (see Opinion at 12, fn. 14), and encourages future petitioners to file suits against both lead and responsible agencies to challenge the same EIR. Requiring separate proceedings against both lead and responsible agencies conflicts with well-established law and would cause confusion affecting not only dam licensing projects in the state, but the many projects in California involving lead and responsible agencies. Review is necessary to restore uniformity to the law and avoid unnecessary confusion of the CEQA process.

IV. The Opinion Thrusts Uncertainty Upon FERC Relicensing, Water Quality Certification, and CEQA Proceedings Throughout California.

The Opinion repeats and entrenches the central problems with the 2018 Opinion. Avoiding the CEQA merits here by invoking preemption would render unreviewable the Oroville Facilities EIR, a document of foundational importance to the counties and communities near the Oroville Facilities and statewide. More than eleven years, including prolonged drought and flooding, have passed since the two most affected counties challenged DWR's EIR, the sole CEQA document informing critical state decisions regarding the largest state-owned dam. DWR agrees with the Counties that it is time to resolve the merits, which will test whether DWR's EIR accounted for the full range of hydrologic conditions

scientists, including DWR's own, anticipate during the fifty-year project term. By contrast, denying review on preemption grounds would effectively end CEQA accountability for an EIR all respondents, including SWC, spent years seeking to uphold.

Preemption here also needlessly casts a shadow over numerous relicensing proceedings and other projects involving CEQA and federal-state interactions. There are around 124 FERC licenses in California.[9] Many dam projects pending licensing in California will foreseeably require compliance with CEQA, either because the dam operator is a public agency, because the facilities will require a water quality certification from the State Board, or both.[10]

The Opinion's retreat from CEQA accountability will affect not just

---

[9]FERC Complete List of Active licenses (updated September 10, 2019) https://www.ferc.gov/industries/hydropower/gen-info/licensing.asp.

[10] *See, e.g.*, Bucks Creek Hydroelectric Project (FERC Project No. 619, FERC Docket No. P-619-164) (last license expired 12/31/18) (Applicants: PG&E and City of Santa Clara); Don Pedro Water Storage and Hydroelectric Storage Project (FERC No. 2299) (last license expired 4/30/16) (Applicants: Turlock Irrigation District & Modesto Irrigation District); Yuba River Development Project (FERC No. 2246) (last license expired 4/30/16) (Applicant: Yuba County Water Agency); South SWP Hydropower Project (FERC No. 2426) (current license expires 1/31/22) (Applicant: DWR and Los Angeles Department of Water and Power); Kerckhoff Hydroelectric Project (FERN No. 96) (current license expires 11/30/22) (Applicant: PG&E); Camp Far West Hydroelectric Project (FERC No. 2997) (current license expires 6/30/21) (Applicants: South Sutter Water District).

projects requiring water quality certification, but any in which the dam operator is a public agency. For example, the Devil Canyon Project, like the Oroville Facilities, is part of the State Water Project and undergoing FERC relicensing. (http://devil-canyon-project-relicensing.com/project/.) DWR's schedule for the proposed project includes time for "CEQA activities" before filing of the final license application. (See http://devil-canyon-project-relicensing.com/schedules/.) Similarly, the Los Angeles Department of Water and Power and DWR are pursuing relicensing of the South State Water Project, a component of the State Water Project. (http://south-swp-hydropower-relicensing.com/project/.) The schedule for this project likewise calls for the preparation of an environmental impact report under CEQA. (See http://south-swp-hydropower-relicensing.com/schedules/.) Beyond that, as noted in the California State Association of Counties' letter supporting review of the 2018 Opinion, the cloud of uncertainty surrounding CEQA compliance mandated under California law extends outside the hydroelectric licensing context, frustrating and muddling CEQA compliance requirements in other areas implicating a federal statutory scheme.

SWC's continued pursuit of preemption, even after DWR disavowed it, underscores the strong likelihood that these and similar efforts to avoid CEQA will continue. Without rigorous adherence to this Court's preemption standards, CEQA may increasingly become an afterthought

immune from judicial review or enforcement. Such a result cannot be squared with *Friends of the Eel River,* which established the critical role CEQA plays in the California's internal governance even in the face of a federal program designed to avoid conflicting state requirements. It also cannot be squared with the U.S. Supreme Court's recognition in *Jefferson County* that requirements of state law cannot be preempted, and are vital to inform and fulfill the water quality responsibilities Congress has expressly left to the states.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

DATED: October 15, 2019 LAW OFFICE OF ROGER B. MOORE

By: /s/ Roger B. Moore
Attorney for Plaintiffs and Appellants COUNTY OF BUTTE, and COUNTY OF PLUMAS et al.

DATED: October 15, 2019 SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Edward T. Schexnayder
Attorneys for Plaintiff and Appellant COUNTY OF BUTTE

DATED: October 15, 2019 R. CRAIG SETTLEMIRE, COUNTY OF PLUMAS, COUNTY COUNSEL

By: /s/ R. Craig Settlemire
Attorney for Plaintiff and Appellant COUNTY OF PLUMAS et al.

DATED: October 15, 2019

BRUCE ALPERT, COUNTY OF BUTTE, OFFICE OF COUNTY COUNSEL

By: /s/ Bruce Alpert
Attorney for Plaintiff and Appellant
COUNTY OF BUTTE

CERTIFICATE OF WORD COUNT

In accordance with California Rules of Court Rule 8.504(d)(1), I certify that, exclusive of this certification and the other exclusions referenced in Rule of Court 8.204(c)(3), this **PETITION FOR REVIEW** contains 7,657 words, including footnotes, as determined by the word count of the computer used to prepare this brief.

DATED: October 15, 2019 SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Edward T. Schexnayder
EDWARD T, SCHEXNAYDER

Attorneys for Plaintiff and Appellant
COUNTY OF BUTTE

EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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.

C071785

(Super. Ct. No. CVCV091258)

Yolo County

OPINION ON TRANSFER

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 a judgment of the Superior Court of Yolo County, Daniel P. Maguire, Judge. Dismissed with directions.

Bruce Alpert, County Counsel; Rossmann and Moore, Antonio Rossmann, Roger B. Moore, and Barton Lounsbury; Law Office of Roger B. Moore and Roger B. Moore; and Shute Mihaly & Weinberger, Ellison Folk for Plaintiff and Appellant County of Butte.

R. Craig Settlemire, County Counsel; Law Office of Roger B. Moore and Roger B. Moore; and Law Offices of Michael B. Jackson and Michael B. Jackson for Plaintiffs and Appellants Plumas County and Plumas County Flood Control and Water Conservation District.

E. Robert Wright for Friends of the River and the California Sportfishing Protection Alliance as Amici Curiae on behalf of Plaintiffs and Appellants.

Kamala D. Harris and Xavier Becerra, Attorneys General, Robert W. Byrne, Senior Assistant Attorney General, Randy L. Barrow and Tracy L. Winsor, Supervising Deputy Attorneys General, and Deborah L. Barnes and Matthew J. Goldman, Deputy Attorneys General for Defendant and Respondent Department of Water Resources.

The Sohagi Law Group, Margaret M. Sohagi and Philip A. Seymour; Duane Morris, Thomas M. Berliner, Paul J. Killion, and Jolie-Anne S. Ansley; and Downey Brand, David R.E. Aladjem for Real Parties in Interest and Respondents Alameda County Flood Control & Water Conservation District, Zone 7, Kern County Water Agency, San Bernardino Valley Municipal Water District, Santa Clara Valley Water District, The Metropolitan Water District of Southern California, and State Water Contractors, Inc.

The Department of Water Resources (DWR) applied to the Federal Energy Regulatory Commission (FERC or Commission) to extend its federal license to operate Oroville Dam and its facilities as a hydroelectric dam.[1] The project subject to relicensing is referred to as the Oroville Facilities Project (sometimes also Project or Settlement Agreement (SA)) by which the affected parties agree to the conditions for the extended license. "The SA includes Appendix A, which incorporates all of the . . . measures that

---

[1] The action does not concern the construction, repair, or replacement of the dam spillways, the need for which occurred during the pendency of this case.

the Settling Parties believe to be under FERC's jurisdiction."[2] The objective of the Project is the continued operation of the Oroville Facilities for water and power generation and the implementation of conditions for the extended license.

DWR filed a programmatic (informational) Environmental Impact Report (EIR) as the lead agency in support of the application pursuant to the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; hereinafter CEQA). Plaintiffs challenged the sufficiency of the EIR, the failure to consider the import of climate change, in the state courts and sought to enjoin the issuance of an extended license until their environmental claims were reviewed.[3] The trial court denied the petition on grounds the environmental claims were speculative.

In an earlier opinion we held that the authority to review the EIR was preempted by the Federal Power Act (16 U.S.C. § 791a et seq.; hereinafter FPA), that the superior court lacked subject matter jurisdiction of the matter, and ordered that the case be

---

[2] Throughout this opinion, all quotations are to the Draft Environmental Impact Report (DEIR) unless otherwise indicated.

[3] The plaintiffs brought this action on the premise the environmental effects of relicensing the dam concern the *operation* of the dam and that jurisdiction to review the matter lies in the state courts pursuant to CEQA. They claim that a CEQA document offered to support the DWR's application to FERC failed to consider the impact of climate change on the operation of the dam for all the purposes served by the dam. The superior court dismissed the complaint on the ground that predicting the impact of climate change is speculative. The plaintiffs appealed.

The plaintiffs rely on CEQA case authority to stay the relicensing procedure pending *state* judicial review of the DWR's approval of the project. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 (*Santiago County*).) Plaintiff Butte County requested that the state court "[e]njoin DWR's project until and unless respondent [DWR] lawfully approves the project in the manner required by CEQA . . . ." Plaintiff County of Plumas requested that: "Respondents and real parties in interest . . . suspend all activity under the certification that could result in any change or alteration in the physical environment until respondent has taken actions that may be necessary to bring the certification into compliance with CEQA."

dismissed. Plaintiffs petitioned for review in the Supreme Court, review was granted, and the matter was transferred to us with directions to reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677 (*Eel River*). We do so.

In part E of the Discussion, *post*, we have reviewed *Eel River* and determined that the Interstate Commerce Commission Termination Act (ICCTA), at issue in *Eel River*, is materially distinguishable from the FPA. We shall conclude that *Eel River* does not apply in this case. *Eel River* did not involve the FPA. At issue was whether the ICCTA preempted the application of CEQA to a project to resume freight service on a stretch of rail line owned by the North Coast Railroad Authority. The Legislature created the North Coast Railroad Authority and gave it power to acquire property and operate a railroad, to be owned by a subsidiary of the state. The Supreme Court found the purpose of the federal law was deregulatory and the state as the owner of the railroad was granted autonomy to apply its environmental law. For that reason, the federal law did not preempt the application of CEQA to the railroad.

INTRODUCTION

Oroville Dam was completed in 1968 as part of the State Water Project (SWP). It blocks access to 66.9 miles of high-quality habitat for anadromous fish (salmon & steelhead). FERC licenses are conditioned on the adoption of a plan for the "adequate protection, mitigation, and enhancement of fish and wildlife . . . and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes . . . ." (16 U.S.C. § 803(a)(1).) The Feather River Fish Hatchery was built to compensate for the loss of spawning grounds resulting from the construction of Oroville Dam.

A federal license is required by the FPA for the construction and operation of a hydroelectric dam. The license is issued by FERC. As we explain, with one relevant exception the FPA occupies the field of licensing a hydroelectric dam and bars review in

the state courts of matters subject to review by FERC. (See, e.g., *First Iowa Hydro-Electric Cooperative v. Federal Power Com.* (1946) 328 U.S. 152 (*First Iowa*).) The reason is that a dual final authority with a duplicate system of state permits and federal licenses required for each project would be unworkable. In this case the duplicate authority involves the separate NEPA (National Environmental Protection Act) and CEQA reviews of the SA. (*Ibid*.)

The exception to preemption lies with the state's authority to impose more stringent water quality conditions on the license than federally required pursuant to section 401 (33 U.S.C. § 1341; hereinafter section 401) of the Clean Water Act[4] (33 U.S.C. § 1251 et seq.).[5] In California the authority to establish the conditions is vested in the state water pollution control board (now State Water Resources Control Board (SWRCB)). (Wat. Code, § 13160 et seq.) The conditions must be set forth in a certificate to be incorporated in the license.[6] The environmental predicate for the certificate is set forth in Appendix A of the SA in both NEPA and CEQA reviews of the conditions for the license. To avoid duplication of federal and state environmental reviews, the jurisdiction to review the environmental conditions lies with FERC.

---

[4] The Clean Water Act provides: "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act [33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317]." (33 U.S.C. § 1341(a)(1).)

[5] The formal name of the Clean Water Act is the Federal Water Pollution Control Act.

[6] References to a certificate is to the law generally, references to the "Certificate" are to the SWRCB certificate issued December 15, 2010. (State Water Resources Control Board, Order WQ 2010-0016 (Dec. 15, 2010).)

The DWR proposes, in fulfillment of the environmental requirements of section 803 of title 16 of the United States Code, that new measures be taken to improve the conditions of fish and wildlife affected by the presence of the dam. The measures include a commitment by DWR to develop plans to enhance, protect, restore, and/or create habitat within the FERC boundary to be set forth in a certificate. These environmental plans, referred to as the "New Project License," are subject to CEQA environmental review when implemented.[7] The DWR has selected a federal alternative procedure, an SA, for the fulfillment of its obligations. The SA involves the agreement of the parties affected by the extended license.

We shall conclude that the plaintiffs cannot challenge the environmental sufficiency of the SA in the state courts because jurisdiction to review the matter lies with FERC and plaintiffs did not seek federal review as required by 18 Code of Federal Regulations part 4.34(i)(6)(vii) (2003). Moreover, the plaintiffs did not challenge and could not challenge the SWRCB Certificate in their pleadings because it did not exist at the time this action was filed. The extended license issues upon the filing of a certificate and that cannot be delayed beyond one year from the date of a request for the certificate.[8]

---

[7] A project under CEQA involves a physical change in the environment. Public Resources Code section 21065 defines one required element of " 'Project' " as: "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment . . . ." Because the CEQA document is programmatic it is a plan only. The implementation of the plan involves the construction of new environmental facilities required by the program, such as new spawning grounds. It is these implementations that may require review under CEQA.

[8] "Section 401(a)(1) requires that a State 'act on a request for certification[] within a reasonable period of time (which shall not exceed one year) after receipt of such request,' or else 'the certification requirements of this subsection shall be waived . . . .' " (*Alcoa Power Generating Inc. v. FERC* (D.C. Cir. 2011) 643 F.3d 963, 972.) It is only after the issuance of the license that the plan in the Certificate may be implemented.

Accordingly, this court has no jurisdiction of the cause tendered. We shall return the case to the trial court with an order to dismiss the complaint for lack of subject matter jurisdiction.[9]

FACTS[10]

The Oroville FERC Project No. 2100 is located on the Feather River in the Sierra Nevada foothills in Butte County, California. The Oroville Facilities were constructed between 1961 and 1968 as part of the SWP, a water storage and delivery system of reservoirs, aqueducts, power plants, and pumping plants designed to provide flood control and to store and distribute water to supplement the needs of urban and agricultural water users in both Northern and Southern California. The Oroville Dam is the largest earthen dam in the United States. The Oroville Facilities Project is operated for power generation, water quality improvement in the Sacramento–San Joaquin Delta, recreation, fish and wildlife enhancement, and flood management. The dam is designed to access

---

[9] The court advised the parties that its tentative view was that the relicensing of the Oroville Dam and Oroville Facilities Project is preempted by the FPA and implementing regulations (e.g., 18 C.F.R. §§ 4.34, 385.602 (2003)) and that jurisdiction over a challenge to the issuance of the license lies with FERC. Accordingly, we advised that the case should be returned to the superior court with directions to dismiss the action for lack of federal subject matter jurisdiction. We invited the parties to submit supplemental briefs in response to our advice.

They did so and agreed that the case was subject to federal law except for the environmental program contained in a certificate prepared by the SWRCB. The plaintiffs then sought to challenge the environmental predicate for the Certificate setting forth the state's more stringent water quality provisions on the ground it also fails to consider climate change. The 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. That has not occurred because implementation is dependent upon the filing of the Certificate. Accordingly, there is no issue regarding the implementation of the Certificate to review on appeal.

[10] The facts and procedure regarding the subject of jurisdiction appear at relevant points in the Discussion.

the waters of Lake Oroville at different depths to allow control of the temperature of the water discharged from the dam. The only physical change to the existing dam is the opening of a water valve to access the cold water at the bottom of Lake Oroville.[11]

The Oroville Facilities include facilities and operations to help protect and enhance fish and wildlife species and their habitat. Many of the existing environmental programs implemented within the Oroville Facilities Project boundary are cooperatively managed or are based on agreements with other agencies such as the Department of Fish and Game and the United States Fish and Wildlife Service. This includes operation and maintenance of facilities such as the Feather River Fish Hatchery and the Oroville Wildlife Area and implementation of measures developed in consultation with interested parties to protect species that are listed under the Federal Endangered Species Act and/or the California Endangered Species Act.

As an integral part of the SWP, water stored in Lake Oroville is released from the Oroville Facilities to meet a variety of statutory, contractual water supply, flood management, and environmental commitments. These contractual, flood management, fishery, water quality, and other environmental obligations are defined in numerous operating agreements that specify the timing, flow limits, storage amounts, and/or constraints on water releases. The relicensing of the operation of the dam is consistent with these existing commitments and no changes to the contractual obligations or to the general pattern of these releases are anticipated.

The Oroville Facilities are also important components of the Sacramento River Flood Control Project, the flood management system for areas along the Feather and Sacramento rivers downstream of Oroville Dam. The Oroville Facilities provide flood protection benefits to Oroville, other portions of Butte County, Marysville, Yuba City,

---

[11] The water valve permits access to cooler water from the bottom of Lake Oroville that is fed by the Feather River, which flows through a tunnel built during the construction of the dam to convey water from the river around the site of the dam.

other portions of Yuba and Sutter counties, and many smaller communities downstream to Sacramento. The use of the dam to control floods is governed by federal regulations issued by the U.S. Army Corps of Engineers. The Oroville Facilities also provide protection to 283,000 acres of developed agricultural lands and a variety of transportation and other public utility infrastructure. Pursuant to section 204 of the federal Flood Control Act of 1958, flood control operations at Oroville are governed by the rules and regulations prescribed by the Secretary of the Army. The Proposed Project is consistent with existing U.S. Army Corps of Engineers flood management objectives.

DISCUSSION

A. The Federal Relicensing Procedure

In order to view the case in the proper light we start with the federal administrative procedure invoked by DWR. Under provisions of the FPA the federal and state license procedures have been melded into a single procedure called an alternative license process (ALP). It combines the federal and state environmental review process into a single process by which the affected parties, federal and state agencies, local entities (including the plaintiffs) and affected private parties,[12] agree to the terms of relicensing in a SA. The SA combines the "pre-filing consultation process, the environmental review process under the National Environmental Policy Act and administrative processes associated with the Clean Water Act and other statutes." (18 C.F.R. § 4.34(i)(2)(i) (2003).) The procedure includes "[t]he cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies" and "[t]he preparation of a preliminary draft environmental assessment [PDEA] or preliminary draft environmental impact statement . . . ." (18 C.F.R. § 4.34(i)(4)(ii) & (iii) (2003).) Some 52 parties

---

[12] The settling parties include not only DWR but also the United States Department of the Interior on behalf of its component bureaus, real parties State Water Contractors, the Department of Fish and Game, and numerous local government and environmental organizations.

including the plaintiffs and the United States Department of the Interior, representing all interested federal agencies, participated in the process. However, the plaintiffs withdrew as parties and subsequently brought this case in the state court challenging inter alia the adequacy of CEQA treatment of global climate change.

The federal law provides for an ALP. We note that the federal administrative regulation does not refer to CEQA. (See 18 C.F.R. § 4.34(i)(6)(vii) (2003).) The purpose of the ALP is to "resolv[e] all issues that have or could have been raised by the Parties in connection with FERC's order issuing a New Project License . . . ." The SA provides that these requirements are incorporated in the license as conditions of the license.

The ALP substitutes the environmental report, normally required in an application to FERC, with a "Preliminary Draft Environmental Assessment (PDEA)." "The ALP is intended to expedite the licensing process by combining the prefiling consultation and federal and State environmental review process into a single process." After DWR submitted its draft license application and draft PDEA the stakeholders continued to negotiate and ultimately developed the SA, which was signed by 52 parties and adopted by DWR as the Proposed Project and submitted to FERC.

The SA includes "[t]he cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies" and "[t]he preparation of a [PDEA] . . . ." (18 C.F.R. § 4.34(i)(4)(ii) & (iii) (2003).) The purpose of the SA is to "resolve[] all issues that may arise in the issuance of all permits and approvals associated with the issuance of the New Project License, including . . . Section 401 Certification, [National Environmental Policy Act] and CEQA." The SA includes two appendices which mark the line between federal (Appendix A) and state (Appendix B) jurisdiction.[13]

---

[13] Appendix B contains agreements by the parties that are not required by federal law including the contribution of money to construct the new facilities. No issue regarding Appendix B has been tendered.

In its federal NEPA environmental impact statement for the Project, FERC evaluated only Appendix A of the SA.

Thus, in keeping with *First Iowa,* Appendix A of the SA sets out the matters subject to federal jurisdiction. The potentially confusing aspect of the procedure is the presence of a lengthy CEQA document. It serves two purposes. It provides the underlying environmental studies supporting both the FERC application (PDEA) and the state's (SWRCB) more stringent clean water law. The environmental matter set forth in the SA is reviewable by FERC for purposes of the PDEA and by the SWRCB as a predicate for the state's more stringent water quality conditions. Thus the program in Appendix A fulfills two functions: (1) It provides the state's environmental information to meet FERC's requirements (PDEA); and (2) it supplies the environmental information from which the SWRCB develops the state's clean water law in a certificate.

That is all that is required for issuance of the FERC license. As noted, the implementation of the clean water rules is potentially subject to further CEQA review. The program contained in the Certificate provides for further studies and implementation of the state's more stringent clean water law rules *after* the issuance of the FERC license.

"[T]he SA 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 to the Oroville license for the next 50 years."

"The objective of the Proposed Project is the continued operation and maintenance of the Oroville Facilities for electric power generation, including implementation of any terms and conditions [(adopted by the SWRCB)] to be considered for inclusion in a new FERC hydroelectric license." (Italics added.)

In this case "[t]he SA includes a commitment by DWR to develop, in consultation with stakeholders, a number of plans to enhance, protect, mitigate, restore, and/or create habitat within the FERC Project boundary. It also requires that DWR complete a number of studies and conduct monitoring to guide future decisions and activities. While these

. . . will likely lead to future actions that would be subject to CEQA environmental review prior to implementation . . . [they] do not result in a physical change to the environment and thus are not ready for project-specific CEQA analysis at this time."[14]

"The SA includes Appendix A, which incorporates all of the protection, mitigation, and enhancement . . . measures that the Settling Parties believe to be under FERC's jurisdiction in Proposed License Articles, and Appendix B, which includes all of the PM&E measures and other agreements that the Settling Parties believe to be outside of FERC's jurisdiction or that are commitments made by parties other than DWR."

"In general, SA Appendix A includes a commitment by DWR to develop, in consultation with stakeholders, numerous environmental plans and programs. These environmental plans and programs would improve fish spawning and rearing habitat to complement FESA anadromous fish species recovery programs, support the Feather River Fish Hatchery, provide additional habitat for waterfowl, provide protection for terrestrial FESA species, monitor water quality in project waters, improve habitat for warmwater fish species and improve the coldwater fishery in Lake Oroville, and provide new management direction for the [Oroville Wildlife Area]."

A dispute concerning "required [environmental] studies," tendered by an entity "participating" in the ALP, is subject to federal administrative review before FERC. (18 C.F.R. § 4.34 (i)(6)(vii) (2003).) Plaintiffs, as participants in the SA, tendered a dispute regarding "required studies" but failed to seek relief before FERC. Accordingly, they failed to exhaust their federal administrative remedies. The SA also contains Appendix B, which sets forth agreements by the parties not required by federal law. No such agreement is at issue in this case.

---

[14] The review of the proposed *implementation* of the changes made by the SWRCB in the Certificate is the only point at which CEQA applies to the licensing procedure.

B. Federal Preemption

Federal preemption is based on the supremacy clause, which states that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI, cl. 2.) There are three types of preemption: (1) express preemption, (2) field preemption, " 'when the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively[,]' " and (3) conflict preemption in which " 'state law is naturally preempted to the extent of any conflict with a federal statute.' " (*Kurns v. Railroad Friction Products Corp*. (2012) 565 U.S. 625, 630.) The FPA contains aspects of all three.

The FPA states: "Nothing herein [16 USCS §§ 791a et seq.] contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. § 821.) "The Supreme Court has read the broadest possible negative pregnant into this 'savings clause.' [(*First Iowa, supra,* 328 U.S. at p. 176.)] The rights reserved to the states in this provision are all the states get." (*Sayles Hydro Associates v. Maughan* (9th Cir. 1993) 985 F.2d 451, 454 (*Sayles Hydro*).)

With one relevant exception, the FPA occupies the field of licensing a hydroelectric dam and bars environmental review of the *federal* licensing procedure in the *state* courts. (*First Iowa, supra*, 328 U.S. 152; *California v. FERC* (1990) 495 U.S. 490; cf. *Sayles Hydro, supra*, 985 F.2d 451; *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330.)

The lead case is *First Iowa.* A state license issued for a hydroelectric dam bypassed the federal licensing system and was enforced in the state courts. The Supreme Court held that the federal law preempted the state law and barred its application in the *state* courts. The court explained that under the FPA "there is a separation of those

subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. . . . A dual *final* authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. . . . [For that reason] [s]ection 9(c) [of the FPA] permits the Commission to secure from the [state] applicant '[s]uch additional information as the Commission may require.' This enables it to secure, in so far as it deems material, such parts, or all of the information that the respective States may have prescribed in state statutes as a basis for state action." (*First Iowa, supra*, 328 U.S. at pp. 167-169, italics added, italics omitted, fns. omitted.) Here that would include the CEQA document in Appendix A of the SA that is the predicate environmental study for the Certificate. Otherwise, *First Iowa* says, the federal law would vest in a state, a veto power over a federal project. "Such a veto power easily could destroy the effectiveness of the [FPA]. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides . . . ." (*Id.* at p. 164.) For the same reasons a state cannot delay a FERC license by issuing a certificate beyond one year of a request for a certificate.

The Supreme Court has said that the FPA preempts the field of "power development and other public uses of the waters." (*California v. FERC, supra*, 495 U.S. at p. 494.) "*California v. FERC* reaffirms *First Iowa*, uses the 'occupy the field' characterization [of the] 'broad and paramount federal regulatory role,' *California v. FERC,* at [p.] 499, and plainly states that 'constricting § 27 [16 U.S.C. § 821] to encompass only laws relating to proprietary rights' accomplishes this 'no sharing' purpose." (*Sayles Hydro, supra,* 985 F.2d at pp. 455-456, fn. omitted.) In *Sayles Hydro*, the Ninth Circuit recognized that "Congress has occupied the entire field, so preemption

will not depend on whether the state requirements conflict with the federal requirements." (*Id*. at p. 453.) Thus, pursuant to *First Iowa*, the state review of the environmental information within the jurisdiction of FERC and contained in the CEQA document cannot be used to delay the issuance of the license.

The Supreme Court also has used a conflict preemption analysis in discussing the supremacy of the FPA. "Even though the ratio decidendi in *California v. FERC* is straight 'occupy the field' preemption, the State Board correctly characterizes words used in the last part of the opinion, where the rule is applied to the facts, as conflict preemption language. The dichotomy between the two types of preemption is not so sharp in practical terms as the legal categorization makes it appear, so the mixed language has little significance." (*Sayles Hydro, supra,* 985 F.2d at p. 456.)

C. The Clean Water Act Exception

The exception to federal jurisdiction is found in section 401 of the Clean Water Act. (33 U.S.C. § 1341.) FERC requires that every application for a federal license that may result in the discharge of pollutants into navigable waters, including pollutants from the discharge of water from a dam, must provide FERC with a *certificate* that the Project has complied with the *state law* that regulates the pollution of water. (33 U.S.C. § 1341; *S.D. Warren Co. v. Maine Bd. of Environmental Protection* (2006) 547 U.S. 370; Wat. Code, § 13160 et seq.). The term pollution includes the temperature and flow of water that impacts the lives of fish in the water below the dam. Thus, "[a]lthough 'the FPA represents a congressional intention to establish "a broad federal role in the development and licensing of hydroelectric power," ' the [Clean Water Act] 'has diminished [the FPA's] preemptive reach by expressly requiring [FERC] to incorporate into its licenses state-imposed waterquality conditions.' [Citation.] FERC's hydroelectric licenses are thus subject to, among other conditions, the requirements of section 401 of the [Clean Water Act]." (*Alabama Rivers Alliance v. FERC* (D.C. Cir. 2003) 325 F.3d 290, 292-293.) Before FERC can issue a new license to DWR, the SWRCB must first issue a

water quality certificate pursuant to section 401 of the Clean Water Act and the Porter-Cologne Act, Water Code section 13160 et seq. However, as noted, the state, including its courts, cannot delay the issuance of a certificate beyond one year from the date of a request to issue a certificate. In issuing its water quality certification, the SWRCB certifies that the Proposed Project will comply with specified provisions of the Clean Water Act, including water quality standards that are developed pursuant to state law and in satisfaction of Clean Water Act section 303 (33 U.S.C. § 1313). Preparation and certification of an EIR under the terms of CEQA and directed to the environmental effects of the state's more stringent water quality law is required *before* the SWRCB can take action. This DEIR is intended to fulfill that purpose, and considers three alternatives: the No-Project Alternative, the Proposed Project (SA), and the FERC Staff Alternative described in the FERC Draft Environmental Impact Statement (DEIS).

The SA contains appendices. It provides that the CEQA "program" in Appendix A is subject to amendment by the SWRCB to comply with the state's more stringent clean water law pursuant to section 401 of the federal Clean Water Act. The "amended program" is set forth in a certificate issued by the SWRCB as conditions to the FERC license to be implemented when imposed after the license is issued. "Preparation and certification of an EIR under the terms of CEQA is required before the SWRCB can take action." The DEIR provides that when the "amended program" in the Certificate is implemented (i.e., constructed) the *implementation* may be subject to CEQA review in the *state* courts.

In this case the Certificate includes an amendment to set water temperature requirements for the fish hatchery as required by a 1983 agreement between DWR and the Department of Fish and Game. It mandates that the water temperature of discharged water be lowered by a specified amount "[a]fter facility modifications [required by the Certificate], but no later than 10 years after [issuance of the] license." "Because of the importance of the river valve [(that permits taking water from the deepest and coolest

parts of Lake Oroville)] for temperature control" the Certificate also requires that "a timeline be submitted within six months of license issuance that includes the steps necessary to finalize the repair or refurbishment of the river valve."

D. The New Project License

Although the Oroville Facilities Project that is subject to licensing is the SA, the project subject to environmental review is referred to in Appendix A as the "New Project License." It is subject to review before FERC because the applicants of the SA "participat[e] in the alternative pre-filing consultation process."[15] As the CEQA document explains, this project, does "not . . . include any annual license extending the original license" for the dam. Rather, it sets forth the environmental proposals that physically condition the new license. For this reason, it does not include the environmental effects of the operation of the dam but only the environmental effects of the projects encompassed by the New Project License, i.e., the projects listed in the Certificate.

A source of confusion is the classification of the overall project subject to the FERC license as the Oroville Dam and Oroville Facilities Project. However, the project subject to environmental review in this case is not the existing dam and facilities but the project to further mitigate the loss of habitat caused by the construction of the dam, and that is referred to as the New Project License. This project would increase the habitat along the lower reaches of the Feather River, open a water valve to access colder water at the bottom of Lake Oroville to meet hatchery temperature requirements, improve the spawning of fish by channel and gravel improvement plans, and regulate the flow of

---

[15] Title 18 Code of Federal Regulations part 4.34(i)(6)(vii) (2003) provides in relevant part: "Any potential applicant, resource agency, Indian Tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process may file a request with the Commission to resolve a dispute concerning the alternative process (*including a dispute over required studies*) . . . ." (Italics added.)

water from the dam.[16] Only the *implementation* of the conditions set forth in the Certificate relating to the state's clean water law, some of them to be completed years after the license is issued, is subject to *independent* CEQA review in the state courts.

There is an extensive CEQA document (DEIR) in the record and it is this document that the plaintiffs rely on in their CEQA challenge. As noted, it serves two purposes. First, it satisfies the state's obligation to provide environmental information to FERC. Second, it is used "to evaluate the potential effects of implementing the SA as new license terms and conditions for the continued operation of the hydroelectric component of the Oroville Facilities." That, however, is reviewable before FERC as general conditions for the operation of the dam.

The federal law has its own means of review of contested issues in the settlement process. Under 18 Code of Federal Regulations part 385.602(h)(1)(i) (2003), if FERC determines that any offer of settlement is contested by any party, the Commission may decide the merits of the issues if the record contains substantial evidence upon which to base a reasoned decision or it determines there is no genuine issue of material fact.[17] (18 C.F.R. § 385.602(h)(1)(i) (2003).)

Second, the DEIR provides an analysis for the preparation of a "water quality certification for the Proposed Project from the [SWRCB] under Section 401 of the [federal] Clean Water Act." The primary purpose of the DEIR is "to identify . . . any

---

16 Insofar as the implementation of the changes made by the SWRCB to the "New Project License" (Appendix A) are subject to CEQA analysis it is programmatic. (Pub. Resources Code, §§ 21093, 21094.) The CEQA "program" is set forth in Appendix A as the environmental predicate for the Certificate. As noted, the CEQA "program" set forth in Appendix A is subject to *federal* administrative review before FERC pursuant to NEPA. (18 C.F.R. § 4.34(i)(6)(vii) (2003).)

17 If the Commission determines that the record does not contain substantial evidence, the Commission has the option to take other action which the Commission determines to be appropriate. (18 C.F.R. § 385.602(h)(1)(ii)(B) (2003).)

potential . . . environmental impacts that may result from *implementation* of" the New Project License. It provides for environmental studies that support the changes made by the SWRCB in the Certificate. To the extent that CEQA applies to the Certificate it is to the proposed implementation of the changes by the SWRCB. (See 33 U.S.C. § 1341(d).) Appendix A also functions as a PDEA, an "analysis required under [the federal] NEPA in support of relicensing."

In this respect the state laws are not a part of relicensing and cannot be used to delay relicensing by resort to the state courts. The SA is clear that the purpose of the SA is to "resolv[e] all issues that have or could have been raised by the Parties in connection with FERC's order issuing a New Project License . . . ." "[I]t is the Parties' intention that this [SA] also resolves all issues that may arise in issuance of all permits and approvals associated with the issuance of the New Project License, including but not limited to . . . CWA [Clean Water Act] Section 401 Certification, NEPA and CEQA."

Although "[t]he DEIR analyzes the potential impacts of implementing the SA including *all* its appendices, as DWR's proposed project," the matters subject to environmental review by the state required to obtain an extended license include only the matters in Appendix A. The state's environmental information provided in Appendix A, which is expressly made subject to federal jurisdiction, satisfies the state's environmental obligation with respect to the federal license. It also provides the environmental information in support of the programmatic portion of the New Project License which is the environmental predicate for review of the "program" by the SWRCB for compliance with the state's more stringent clean water law.

The program set forth in the "New Project License" was submitted to the SWRCB for its review pursuant to the California Clean Water Act. (Porter-Cologne Act, Wat. Code, § 13160 et seq.) The changes made to the program are set forth in a Certificate (adopted December 15, 2010, two years after the filing of this action). The Certificate

has not been filed with FERC because of the pendency of this action.[18] The CEQA document asserts only that the changes made to the program by the SWRCB in the Certificate are subject to CEQA review in the state courts when *implemented after* the Certificate is submitted to FERC *and* the license issued.

Neither the program subject to the SWRCB review, nor the Certificate by which SWRCB exercises its section 401 authority to *implement* the provisions of Appendix A are the subject of plaintiffs' petition. Because the plaintiffs' petition was filed in the state court two years before the SWRCB adopted the Certificate, no issue is tendered concerning the changes the Certificate makes to the program, and no action under CEQA to review the changes can be filed in a state court until *after* the license is issued and the changes implemented. As a consequence, they have not tendered a question of how the CEQA part of the section 401 review meshes with the non-CEQA part of the licensing process.

E. *Eel River*

As indicated, the Supreme Court has directed us to vacate our prior decision and reconsider the case in light of *Eel River*. Having done so, we hold once again that this court has no jurisdiction because federal law preempts CEQA under the circumstances presented.

The issue in *Eel River* was whether the ICCTA preempted the application of CEQA to a project to resume freight service on a stretch of railroad line owned by the North Coast Railroad Authority. (*Eel River, supra*, 3 Cal.5th at pp. 692, 700, 702.) The California Legislature created the North Coast Railroad Authority and gave it the power to acquire property and to operate a railroad. (*Id*. at p. 692.) Thus, the railroad was to be owned by a subsidiary of the state.

---

[18] The plaintiffs rely on CEQA case authority to stay the relicensing procedure pending *state* judicial review of the DWR's approval of the project. (*Santiago County, supra,* 118 Cal.App.3d at p. 829.)

The ICCTA contained an express preemption provision, which stated in pertinent part: " 'The jurisdiction of the [Surface Transportation Board] over—[¶] (1) transportation by rail carriers . . . [,] and [¶] (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, [¶] is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.' " (*Eel River, supra*, 3 Cal.5th at p. 706.) Accordingly, the Supreme Court acknowledged that as to privately-owned railroads, the ICCTA preempted CEQA. (*Id*. at p. 703.)

Significantly, in spite of the express preemption provision, *Eel River* looked to the purpose and history of the ICCTA, to conclude that although the preemption of state regulation of rail transportation had a long history, more recent enactments sought to achieve broad deregulation. (*Eel River, supra*, 3 Cal.5th at p. 708.) The court opined that the purpose of the ICCTA was "deregulatory." (*Id*. at p. 691.) Because of this deregulatory purpose, the state was left with an area of autonomy in which it could choose to self-govern on matters of the environment. (*Id*. at p. 704.)

Eel River recognized that federal remedies preempt state remedies " 'with respect to regulation of rail transportation.' " (*Eel River, supra*, 3 Cal.5th at p. 711.) Central to *Eel River's* analysis was "whether application of CEQA to the rail carriers in this case would constitute regulation of rail transportation within the terms of the ICCTA." (*Ibid*.) The case held that application of CEQA to private rail carriers would be a regulation preempted by federal law. (*Id*. at p. 720.) However, the court reasoned that while CEQA's restriction of a private party's ability to develop property is plainly regulatory, when the state or a subdivision of the state is the property owner, CEQA operates not as a regulation, but as a form of self-government. (*Id*. at p. 723.) Thus, CEQA is not a

preempted regulation when applied to state-owned projects, or projects owned by a subdivision of the state.

Eel River stated that because of the deregulatory purpose of the ICCTA, private railroad owners have the "freedom to plan, develop, and restore rail service on market principles but within the framework of modest federal regulation[,]" such that "the [private] owner may carry out its activities according to its own corporate goals and in response to market forces." (*Eel River, supra*, 3 Cal.5th at p. 724.) The court reasoned that as private owners are accorded the freedom to make decisions based on their own internal guidelines, so too must the state as owner be able to make decisions based on its own guidelines, CEQA being one of those guidelines. (*Ibid.*) Thus, in the case of the ICCTA, which purpose is to deregulate the railroad industry, CEQA is not a preempted regulation when applied to a state-owned project, but is merely an expression of self-governance.

Eel River also relied on two presumptions in reaching its decision. The first is the presumption that when Congress adopts a preemption provision, it does not intend to deprive a state of its sovereign authority over its internal governance without a clear statement of intent. (*Eel River*, *supra*, 3 Cal.5th at p. 725.) However, as we explain below, the United States Supreme Court has rejected this presumption with respect to the FPA. The second presumption the court relied on was the market participant doctrine. (*Id.* at p. 734.) The court described this doctrine as the circumstance where states act, "not as regulators of *others*, but as participants in a marketplace who *themselves* need to deal with private parties to obtain services or products." (*Ibid.*) In this capacity states should have the same freedom as private actors in the market. (*Ibid.*) As discussed further, the doctrine does not apply here.

1. FPA Does Not Have a Deregulatory Purpose

Critical to *Eel River's* conclusion that the ICCTA did not preempt CEQA was "the deregulatory aspect of the ICCTA and the different way in which deregulation affects

public and private rail lines." (*Eel River, supra*, 3 Cal.5th at p. 734.) The ICCTA expressly provides that it is the policy of the federal government, inter alia, "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail[,]" "to minimize the need for Federal regulatory control over the rail transportation system[,]" and "to reduce regulatory barriers to entry into and exit from the industry." (49 U.S.C. § 10101.)

Eel River reasoned that because of this deregulatory feature of the ICCTA, private railroad owners were free to make market-based decisions without an undue level of regulation of any kind, relying instead on their own internal corporate rules and bylaws to guide market-based decisions. (*Eel River, supra*, 3 Cal.5th at p. 691.) The court reasoned that a government-owned railroad must have the same "sphere of freedom of action[,]" and that state laws are the state's expression of its decisions, similar to corporate rules and bylaws. (*Ibid*.) "This is how the deregulatory purpose of the ICCTA necessarily functions when state-owned, as opposed to privately owned, railroad lines are involved." (*Ibid*.)

By contrast, there is no deregulatory feature of the FPA. Instead, the "purpose, structure, and legislative history of the [FPA]" shows that it "envisioned a considerably broader and more active federal oversight role in hydropower development . . . ." (*California v. FERC, supra*, 495 U.S. at p. 492 [comparing the FPA to the Reclamation Act].) FERC's planning authority over hydropower development is "comprehensive." (*Id*. at p. 506.) The Ninth Circuit has stated that the FPA, read in its entirety, was intended "to vest final authority for the regulation of hydroelectric power projects in federal hands." (*State of California ex rel. State Water Resources Bd. v. FERC* (9th Cir. 1989) 877 F.2d 743, 746.) The FPA authorizes FERC to issue licenses to construct, operate, and maintain dams, water conduits, reservoirs, and powerhouses, and to develop, transmit, and utilize power in any of the streams over which Congress has jurisdiction. (*Id*. at p. 747.) FERC has the authority to order any project modified " 'for the

improvement and utilization of water-power development.' " (*Ibid*.) FERC has "general planning power," as well as specific powers "to issue preliminary permits," "investigate power development resources," "mandate prompt construction schedules," "grant licenses," "control the precise terms of the license," "and to award powers of eminent domain to licensees." (*Ibid*.)

The rationale behind *Eel River* is that because of the ICCTA's deregulatory sweep, it protects a "zone of autonomy belonging to the state when it is the owner, such that within the deregulated zone, the state as owner may make its decisions based on its own guidelines rather than some anarchic absence of rules of decision." (*Eel River, supra*, 3 Cal.5th at p. 724.) In this zone of autonomy, the state must have leave to self-govern as if it were a private owner. However, in the case of the FPA, there is no "zone of autonomy" because the FPA was not designed with a deregulatory purpose. Without a zone of autonomy or "sphere of regulatory freedom," application of CEQA to a public project is not merely self-governance. Rather, the application of the state law encroaches on the regulatory domain of the FPA. (See *id.* at pp. 691, 723.)

The United States Supreme Court has opined that the field of hydropower licensing is highly regulated by the FPA. "The detailed provisions of the [FPA] providing for the federal plan of regulation leave no room or need for conflicting state controls." (*First Iowa, supra,* 328 U.S. at p. 181.) "By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with final authority to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA to elaborate and reaffirm First Iowa's understanding that the FPA establishes a broad and paramount federal regulatory role." (*California v. FERC, supra,* 495 U.S. at p. 499.) The Ninth Circuit has agreed. "Congress has occupied the entire field, so preemption will not depend on whether the state requirements conflict with the federal requirements.

Second, occupation of the field implies as a corollary that the state process itself, regardless of the results, is preempted." (*Sayles Hydro, supra,* 985 F.2d at p. 453.)

The Ninth Circuit even directly addressed the preemption of state environmental laws, saying, "There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." (*Sayles Hydro, supra,* 985 F.2d at p. 456.) In California, one court has "recognized that for at least half a century federal law has been supreme when it comes to the subject of regulating hydroelectric dams operating under a federal license[,]" and stated that "the FPA occupies the field of hydropower regulation." (*Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region, supra*, 183 Cal.App.4th at pp. 335, 359.)

Unlike the ICCTA, which does not specifically indicate that the federal government has regulatory authority over the preservation of the environment, the FPA expressly authorizes FERC to consider environmental protection when issuing licenses.[19] The FPA authorizes FERC to issue licenses to "any State or municipality for the purpose of . . . operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works . . . for the development, transmission, and utilization of power across . . . any of the streams . . . over which Congress has jurisdiction . . . ." (16 U.S.C. § 797(e).) Furthermore, FERC, "in addition to the power and development purposes for which licenses are issued, shall give equal consideration to . . . the protection, mitigation of damage to, and enhancement of, fish and wildlife

---

19 With regard to the regulation of solid waste rail transfer facilities, the ICCTA states that it is not intended "to affect the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health, and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers." (49 U.S.C. § 10910.)

(including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." (*Ibid*.)

FERC's published Processes for Hydropower Licenses specifically provides for environmental analyses.[20] FERC Guidelines state that the ALP includes in its collaborative process the evaluation of the environmental impacts of the Project pursuant to NEPA. Other federal laws intersect with the hydropower licensing process, which duplicate the impacts considered in a CEQA review. These include the federal Clean Water Act, the federal Endangered Species Act, the Fish and Wildlife Coordination Act, the Magnuson-Stevens Fishery Conservation and Management Act, the National Historic Preservation Act, and the Wild and Scenic Rivers Act. Legislation amending the FPA has been passed for the purpose of "assuring adequate environmental protections . . . ." (H.R.Rep. No. 99-507, 2d Sess., p. 10 (1986).)

The FPA has occupied the field of regulating hydropower projects, leaving no sphere of regulatory freedom in which state environmental laws may operate as self-governance. Instead, such laws directly encroach on the province of FERC under the FPA.

2. Congress's Intent to Preempt State Law Is Unmistakably Clear

Eel River concluded that the ICCTA did not preempt CEQA because "Congress does not intend to deprive the state of sovereignty over its own subdivisions" "in the absence of unmistakably clear language." (*Eel River, supra*, 3 Cal.5th at p. 690.) Appellants argue this presumption is dispositive here. The United States Supreme Court has held otherwise. The question before the court in *California v. FERC, supra,* 495 U.S. 490 was not the environmental consequence of the of the hydroelectric project, but

---

20 We grant the request of the State Water Contractors et al., to judicially notice the published FERC Processes for Hydropower Licenses and FERC Guidelines, as well as the excerpts from the House of Representative Conference Reports relating to amendments to the FPA.

whether section 27 of the FPA (16 U.S.C. § 821) was intended to preempt California's laws requiring minimum stream flows. (*California v. FERC,* at p. 497.) The petitioner argued that there was a " 'presumption against finding pre-emption of state law in areas traditionally regulated by the States' and ' "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." ' " (*Ibid*.)

In response to this argument the Supreme Court stated: "But the meaning of § 27 [16 U.S.C. § 821] and the pre-emptive effect of the FPA are not matters of first impression. Forty-four years ago, this Court in First Iowa construed the section and provided the understanding of the FPA that has since guided the allocation of state and federal regulatory authority over hydroelectric projects. . . . [¶] . . . This Court has endorsed and applied First Iowa's limited reading of § 27, [citations], and has employed the decision with approval in a range of decisions, both addressing the FPA and in other contexts. [Citations.] By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with final authority to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA to elaborate and reaffirm First Iowa's understanding that the FPA establishes a broad and paramount federal regulatory role." (*California v. FERC, supra,* 495 U.S. at pp. 497-499.)

As the United States Supreme Court has stated, the preemptive effect of the FPA has been litigated repeatedly since *First Iowa*. The exceptions to the FPA's preemptive effect are limited and are specified in the statute. There is no exception for the application of a state's environmental laws, therefore the presumption employed by *Eel River* is not applicable to this case.

3. Market Participant Doctrine

Eel River did not find the market participant doctrine "fully on point," but found elements of case law concerning the doctrine "instructive." (*Eel River, supra*, 3 Cal.5th at pp. 736-737.) We fail to see how the market participant doctrine applies here at all.

The United States Supreme Court first articulated the market participant doctrine in *Hughes v. Alexandria Scrap Corp*. (1976) 426 U.S. 794 (*Hughes*). The issue arose when a Virginia scrap processor brought an action challenging the constitutionality of a Maryland law by which the state of Maryland would pay scrap processors a "bounty" for the destruction of old, inoperable automobiles. The purpose of the law was to deal with the aesthetic problem of abandoned automobiles. (*Id*. at p. 796.) The law required the processors to provide title documentation to the state, and the documentation required of out-of-state processors was more extensive than the requirement for in-state processors. (*Id*. at p. 800.)

The Virginia processor argued the law violated the commerce clause by burdening the flow of abandoned automobiles across state lines. (*Hughes, supra*, 426 U.S. at p. 802.) The Supreme Court disagreed. The court reasoned that the purpose of the commerce clause was to prevent trade barriers between the states so that citizens would have free access to every market in the nation without embargos, customs, duties, or regulations. (*Id.* at pp. 807-808.) But, the commerce clause does not prohibit a state "from participating in the market and exercising the right to favor its own citizens over others." (*Id*. at p. 810.)

Where the preemptive law in question prohibits state laws and regulations in the subject area, a state acting as a participant in the market in a narrow and focused manner consistent with the behavior of other market participants, does not constitute regulation subject to preemption. (*Cardinal Towing & Auto Repair, Inc. v. City of Bedford* (5th Cir. 1999) 180 F.3d 686, 691.)

Here, the state action in question, i.e., the state act which is arguably subject to preemption, is not California's operation of a hydroelectric dam. It is California's imposition of CEQA in the FERC licensing process. The CEQA laws are not narrow and focused actions consistent with the behavior of other market participants. They are regulatory acts pure and simple, and are subject to preemption.

F. The Parties' Status

The plaintiffs participated extensively in the ALP but refused to sign the SA. As a consequence, they are not parties to the SA and have no procedural rights pursuant to its internal review procedures in Appendix B of the SA to dispute the agreement of the parties.[21] Nor did the plaintiffs seek administrative review of the New Project License before FERC as required by 18 Code of Federal Regulations part 4.34(6)(vii) (2003). Instead, on August 21, 2008, they filed a CEQA complaint for a writ of mandate in the superior court challenging the environmental effects of climate change on the *operation* of the dam and facilities for all the purposes served by the SWP. It is the propriety of the appeal from the judgment of the superior court in that action that we consider.

The plaintiffs argue that the SA applies only to entities that have signed the SA as parties. That is true, but the source of the plaintiffs' contractual rights, if any, is the SA. There is one remedy for which status as a party is not required, and it is a federal remedy for the violation of the environmental requirements of federal law. "Any . . . entity participating in the alternative pre-filing consultation process may file a request with the Commission to resolve a dispute concerning the alternative process (including a dispute over *required studies*) . . . ." (18 C.F.R. § 4.34(i)(6)(vii) (2003), italics added.) The plaintiffs participated extensively in the pre-filing consultation process and tendered essentially the same climate change argument and supporting data for consideration by

---

[21] The internal review procedures apply to matters agreed to by the parties that are not subject to FERC review, such as the provision of funds to carry out the agreements. As noted, no such issue is tendered in this action.

the SA in their opening brief as CEQA claims, but refused to sign the SA as a party. Since the plaintiffs are not parties to the SA and did not utilize its administrative process they have no rights under the SA and cannot challenge the provisions of the SA relating to Appendix B.

The plaintiffs alleged that the SA did not consider the impact of global climate change on DWR's *continued operation* of the existing dam and facilities for the purposes served by the SWP. They argue that "[c]limate change will almost certainly affect the project's ability to meet water supply, water temperature, water quality, flood management, and recreational requirements, thus severely impacting human populations and ecosystems."[22] A project subject to CEQA review involves the environmental consequences of a physical change in the environment. Since no physical changes are planned for the dam itself,[23] other than the reopening of the water valve, the plaintiffs assume the project subject to environmental review is the DWR's *operation* of the dam as part of the SWP.

---

22 In their initial briefing, the plaintiffs challenged the project description as "truncated," as failing to include all the uses to which water from the dam would be put pursuant to the SWP. These are referred to as "project operations." The plaintiffs argue: "Climate change will almost certainly affect the project's ability to meet water supply, water temperature, water quality, flood management, and recreational requirements, thus severely impacting human populations and ecosystems. DWR's own report discusses several impacts but never analyzes them in light of climate change due to the EIR's erroneous assumption of stationarity." (Fn. omitted.) " '[R]eservoirs will likely experience changes in the rate and timing of inflow. Changes in reservoir operations and reduced annual storage in snowpack could result in less water being available in the summer and fall to meet Delta outflow and salinity requirements.' "

It is true that changes in the earth's climate could affect the temperature or flow of water to the new environmental project, but as noted, any such argument must be made when the project in the Certificate is implemented.

23 See footnote 1, *ante*.

The plaintiffs do not claim that, given climate change, the environmental measures in Appendix A would *cause* an environmentally *harmful* physical change in the environment, since Appendix A is designed to ameliorate environmental harms caused by the existing dam. Rather, they claim that the impact of climate change on the *continued operation* of the dam would affect the DWR's ability to carry out the purposes served by the SWP.

The respondents reply that the impact of climate change on the *operation* of the dam is too speculative to require consideration under CEQA. The superior court agreed and entered a judgment in favor of the respondents. This is the posture in which the appellate case was initially briefed.

The operation of the existing dam and facilities, however, is not the project subject to *environmental* review. The project subject to review is labeled the New Project License and expressly does "not . . . include any annual license extending the original license . . . ." The New Project License does include new spawning grounds for anadromous fish and changes in the temperature and flow of water from the dam to improve the spawning and survivability of the fish. It is subject to review by the SWRCB for compliance with California's clean water laws.

The parties were likely misled by the lengthy CEQA document in the record that includes a CEQA review of the environmental consequences of relicensing the existing dam. From this premise the plaintiffs argue that DWR should have considered the project subject to environmental review as the environmental impact of climate change on the *operation* of the dam and facilities, as part of the SWP, and that, as a result, the DWR failed to consider the consequences of climate change on the operation. It was on this basis that the plaintiffs claimed the decision to approve the project and issue the license should be stayed pending a state court resolution of their CEQA claims. (*Santiago County, supra*, 118 Cal.App.3d at p. 829.)

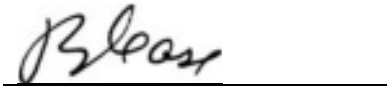
The plaintiffs' primary mistake is that the project subject to environmental review by the state is not the dam and facilities as built, but the project to further mitigate the loss of habitat caused by construction of the dam in 1967, increasing the habitat along the lower reaches of the Feather River, opening a water valve to access colder water at the bottom of Lake Oroville to meet hatchery temperature requirements, improving the spawning of fish by channel and gravel improvement plans, and regulating the flow of water from the dam.

The correct view of the project tenders questions of *federal* administrative and substantive law applicable to the relicensing of a hydroelectric dam and its facilities.

DISPOSITION

The plaintiffs cannot challenge the environmental sufficiency of the program in Appendix A because review of that program lies with FERC and they did not seek review as required by 18 Code of Federal Regulations part 4.34(i)(6)(vii) (2003). The plaintiffs cannot challenge the environmental predicate to the Certificate contained in the CEQA document because that is subject to review by FERC. The plaintiffs cannot challenge the Certificate because it did not exist when this action was filed, and they cannot challenge the physical changes made by the SWRCB in the Certificate until they are implemented. For these reasons the parties have not tendered a federal issue over which this court has state CEQA jurisdiction. Accordingly, we shall dismiss the appeal with directions to the trial court to vacate its judgment and dismiss the action for lack of subject matter

jurisdiction. Costs are awarded to respondents. (Cal. Rules of Court, rule 8.278(a)(1), (2).)



BLEASE, J.

We concur:

RAYE, P. J.

HULL, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: County of Butte et al. v. Department of Water Resources et al.
C071785
Yolo County
No. CVCV091258

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

Bruce Alpert
Office of County Counsel
25 County Center Drive
Oroville, CA 95965

Roger B. Moore
Law Office of Roger B. Moore
337 17th Street, Suite 211
Oakland, CA 94612

Ellison Folk
Shute, Mihaly & Weinberger
396 Hayes Street
San Francisco, CA 94102

R. Craig Settlemire
Office of the County Counsel
520 Main Street, Room 302
Quincy, CA 95971

Matthew J. Goldman
Office of the Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814-208

Thomas M. Berliner
Duane Morris LLP
One Market, Spear St. Tower, Suite 2200
San Francisco, CA 94105-1127

Jolie-Anne Shappell Ansley
Duane Morris LLP
1 Market St
Ste 2200
San Francisco, CA 94105-1413

Paul J. Killion
Duane Morris LLP
Spear Tower One Market Plaza, # 2200
San Francisco, CA 94105-1127

David R. E. Aladjem
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

E. Robert Wright
Friends of the River
1418 20th Street, Suite 100
Sacramento, CA 95811

Honorable Daniel P. Maguire
Judge of the
Yolo County Superior Court- Main
1000 Main Street
Woodland, CA 95695

PROOF OF SERVICE

County of Butte et al. v. Department of Water Resources et al.
Supreme Court of the State of California

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On October 15, 2019, I served true copies of the following document(s) described as:

PETITION FOR REVIEW

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I served the document(s) on the person(s) listed in the Service List by submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on October 15, 2019, at San Francisco, California.

/s/ Patricia Larkin
Patricia Larkin

SERVICE LIST

County of Butte et al. v. Department of Water Resources et al.
Supreme Court of the State of California

Matthew J. Goldman
Office of the Attorney General
1300 I Street, Suite 125
Sacramento, California 95814
Telephone: (916) 210-7841
Facsimile: (916) 327-2319
matthew.goldman@doj.ca.gov
Attorneys for Defendant and Respondent DEPARTMENT OF WATER RESOURCES

Thomas M. Berliner
Duane Morris LLP
Spear Tower
One Market Plaza, Suite 2200
San Francisco, California 94105
Telephone: (415) 957-3333
Facsimile: (415) 520-5835
tmberliner@duanemorris.com
Attorneys for Real Party in Interest and Respondent STATE WATER CONTRACTORS INC.

David R. E. Aladjem
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, California 95814
Telephone: (916) 444-1000
Facsimile: (916) 444-2100
daladjem@downeybrand.com
Attorneys for Real Party in Interest and Respondent SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT et al.

E. Robert Wright
Friends of the River
1418 20th Street, Suite 100
Sacramento, California 95811
Telephone: (916) 442-3155
Facsimile: (916) 442-3396
bwright@friendsoftheriver.org
Attorneys for FRIENDS OF THE RIVER AND THE CALIFORNIA SPORTFISHING PROTECTION ALLIANCE – *AMICUS CURIAE*

VIA MAIL
Honorable Daniel P. Maguire
Yolo County Superior Court
1000 Main Street
Woodland, California 95695

VIA TRUEFILING
California Court of Appeal

STATE OF CALIFORNIA

PROOF OF SERVICE

STATE OF CALIFORNIA

Case Name: **County of Butte et al. v. Department of Water Resources et al.**
Case Number: **TEMP-R0JDH3PE**
Lower Court Case Number:

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

2. My email address used to e-serve: **schexnayder@smwlaw.com**

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

Title(s) of papers e-served:

Filing Type	Document Title
PETITION FOR REVIEW	Petition for Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
Edward Schexnayder Shute, Mihaly & Weinberger LLP	schexnayder@smwlaw.com	e-Serve	
Ellison Folk Shute, Mihaly & Weinberger LLP	folk@smwlaw.com	e-Serve	
Thomas Berliner Duane Morris LLP	tmberliner@duanemorris.com	e-Serve	
David Aladjem Downey Brand LLP	daladjem@downeybrand.com	e-Serve	
E. Robert Wright Friends of the River	bwright@friendsoftheriver.org	e-Serve	
Roger Moore Law Office of Roger B. Moore	rbm@landwater.com	e-Serve	
Matthew Goldman California Dept of Justice, Office of the Attorney General	Matthew.Goldman@doj.ca.gov	e-Serve	
R. Craig Settlemire	CSettlemire@countyofplumas.com	e-Serve	
Bruce Alpert	balpert@buttecounty.net	e-Serve	

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

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

Date

/s/Edward Schexnayder

Signature

Schexnayder, Edward (284494)

Last Name, First Name (PNum)

Shute, Mihaly & Weinberger LLP

Law Firm