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Civil No. S258574 [Fee Exemption, Gov. Code § 6103]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COUNTY OF BUTTE, COUNTY OF PLUMAS, et al.,
Petitioners and Appellants,
v.

DEPARTMENT OF WATER RESOURCES,
Defendant and Respondent;

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

ANSWERING BRIEF ON THE MERITS OF STATE WATER CONTRACTORS, INC., et al.

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

Appeal from Superior Court
Yolo County Case No. CV09-1258
The Honorable Daniel P. Maguire, Judge Presiding

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I. THE ISSUES ON REVIEW

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

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

II. PRELIMINARY STATEMENT

Congress enacted the Federal Power Act ("FPA") in 1935 (and its predecessor statute, the Federal Water Power Act in 1920) to secure the comprehensive development of the nation's water resources. (16 U.S.C. § 791a et seq.; *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (1946) 328 U.S. 152, 170-171, 180-181 ("*First Iowa*").) Over the decades, the United States Supreme Court has repeatedly held that in enacting the FPA, Congress intended to occupy the field concerning the regulation of hydroelectric facilities. Occupation of the field implies, as a corollary, that state regulation or control in the same field, regardless of intent or result, is preempted.

Petitioners County of Butte, County of Plumas, and Plumas County Flood Control and Water Conservation District (collectively "the Counties") seek to use a claim of self-governance to overturn the long-established FPA program of cooperative federalism that governs hydroelectric facilities. Ignoring longstanding federal case law interpreting the FPA, the Counties

argue the California Environmental Quality Act (Pub. Resources Code §§ 21000 et seq.) ("CEQA") applies to the decision by the Department of Water Resources ("DWR") to seek relicensing of the Oroville hydroelectric facilities via a Settlement Agreement collaboratively developed under federal regulations adopted pursuant to the FPA. The Counties contend this decision falls within the power of the state to govern its subdivisions and, therefore, is not preempted. Issue No. 1 addresses whether the Counties' contention is correct. It is not, for several reasons.

First, the Counties' preemption analysis is flawed. They start from the assumption that application of CEQA to a project owned by a state is always self-governance, failing even to consider whether the activities in question were intended to be free from federal regulation under the applicable federal statute, which is the analysis this Court used in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677 ("*Friends*"). In fact, CEQA is preempted where it invades the authority of a federal agency. In *Friends*, CEQA was not preempted because it was being applied to state activities this Court found expressly *deregulated* by Congress under the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §10101 et seq. ("ICCTA"). The Counties forego any similar analysis of congressional intent under the FPA, and they reach an incorrect conclusion as a result.

Here, the FPA imposes a highly regulated and comprehensive federal regime governing hydroelectric facilities. Other than the narrow state certification requirements set forth

in Section 401 of the Clean Water Act relating to water quality issues, and in Section 27 of the FPA relating to proprietary water rights, the FPA grants to the Federal Energy Regulatory Commission ("FERC") exclusive power to set the terms and conditions of hydroelectric licenses and to balance environmental considerations in doing so. Because CEQA, as used by the Counties in this case, invades FERC's authority under the FPA, it is preempted. This case is not like *Friends*.

In an effort to portray their requested remedy as not invading FERC's regulatory domain, the Counties misrepresent the nature of the relief they sought below. They try to hide the fact that their writs demand a *halt* to the FERC relicensing process, DWR's *withdrawal* of its application pending state-level environmental review pursuant to CEQA, and the imposition of enforceable mitigation measures as *conditions* on the FERC license. But the FPA contains unmistakably clear language preempting such efforts to halt federal hydroelectric licensing.

Second, the Counties misperceive the ability of DWR to withdraw its license request, pursuant to the executed Settlement Agreement submitted to FERC as the proposed license, or to "reject" or surrender a license for the Oroville Facilities. Under the non-alienation provision in California Water Code section 11464, DWR is foreclosed from divesting title or ownership of any "water right, reservoir, conduit, or facility for the generation, production, transmission or distribution of electric power, acquired by the department…." DWR is *not* like other licensees.

Third, as a factual matter, the "discretionary decisions" the Counties seek to attribute to DWR as exercises in "self-governance" all occurred either before the CEQA Environmental Impact Report ("EIR") was issued, or involve "decisions" DWR is unable to make due to Water Code section 11464.

As to Issue No. 2, which asks whether the FPA preempts state court challenges to a CEQA EIR prepared to comply with Section 401 of the Clean Water Act, no party disputes the role of CEQA in that process. But the exception has no application to this case, as the Court of Appeal found. (Court of Appeal Opinion dated September 5, 2019, p. 20 ("2019 Opinion").) Here, the Counties never challenged the 401 certification for the Oroville Facilities issued by the State Water Resources Control Board ("Water Board"), which occurred two years *after* the Counties' writ petitions were filed. In fact, the Counties dismissed the Water Board from this case prior to the issuance of the 401 certification.

Instead, the Counties' CEQA claims challenge the relicensing process itself, and the proposed terms of the FERC license (i.e., the Settlement Agreement, which FERC considers as a recommendation for the license to be issued). As the Court of Appeal correctly concluded, "[the Counties] cannot challenge the environmental sufficiency of the [Settlement Agreement] in the state courts because jurisdiction to review the matter lies with FERC and [the Counties] did not seek federal review as required by [the federal regulations]." (2019 Opinion, p. 6.)

The decision of the Court of Appeal should be affirmed.

III. STATEMENT OF THE CASE

A. The FERC Relicensing Process for the Oroville Facilities.

1. The Oroville Relicensing Process Has Been Ongoing for Almost 20 Years.

This case arises from a federal application submitted by respondent DWR to renew the operating license issued by FERC for hydropower generation at its Oroville Facilities (FERC Project No. P-2100). Originally licensed in 1957 and constructed between 1961 and 1968, the Oroville Facilities were developed as part of the State Water Project, a system of reservoirs, aqueducts, power plants, and pumping plants that store and distribute water to urban and agricultural water users in Northern California, the San Francisco Bay Area, the San Joaquin Valley, and Southern California. (Administrative Record ("AR") E000067, G000108, G000184; 2019 Opinion, p. 7.)

The Oroville Facilities consist of Oroville Dam (the largest earthen dam in the United States), its reservoir (Lake Oroville), two smaller reservoirs, three hydropower generating and pumping stations, several diversion dams, impoundments and channels, the Feather River Fish Hatchery and supporting facilities, and extensive public recreational facilities, including the Oroville Wildlife Area. (AR G000113, G000184-207; 2019 Opinion, p. 7.) The Oroville Facilities serve multiple purposes, including flood control, water storage and supply, hydropower production, fisheries and wildlife enhancement, and recreation. (AR G000108, G000110, G000128; 2019 Opinion, p. 7.)

The Oroville Facilities are an integral part of the State Water Project, which delivers water to approximately two-thirds of California's population and over 750,000 acres of California agricultural lands. (AR D000428.) In particular, Oroville's power generation is "vital to the State of California." (AR E000845.) "The primary operating function of the Oroville Facilities' power plants is to provide electricity to State Water Project pumps that move water through the State Water Project system." (*Ibid.*)

Overall, the State Water Project uses more energy than it produces, and the Oroville Facilities play an important role meeting the capacity requirements of DWR and is a significant power resource for California. (AR E000844-845, G000158, G000189-190.) According to DWR, "[c]ontinued operation of the Oroville Facilities for electric power generation is critical to the State of California, and is key to DWR achieving its mission of providing a reliable and affordable supply of water throughout the State." (AR G000158.) "Any decrease in power generation at the Oroville Facilities would need to be offset by increased purchases of energy from other resources and/or by construction of new power generating facilities." (AR E000845.)[1]

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[1] "Hydropower generation is extremely clean, producing very little [Greenhouse Gas] emissions when compared to other power generation." (AR G000159.) "By generating hydroelectric power, the Oroville Facilities help reduce the amount of generation that is needed from fossil fuel power plants, thereby avoiding the emission of pollutants as hydrocarbons, nitrogen oxides, carbon monoxide, and particulate matter." (*Ibid.*)

Respondents State Water Contractors are an association of 27 of the 29 public agencies from Northern, Central and Southern California that purchase water under contract from the State Water Project.[2] Petitioners County of Butte and Plumas County Flood Control and Water Conservation District are the remaining two contractors with the State Water Project.

Almost all non-federally owned hydropower projects are subject to the FPA's comprehensive regulatory regime. (16 U.S.C. § 797(e); 2019 Opinion, p. 4.) Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation and maintenance of new and existing hydropower projects. (16 U.S.C. §§ 797(e), 808, 817.) The original 50-year FERC license for the Oroville Facilities expired on January 31,

[2] The SWC members are: Alameda County Flood Control & Water Conservation District, Zone 7; Alameda County Water District; Antelope Valley-East Kern Water Agency; Central Coast Water Authority; City of Yuba City; Coachella Valley Water District; County of Kings; Crestline-Lake Arrowhead Water Agency; Desert Water Agency; Dudley Ridge Water District; Empire-Westside Irrigation District; Kern County Water Agency; Littlerock Creek Irrigation District; Metropolitan Water District of Southern California; Mojave Water Agency; Napa County Flood Control & Water Conservation District; Oak Flat Water District; Palmdale Water District; San Bernardino Valley Municipal Water District; San Gabriel Valley Municipal Water District; San Gorgonio Pass Water Agency; San Luis Obispo County Flood Control & Water Conservation District; Santa Clara Valley Water District; Santa Clarita Valley Water Agency (incorporating the former Castaic Lake Water Agency); Solano County Water Agency; Tulare Lake Basin Water Storage District; and Ventura County Watershed Protection District (formerly Ventura County Flood Control Water District). (AA11 {98} p. 7 fn. 9.)

2007. (AR G000128.) Fully aware of the complexity and time involved in the relicensing process, DWR began its relicensing activities for the Oroville Facilities in late-1999, when it provided informal notice it was commencing the process that would lead to preparation of an application to FERC for license renewal. (AR G001036.)

Under the FERC regulations at the time, there were two approval processes available to an applicant licensee: the Traditional Licensing Process, set forth at 18 C.F.R. Parts 4 and 16, and the Alternative Licensing Process ("ALP"), set forth at 18 C.F.R. § 4.34(i). Under the traditional approach, the licensee drives the process until the filing of the license application. (18 C.F.R. Parts 4, 16.)

In 1997, FERC instituted an alternative approach, designed to foster collaboration among the interested parties, culminating in a settlement. (18 C.F.R. § 4.34(i); *Regulations for the Licensing of Hydroelectric Projects* (Oct. 29, 1997) 81 FERC ¶ 61103 [1997 WL 672674].) The purpose of the ALP is to "[c]ombine into a single process the pre-filing consultation process, the environmental review process under the National Environmental Policy Act ["NEPA"] and administrative processes associated with the Clean Water Act and other statutes." (18 C.F.R. § 4.34(i)(2); 2019 Opinion, p. 9.)[3] The procedure includes

[3] For an overview of the Alternative License Process, FERC produces illustrative flowcharts and guidelines that can be found at https://www.ferc.gov/resources/processes/flow/hydro-3.asp, https://www.ferc.gov/resources/processes/flow/hydro-4.asp, and https://www.ferc.gov/industries/hydropower/indus-

"[t]he cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies and any further scoping," and the preparation of a preliminary draft environmental assessment or preliminary draft environmental impact statement and related application. (18 C.F.R. §§ 4.34(i)(4)(ii), (iii); 2019 Opinion, p. 9.) The goal is to reach a settlement of all relicensing issues in a single, comprehensive agreement, which then becomes the proposed license that FERC will consider pursuant to the FPA. (18 C.F.R. § 4.34(i)(2).) In theory, the ALP is intended to expedite the relicensing process, through a consensus approach designed to avoid litigation.[4]

On November 16, 2000, DWR requested FERC's approval to use the Alternative Licensing Process for the Oroville Facilities, which FERC granted January 11, 2001. (18 C.F.R. § 4.34(i) [FERC Order No. 596]; AR B000571-572; B000617-619; G000128.) The ALP for the Oroville Facilities began on January 9, 2002, when DWR filed its "Notice of Intent" to apply for a new license with FERC. (AR B068710-68717.) DWR's initial relicensing application followed on January 19, 2005. (AR G000168.)

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act/itf/alp_final.pdf. (SWC's Request for Judicial Notice, Exhibit A, p. RJN 002; Exhibit B, p. RJN 004; Exhibit C, p. RJN 006; judicial notice was granted in the 2019 Opinion, p. 26, fn. 20.)

[4] There is currently a third process now available under the regulations—the Integrated Licensing Process ("ILP"), codified in 18 C.F.R. part 5.

The Oroville ALP involved numerous stakeholders, including state and federal agencies, local governmental entities, counties, Native American tribes, water agencies, nongovernmental organizations, and interested individuals. (AR G000163-178, G001036- 1041; 2019 Opinion, pp. 9-10.) Working Groups were formed to address overall aspects of the project, organized by discipline, e.g., environmental (water quality, terrestrial resources, fisheries, and geomorphology), engineering and operations, recreation, socioeconomics, cultural resources, land use, land management and aesthetics. (AR G001036-1041.) Task Forces were formed to study and resolve specific issues. (*Ibid.*) A Plenary Group was formed to conduct the main negotiations. (*Ibid.*)

Pursuant to FERC regulations, DWR—as the applicant for the license—prepared and submitted to FERC a Preliminary Draft Environmental Assessment based on studies of potential environmental effects of the project and assessments of alternatives. (AR G000128-129; 18 C.F.R. § 4.34(i)(4)(iii).) FERC regulations provide administrative remedies for resolution of any disputes that might arise during the process, including disputes over required studies. (2019 Opinion, pp. 12; 18 C.F.R. § 4.34(i)(6)(vii).) If an interested party—like Butte or Plumas—had concerns with the studies underlying the environmental review or the recommendations, they could raise them through the FERC administrative process. (18 C.F.R. § 4.34(i)(6)(vii).)[5]

[5] Any participating entity in the ALP may file a request with FERC to resolve a dispute concerning the process (including a

After approximately six years of collaborative effort, including 23 months of intensive negotiations, DWR finally submitted a Settlement Agreement to FERC for approval on March 24, 2006. (AR G000108, G000134, G001042-1043.) The Settlement Agreement was effectively the proposed license for the Oroville Facilities for the next 50 years of operations. (AR G000108.) The agreement was signed by over 50 state, federal and local governmental entities, nongovernmental organizations, and private parties. (AR G000111-112; G000173-178; G001042-1043; G001098-1253; D000422-576 [signed settlement]; 2019 Opinion, pp. 9-10.) Signatories included the National Marine Fisheries Service, U.S. Fish and Wildlife Service and the California Department of Fish and Game (now the California Department of Fish and Wildlife). (AR G000173-178; AR D000422-576.) Among the local agency signatories were the towns, cities and districts most directly affected by the project, including the City of Oroville, Town of Paradise, and the Feather River Recreation and Park District. (*Ibid.*)

The objective of the Settlement Agreement submitted to FERC as the proposed license is the continued operation and maintenance of the Oroville Facilities for power generation, with the addition of new environmental and recreational measures.[6] (2019 Opinion, pp. 3, 11; AR A000013, G000108-110, E000842.)

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dispute over required studies), after reasonable efforts first have been made to resolve the dispute. (18 C.F.R. § 4.34(i)(6)(vii).)

[6] Although the Counties raise the 2017 Oroville spillway problems to inflame issues (Counties' Opening Brief on the Merits ("OBM") p. 21), this action "does not concern the

As an integral part of the State Water Project, 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. (AR A000013, G000110; 2019 Opinion, pp. 8-9.) The Settlement Agreement submitted to FERC is consistent with these existing commitments and no changes to the contractual obligations or to the general pattern of water releases is anticipated. (AR A000013, G000110; 2019 Opinion, pp. 8-9.)[7]

The additional environmental and recreational measures included within the Settlement Agreement are divided into two categories: "Appendix A" contains protection, mitigation, and enhancement measures recommended for inclusion in the new Project License under FERC's jurisdiction; "Appendix B" contains those measures principally involving plans, studies or funding not to be included in the new Project License or otherwise subject to FERC's jurisdiction.[8] (AR G000112, G000117; E000839.)

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construction, repair or replacement of the dam spillways, the need for which occurred during the pendency of this case." (2019 Opinion, p. 2, fn. 1.)

[7] As the Court of Appeal correctly explained, "the project subject to environmental review in this case is not the existing dam and facilities but the project to further mitigate the loss of habitat caused by construction of the dam, and that is referred to as the New Project License." (2019 Opinion, p. 17.)

[8] Appendix B measures include additional environmental and recreational measures, as well as a supplemental benefits fund of up to $61 million to support local communities and local projects. (AR G000121-122; D000515-531.)

The Appendix A protection, mitigation, and enhancement measures implement plans and programs to improve fish spawning and rearing to complement recovery programs for endangered anadromous fish species, like spring-run Chinook salmon, support the Feather River Fish Hatchery, provide additional habitat for waterfowl, provide protection for terrestrial endangered species, monitor water quality in project waters, improve habitat for warmwater fish species, improve the coldwater fishery in Lake Oroville, and provide new management direction for the Oroville Wildlife Area. (AR G000118-120, E000839.) The Settlement Agreement also includes measures to enhance recreation and a framework to protect sensitive cultural and historical resources in the project area. (AR G000120.)

The intention of the parties entering into the Settlement Agreement was to resolve "all issues that have or could have been raised by the Parties in connection with FERC's order issuing a New Project License." (AR D000432.) Specifically, the Settlement Agreement states: "While recognizing that several regulatory and statutory processes are not yet completed, it is the Parties' intention that this Settlement Agreement also resolves all issues that may arise in the issuance of all permits and approvals associated with the issuance of the New Project License, including but not limited to [Endangered Species Act] Section 7 Biological Opinions, [Clean Water Act] Section 401 Certification, NEPA and CEQA." (*Ibid*.)

Although the two Counties were active participants in the licensing process, they alone among the major participants

refused to sign the final Settlement Agreement and sued instead. (AR G000174, G001036-1041.) While they now portray their objections to the new license as environmental, their principal dispute has always been about money—they contend they are entitled to over $11 million *per year* in ongoing damages for alleged "costs" incurred due to the presence of the Oroville Facilities in their counties.[9] (AR D000422-576, G000174; OBM, p. 19 fn 2.) Butte even filed a claim before FERC seeking recovery of the alleged "damages," but the claim was rejected by FERC and the Ninth Circuit. (See *County of Butte v. F.E.R.C.* (9th Cir. 2011) 445 Fed.Appx. 928, 930 ["None of the statutory provisions or regulations relied on by the County require the reimbursement of funds to a project's host municipality."].)

While the relicensing process drags on—now entering its 21st year—the Oroville Facilities have been operating since 2007 under a series of annual licenses issued by FERC. (AR G000158.)

2. The Licensing Process Involved Extensive Consideration of Environmental Impacts, Including Federal Environmental Review Under NEPA.

The FPA includes several environmental review requirements, including consideration by FERC of recommendations from state and federal agencies to ensure the project is the best adapted to a comprehensive plan for

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[9] See public comments by Paul McIntosh, ex-Butte County Chief Administrative Officer, at environmental scoping session, November 8, 2006, demanding approximately $11.3 million per year. (AR E00579-584)

development of a waterway, and that appropriate protections, mitigation and enhancements are provided for fish and wildlife. (16 U.S.C. §§ 797(e), 803(a), 803(j), 811 [Federal Power Act §§ 4(e), 10(a), 10(j), 18, respectively].) Specific to the Oroville Facilities, numerous environmental-related agencies submitted recommendations and proposed terms and conditions to FERC, including the federal fisheries agencies, U.S. Forest Service, and the California Department of Fish and Game. (AR E000879-881, E001235-1237.)

a. The EIS Under NEPA.

Pursuant to its obligations under NEPA (42 U.S.C. § 4321 et seq.), FERC issued a draft Environmental Impact Statement ("Draft EIS") for the relicensing application on September 29, 2006. (AR E000033; E000541-542; G000129.) NEPA is the federal counterpart of CEQA, requiring environmental impact review of major federal actions. (42 U.S.C. § 4332.) The Draft EIS analyzed the Settlement Agreement as DWR's "proposed action" subject to FERC's jurisdiction, and examined its environmental impacts on: geology; soils and paleontological resources; water quantity and quality; aquatic resources such as fish species; terrestrial resources; threatened and endangered species; recreational resources; land use and management; cultural resources; aesthetic resources; and socioeconomics. (AR E000044-45; E000827-828.) FERC also analyzed a FERC staff alternative, which added additional measures to DWR's proposed action. (AR E000881-882.) To compile the Draft EIS, FERC used information from an earlier Preliminary Draft Environmental

Assessment ("PDEA") prepared by DWR. (AR G000129.) FERC issued a final Environmental Impact Statement ("Final EIS") on May 18, 2007. (AR E000815-1427.)

b. The EIR Under CEQA

After the Settlement Agreement was signed and submitted to FERC in 2006, DWR issued a Draft Environmental Impact Report ("Draft EIR") pursuant to CEQA. (AR G000001-3.) The Draft EIR, released in May 2007, identified the Settlement Agreement as the preferred project and, like the NEPA EIS, it also analyzed a broad array of potential environmental impacts on geology, soils and paleontological resources, water quantity and quality, aquatic resources, terrestrial resources, land use and land management plans, recreational resources, cultural resources, population, housing and public services, environmental justice, aesthetic resources, air quality, agricultural resources, transportation and traffic resources and public health and safety.[10] (AR G000001-3, G000078-82, G000108.)

The Draft EIR relied heavily on the extensive technical information collected during the Oroville Facilities relicensing studies, including the same Preliminary Draft Environmental

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[10] As noted by FERC, content requirements for an EIR under CEQA are similar to the requirements for an EIS under NEPA, though an EIR must contain two elements not required by NEPA: a discussion of how the proposed project could induce growth, and discussion of a monitoring and reporting program. (E001242.) Although not required, population growth-inducing impacts were discussed in Section 3.3.10 of the FERC EIS. (*Ibid.*) The FERC EIS also listed monitoring and reporting requirements for inclusion in the license in Section 5.1. (*Ibid.*)

Assessment used for the NEPA EIS. (AR G000128-130, G000136-155.) In addition to the proposed project (i.e., the Settlement Agreement), the Draft EIR also analyzed a "no project alternative," as required by CEQA, which assessed continued operation of the Oroville Facilities "as it is now under the terms and conditions in the existing FERC license, and no new protection, mitigation, and enhancement measures would be implemented, other than those arising from existing legal obligations and agreements." (AR G000208-210.)

At no point, however, did DWR analyze an alternative of not operating the Oroville Facilities for hydroelectric power. In other words, the DWR never considered, as an alternative, the outright rejection of a project license issued by FERC. (See AR G000110-111, G000250-254.) Likewise, DWR declined to analyze any alternative in which it surrendered its license, finding that such an occurrence was not "reasonably foreseeable" and "would not support the primary purpose and needs of the Oroville Facilities that relate to providing electric power." (AR G000252-253.) On July 22, 2008, DWR certified the Final EIR. (AR H004699; AR A000003-101.)

c. Additional Environmental Review Pursuant to Federal Law

The Oroville relicensing process also included other environmental regulatory actions, including issuance of biological opinions under the Endangered Species Act (16 U.S.C. § 1531 et seq.) prepared by both the U.S. Fish and Wildlife Service (AR

G000112) and the National Marine Fisheries Service,[11] and the certification prepared by the Water Board under Section 401 of the Clean Water Act ("401 certification"). (33 U.S.C. § 1341; see AA11 {95} pp. 2369-2418.)[12] As to the 401 certification, the Water Board relied on the Final EIR in making its decision to issue the 401 certification. (AA11 {95} pp. 2384-2385.) The proposed license renewal also was required to comply with the federal Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 et seq.; AR E001240-1241) and the Fish and Wildlife Coordination Act (16 U.S.C § 661 et seq.; AR G000112), among other federal laws.

Although the Counties now complain they are unhappy with the environmental protections developed and approved during the ALP, they did not file formal challenges to *any* of these other environmental-related opinions, certifications, reports, or recommendations.

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[11] A copy of the final Biological Opinion can be found at https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20161205-5420 .

[12] The Court of Appeal judicially noticed the 401 certification for the Oroville Facilities by Order dated May 8, 2014. The reference to AA is to the Appellants' Appendix in the Court of Appeal.

B. The Proceedings Below and the Orders of this Court.

1. The Counties' CEQA-based Challenges in the Superior Court Were Denied as Non-Meritorious.

In August 2008, the Counties filed separate petitions for writ of mandate under CEQA in the Superior Court, challenging DWR's environmental review of the Settlement Agreement and seeking to enjoin or stay the licensing process. (2019 Opinion, p. 3; AA1 {1} pp. 0001-28; AA1 {3} pp. 0030-43.) The cases were consolidated and transferred to Yolo County Superior Court. (AA1 {16} pp. 0105-0120; AA1 {17} pp. 0121-0137.)

A CEQA action was never the Counties' only opportunity to assert their objections concerning the relicensing of the Oroville Facilities. But the Counties decided not to challenge the 401 certification or use the intra-licensing remedies provided under FERC regulations.

In Butte's Petition, it asked the trial court to issue a writ of mandate setting aside the orders of DWR, including its certification of the Final EIR, and enjoining DWR's Project, i.e. the FERC Settlement Agreement, "until and unless respondent [DWR] lawfully approves the project in the manner required by CEQA, including enforceable mitigation measures to prevent environmental and related socioeconomic harm within the County of Butte." (AA1 {1} pp. 0024.) Plumas similarly asked the trial court to issue a writ of mandate directing DWR to vacate and set aside its certification of the EIR for the project and "to suspend all activities under the certification." (AA1 {3} pp. 0041.)

In other words, the Counties sought to: (1) enjoin and suspend the consideration of the Settlement Agreement as the basis for FERC's renewed license; (2) demand that the application be withdrawn pending CEQA review; and (3) impose mandatory mitigation measures on the proposed federal relicensing project pursuant to CEQA. In short, the Counties sought to halt the federal relicensing of the Oroville Facilities based on state law, i.e. CEQA. (AA1 {1} p. 0024, AA1 {3} p. 41, 2019 Opinion, p. 3, fn. 3.)

Following a 3-day hearing, and submission of an extensive administrative record totaling more than 300,000 pages, the trial court issued a 16-page statement of decision denying Butte's and Plumas' petitions for writ of mandate and finding that the Counties' CEQA claims were entirely non-meritorious. (AA14 {124} pp. 3046-3063.) Judgment was entered on June 8, 2012, and the Counties appealed. (*Ibid.*; AA15 {131} pp. 3279-3354.)

2. The Court of Appeal's First Decision.

On appeal, the parties briefed the CEQA claims extensively. But the Court of Appeal decided the matter on a much simpler basis—lack of subject matter jurisdiction. As the Court of Appeal explained, "[the Counties] cannot challenge the environmental sufficiency of the [Settlement Agreement] in the state courts because jurisdiction to review the matter lies with FERC and [the Counties] did not seek federal review as required by 18 Code of Federal Regulations part 4.34(i)(6)(vii) (2003)." (December 20, 2018 Opinion ("2018 Opinion"), pp. 5, 20-21.)

The Court further held that with the exception of the 401 certification, which it found not to be at issue in the case, the "FPA occupies the field of licensing a hydroelectric dam and bars environmental review of the *federal* licensing procured in the *state* courts," citing *First Iowa, supra,* 328 U.S. 152, *California v. F.E.R.C.* (1990) 495 U.S. 490 ("*California v. FERC*"), *Sayles Hydro Associates v. Maughan* (9th Cir. 1993) 985 F.2d 451 ("*Sayles Hydro*"), and *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330 ("*Karuk Tribe*"). (2018 Opinion, pp. 8-9.) The Court explained, "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." (*Id.* at p. 9.)

As to the 401 certification issue, the Court found that "neither the program subject to the [Water Board] review, nor the Certificate by which [the Water Board] exercises its Section 401 authority to implement the provisions of the [FERC Settlement Agreement] are the subject of [the Counties'] petition." (*Id.* at p. 17.)

Accordingly, in its December 20, 2018 decision, the Court of Appeal dismissed the appeal for lack of subject matter jurisdiction, with directions to the trial court to vacate its judgment and enter a dismissal on the same basis. (*Id.* at p. 21.) The Counties did not file a Petition for Rehearing.

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3. The First Petition for Review.

After briefing in the Court of Appeal had closed, but before argument, this Court issued its decision in *Friends,* 3 Cal.5th 677. The *Friends* decision addressed application of CEQA in the context of a case involving deregulated activities subject to the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). (*Id.* at pp. 723-34.) This Court determined that, in that deregulated sphere, CEQA applies as part of an agency's self-governance process. (*Id.* at pp. 691, 723-34.) Although the *Friends* decision was raised by the Counties in a post-briefing letter, the Court of Appeal did not address the case in its 2018 Opinion.

On January 29, 2019, the Counties filed a petition for review to this Court raising the *Friends* decision. The Water Board filed a letter supporting the Court of Appeal's determination, but requesting depublication due to concerns about dicta and ambiguous language in the decision.[13] On April 10, 2019, this Court granted review and transferred the matter back to the Court of Appeal with directions to "vacate its [December 20, 2018] decision and reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677."

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[13] The Counties incorrectly state that the Water Board also opposed preemption on these grounds. (OBM, p. 11.)

4. The Court of Appeal's Decision After Transfer.

On September 5, 2019, the Court of Appeal issued a new decision after transfer back from the Supreme Court (the "2019 Opinion"). At this Court's direction, the Court of Appeal reconsidered the case in light of the decision in *Friends*. It found the decision inapplicable under the circumstances. (2019 Opinion, pp. 4, 20.) As the appellate court explained, the deregulatory sweep of the ICCTA at issue in *Friends* protected a zone of autonomy or sphere of regulatory freedom in which a state is entitled to self-govern a public project like any private owner. (*Id*. at pp. 22-23.) "Thus, in the case of the ICCTA, which purpose is to deregulate the railroad industry, CEQA is not a preempted regulation when applied to a state-owned project, but is merely an expression of self-governance." (*Ibid*.)

In contrast, the court explained, there is no "zone of autonomy" under the FPA because the Act was not designed with a *de*regulatory purpose. (*Id*. at p. 24.) "Without a zone of autonomy or 'sphere of regulatory freedom,' application of CEQA to a public project is not merely self-governance." (*Ibid*.) Rather, the FPA fully occupies the field of hydropower projects, "leaving no sphere of regulatory freedom in which state environmental laws may operate as self-governance. Instead, such laws directly encroach on the province of FERC under the [Federal Power Act]." (*Id*. at p. 26.)

The Court of Appeal found that Congress' intent to preempt state law is unmistakably clear. (*Id*. at pp. 26-27.) "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." (*Id*. at p. 27.)

The court noted one relevant exception to federal jurisdiction: Section 401 of the Clean Water Act. (*Id*. at pp. 15-16.) But the Court found Section 401 not relevant here, because "[n]either the program subject to the [Water Board] review, nor the Certificate by which [the Water Board] exercises its section 401 authority to *implement* the provisions of the [FERC Settlement Agreement] are the subject of [the Counties'] petition." (*Id*. at p. 20.)

In addition, because the Counties did not seek federal review of the Settlement Agreement before FERC, as required by 18 C.F.R. part 4.34(i)(6)(vii)(2003), they failed to exhaust their federal administrative remedies. (*Id*. at pp. 6, 12, 29, 32.) As the Court of Appeal pointed out, "state laws are not part of relicensing and cannot be used to delay relicensing by resort to the state courts." (*Id*. at p. 19.)

For these reasons, the Court of Appeal once again dismissed the appeal for lack of subject matter jurisdiction, concluding that the Counties cannot challenge the environmental sufficiency of the FERC Settlement Agreement (i.e. the proposed license) in state court, because jurisdiction to review the matter lies exclusively with FERC. (Opinion, pp. 6, 20, 32.) The Counties did not file a Petition for Rehearing.

5. The Second Petition for Review.

The Counties filed a new petition for review from the Court of Appeal's 2019 Decision. The Water Board again filed a letter with this Court supporting the Court of Appeal decision, but again requesting depublication due to concerns about dicta and ambiguous language in the decision. (See Water Board request for depublication dated November 4, 2019.) Declining to file an answer to the petition for review, DWR nonetheless filed a letter also requesting depublication on the grounds that the Court of Appeal decision was incorrectly decided in light of *Friends*—a reversal of its earlier position. On December 11, 2019, this Court again granted review, and directed the parties to brief the two issues set forth above.

IV. ARGUMENT

A. The Answer to Issue No. 1: The Federal Power Act Preempts CEQA Whenever CEQA Operates to Limit FERC's Regulatory Authority or Ability to Issue a License.

This Court stated in *Friends* that, "like the private owner, the state as owner cannot adopt measures of self-governance that conflict with [federal law] or invade the regulatory province of the federal regulatory agency." (*Friends, supra*, 3 Cal.5th at p. 691.) Here, the Counties challenge the environmental sufficiency of the proposed FERC license (i.e., the Settlement Agreement) and seek to interfere with the federal licensing process in order to add additional enforceable conditions on the license pursuant to CEQA. The relief sought by the Counties presents a clear but narrow case of preemption, because application of CEQA as

requested by the Counties in this action invades the regulatory authority of FERC, interfering with the licensing process.

1. Congress Clearly and Unmistakably Intended the FPA to Occupy the Field of Hydroelectric Licensing, Including License Conditions Relating to Environmental Concerns.

Without analyzing either the statutory wording or any evidence of congressional intent, the Counties assert the FPA "lacks an unmistakably clear Congressional statement of intent to preempt state self-governance" in matters concerning environmental review. (OBM, pp. 26-33.) Yet, the "fundamental question regarding the scope of preemption is one of congressional intent," which is a question that can only be answered with respect to the specific statute at issue, in the context of the case at hand. (*Friends, supra*, 3 Cal.5th at p. 702; see also *Hughes v. Talen Energy Marketing, LLC* (2016) 136 S.Ct. 1288, 1297 ["the purpose of Congress is the ultimate touchstone in every pre-emption case"].)

As a question of statutory construction, this Court looks to the text of the statute, the overall function of the FPA, and Congress' purpose in constructing the surrounding regulatory framework as disclosed by the legislative history. (*Friends, supra*, 3 Cal.5th at p. 702.) It is not necessary that the FPA specifically reference preemption of state-level environmental review of a hydroelectric license; rather, it must be clear from reading the statute that it encompasses such environmental review. (See *Gregory v. Ashcroft* (1991) 501 U.S. 452, 467; *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 132-133.)

The Counties refuse to acknowledge that the statutory language of the FPA and Congress' stated intent behind its provisions have long been understood to preempt virtually all state regulation of any matter relating to the generation of hydropower. As repeatedly recognized in decisions of the United States Supreme Court, federal courts, and California state courts, the FPA occupies the field of hydroelectric relicensing, establishing a broad and paramount federal regulatory role. (2019 Opinion, pp. 13-15, 26-27; see *First Iowa, supra*, 328 U.S. at p. 181 ["detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls"]; *California v. FERC, supra*, 495 U.S. at pp. 496-500 [Congress intended the FPA to establish "a broad and paramount federal regulatory role"]; *Sayles Hydro, supra*, 985 F.2d at pp. 454-456 [Congress has occupied the entire field, preventing state regulation; "the only authority states get over federal power projects relates to allocating proprietary water rights"]; *Karuk Tribe, supra*, 183 Cal.App.4th at pp. 342-360 [the FPA "occupies the field of hydropower regulation"].)

The United States Supreme Court explained in its seminal 1946 *First Iowa* decision, "[i]n the Federal Power Act 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 Energy Regulatory Commission] with the authority to act. … The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government

supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in the Act in [sections] 4(e), 10(a)(b) and (c), and 23(b)." (*First Iowa, supra*, 328 U.S. at pp. 167-168.) The Court went on to explain, "in those fields where rights are not thus 'saved' to the states, Congress is willing to let supersedure of the state laws by federal legislation take its natural course." (*Id*. at p. 176.) "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." (*Id*. at p. 181.)

Congress vested in FERC comprehensive planning authority over the development of waterways for hydroelectric projects, expressly including environmental considerations. (16 U.S.C. §§ 797(e), 803(a).) The FPA clearly mandates FERC's consideration of the environmental impacts of any hydroelectric license and requires FERC itself to set the terms and conditions of the license for the adequate protection, mitigation and enhancement of fish and wildlife and for other beneficial uses. (See 16 U.SC. §§ 797(e), 803(a), 803(j); see also 42 U.S.C § 4332 [NEPA].) This congressional intent to vest FERC with environmental review authority over hydroelectric licensing was re-emphasized and strengthened in the amendments to the FPA promulgated pursuant to the Electric Consumer Protection Act of 1986 (Pub. L. No. 99-495 (Oct. 16, 1986) 100 Stat. 1243).

In the 1986 amended Section 4(e), Congress directed that FERC, as part of its licensing authority, "give equal consideration to the purposes of energy conservation, the protection, mitigation

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

In amended Section 10(a), Congress directed FERC to set terms and conditions on a license that, in FERC's judgment, accommodate the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and other beneficial public uses, including irrigation, flood control, water supply, and recreation. (16 U.S.C. § 803(a).) In making this change to Section 10(a), Congress intended that, "[i]n essence, the law will now specifically recognize those waterway values and require, where they compete, that FERC resolve those issues in a manner that takes them into account, but does not necessarily result in their equal treatment." (H.R.Rep. No. 99-934, 2d Sess., p. 22 (1986); State Water Contractors' RJN, Exhibit E, p. RJN 053, granted in 2019 Opinion, p. 26, fn. 20.)

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

U.S.C. § 803(j).) In adding Section 10(j), Congress explained that the new provision does not give such recommending state and federal agencies "a veto, nor does it give them mandatory authority" over a project. (H.R.Rep. No. 99-934, 2d Sess., p. 23 (1986), State Water Contractors' RJN, Exhibit E, p. RJN 054, granted 2019 Opinion, p. 26, fn. 20.) Instead, "FERC is empowered to decide license terms, but there is a guarantee that the recommendations of the agencies cannot be lightly dismissed." (*Ibid*.) In other words, FERC remains in control.

Together, Sections 4(e), 10(a), and 10(j) provide FERC with the paramount regulatory role in balancing environmental considerations in the issuance of a license to operate a hydroelectric project, as the United States Supreme Court held in *California v. FERC,* 495 U.S. at pp. 499-500.

California v. FERC involved an effort by the California Water Board to impose higher minimum stream flow requirements than those required by FERC on a hydroelectric project, using the State's water right permitting authority. (*Id*. at pp. 494-495.) Construing the State's limited authority reserved under Section 27 of the FPA as to proprietary state water rights (16 U.S.C. § 821), the Supreme Court found that allowing California to impose higher minimum stream flow requirements "would disturb and conflict with the balance embodied" in FERC licensing conditions, contrary to congressional intent regarding the Commission's licensing authority, and would "constitute a veto of the project that was approved and licensed by FERC." (*Id.* at pp. 506-07.) Examining

the FPA and the subsequent 1986 amendments, the Court concluded: "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." (*Ibid.*)

Save for the limited role Congress provided to the States on proprietary water rights under Section 27—not at issue in this case—it is well established "that California's regulatory laws do not apply to hydropower projects." (*Karuk Tribe, supra*, 183 Cal.App.4th at p. 355; see also *Sayles Hydro, supra*, 985 F.2d at pp. 454-455; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 959-962.)

In sum, nothing in the FPA leaves a state agency with the authority to stay or enjoin a federal licensing process pending application of state law, or to impose mandatory conditions on a federally-licensed hydroelectric project, whether due to internal governance or otherwise. Moreover, because the FPA occupies the field of hydropower licensing, preemption does not depend on whether the state requirements conflict with the federal requirements. (*Sayles Hydro, supra*, 985 F.2d at p. 453.) "[O]ccupation of the field implies as a corollary that the state process itself, regardless of the results, is preempted." (*Ibid.*)

The Counties try to dismiss the entire body of case law interpreting the FPA on the basis that the cases addressed state

regulation of "private parties." (OBM, p. 10.) But the Counties ignore that the cited case law, including United States Supreme Court precedent, provides the governing interpretation of the intent of Congress in enacting the FPA and the 1986 amendments, and defines the regulatory jurisdiction of both FERC and the States in hydroelectric licensing. Accordingly, this body of case law cannot be ignored—it determines whether application of CEQA in this case encroaches on the regulatory domain of FERC under the FPA as established by Congress.

When these authorities are applied here, it is clear that the relief sought by the Counties seeks to directly interfere with the FERC licensing process by trying to halt the process, conditioning issuance of the license on environmental preclearance by CEQA and by imposing enforceable mitigation measures and financial costs on the proposed license. Those results are preempted because they invade the clear regulatory province of FERC under the FPA.

2. DWR Does Not Have the Discretion to Impose Environmental Conditions on the FERC License Based on CEQA.

The Counties would have this Court analyze the preemptive effect of the FPA in a vacuum, divorced from the facts of this case and from applicable law. Contrary to the Counties' assertion, this Court *did not* generally hold in *Friends* that "federal law does not preempt CEQA's application to California agency decisions about whether and how to pursue publicly owned and operated projects." (OBM, p. 27.) Nor does the

Counties' action below challenge any discretionary decision by the DWR.

a. The FPA is Not Like the ICCTA at Issue in *Friends of the Eel River*.

The decision in *Friends* turned on the text of the ICCTA, its overall function, and the unifying and deregulatory purpose disclosed by the legislative history behind the Act. (*Friends, supra*, 3 Cal.5th at p. 702.) Central to the Court's analysis was a determination whether or not application of CEQA in the context of the case was regulatory or internal governance of a state subdivision. (*Id*. at p. 690.)

As this Court explained, the deregulated scheme of the ICCTA involved railroad operations and the freedom of owners – private or public – within that deregulated sphere to make environmental decisions on their projects. (*Id*. at pp. 691, 723-734.) In such a situation, this Court determined that states should have the same freedom of ownership *within that deregulated sphere* as a private owner to make environmental decisions on a project: "Where owners are free from regulation, this freedom belongs to both public and private owners. When there is state ownership, we do not believe it constitutes regulation when a state applies state law to govern how its own state subsidiary will act within the area free of [Surface Transportation Board] and ICCTA regulation." (*Id*. at p. 733.) Under these circumstances, this Court concluded that the state, as owner, enjoyed the same freedom as a private owner to apply its own environmental standards and that the ICCTA "does not preempt the application of CEQA to this project." (*Id*. at p. 691.)

The Counties forego the critical statutory analysis and ignore the distinctions between the ICCTA and the FPA here. (OBM, pp. 25-37.) In fact, despite this Court's extensive analysis in *Friends,* the Counties continue to assert that the deregulatory component of the ICCTA was "irrelevant" to determining whether the statute's preemptive scope stretched beyond state regulation to invade state self-governance. (OBM, p. 31.) The Counties also argue—again with no analysis—that the FPA is similar to the ICCTA simply on the grounds that both federal laws have a "broad preemptive scope" in their respective regulatory fields, claiming that because no meaningful distinction exists between the two acts, the holding in *Friends* should apply here. (OBM, pp. 31-32.)

The FPA, however, is materially different from the ICCTA. There is no deregulated sphere in the regulatory regime governing the licensing of hydropower projects. Instead, the FPA provides a comprehensive and complex regulatory scheme for the licensing of hydroelectric facilities; it occupies the entire field of hydropower licensing, including environmental issues. (See *First Iowa*, *supra*, 328 U.S. at p. 181; *California v. FERC, supra*, 495 U.S. at pp. 496-500; *Sayles Hydro*, *supra*, 985 F.2d at pp. 454-456; *Karuk Tribe, supra*, 183 Cal.App.4th at p. 359.)[14]

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[14] Based on an out-of-context snippet from *First Iowa*, the Counties incorrectly assert that "the Federal Power Act's text and legislative history…reflect Congress's 'determination to avoid [an] unconstitutional invasion of the jurisdiction of the states.'" (OBM, p. 28.) But the Counties omit the remainder of *First Iowa's* analysis, which went onto explain that "[t]he Act leaves to the states their traditional jurisdiction *subject to the admittedly*

b. The Counties' Action Below Did Not Put at Issue Any DWR Discretionary Decisions.

To save their case from preemption, the Counties now seek to re-draw their action to obfuscate the relief they are seeking below. The Counties incorrectly claim that "[t]he Counties, in seeking DWR's CEQA compliance, do not propose cessation of Oroville operations, or withdrawal of DWR's pending FERC license application." (Petition for Review dated October 15, 2019, p. 31, fn. 6.) They argue that while they seek "injunctive relief against DWR pending CEQA compliance," they "do not seek an injunction in the FERC proceeding nor will they request the Superior Court to enjoin those proceedings." (OBM, p. 36, fn. 5.)

In truth, the Counties' CEQA action below challenged the environmental sufficiency of the FERC proposed license (the Settlement Agreement) and specifically "sought to enjoin the issuance of an extended license until their environmental claims were reviewed." (2019 Opinion, pp. 3, 6.) Their petitions in the superior court challenged DWR's environmental review of the Settlement Agreement, sought to enjoin or stay the licensing process, and to impose mandatory mitigation measures on the

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superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the Unites States. These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States." (*First Iowa, supra*, 328 U.S. at pp. 171-172 [emphasis added].)

proposed federal relicensing project pursuant to CEQA. (AA1 {1} pp. 0001-28; AA1 {3} pp. 0030-43; 2019 Opinion, p. 3, fn. 3.)

The Counties repeatedly reasserted their request that the license application be withdrawn pending another CEQA review and sought relief well beyond CEQA's purview. (See AA5 {78} pp. 1079, 1128 [joint opening trial brief: "DWR's project approval, EIR certification, and license application must be set aside until DWR prepares an adequate EIR and renders a lawful project decision."]; AA12 {106}, p. 2651 [joint reply trial brief: "DWR's project application should be withdrawn until the Department lawfully analyzes the project in the manner required by CEQA"]; Appellants' Opening Brief filed 3/27/2013, p. 89 ["DWR's project application should be withdrawn" pending CEQA review"].)

In fact, the Counties went so far as to ask the superior court to "retain *jurisdiction over [Oroville Facilities] operations"* pending CEQA compliance, and, during that period, to order DWR to "annually compensate Butte County for its costs of hosting the Oroville project." (AA5 {78} pp. 1079, 1128 [emphasis added].) As the Counties' own pleadings make clear, they are challenging the FERC Settlement Agreement itself, and the relief they seek is to halt the federal licensing process in order to impose conditions on the Settlement Agreement the Counties refused to sign. It is the actual relief the Counties seek below—their request to *enjoin* FERC's issuance of the license until a CEQA review is completed, and to *impose* their desired mitigation measures on the proposed project—that is before this Court on review.

A funny thing happened on the way to this forum, however. Apparently, the Counties realized that the relief they were seeking below was exactly what this Court declared would be preempted in *Friends*. (See *Friends, supra*, 3 Cal.5th at p. 691.) So now, the Counties claim they are only "challeng[ing] DWR's discretionary decision to adopt the Settlement Agreement as its proposed project for relicensing, and to submit the Settlement Agreement to FERC," arguing the relicensing of the Oroville Facilities was not mandatory and that "DWR *chose* to pursue and propose terms for relicensing, and its EIR was integral to this decision-making." (Petition for Review, pp. 8, 20, 21, 25; see also OBM, p. 34.) The Counties scramble to identify multiple "discretionary decisions" that required the support of the CEQA EIR. (OBM, pp. 9-10, 20, 22, 27-28, 34-35.) The problem is that the Counties' new theory is based on a factual disconnect with the record.

The Counties suggest the CEQA EIR was used to support the following alleged "discretionary decisions" by DWR:

- DWR's decision "whether to pursue a new license from FERC in the first instance" and "which project to pursue." (OBM, pp. 27, 34, see also pp. 9-10, 27-28, 34-35.)

- DWR's "ultimate decision to approve the project." (OBM, pp. 27-28, see also pp. 20, 22.)

- DWR's "decisions for acceptance and implementation of the new FERC Project License' and implementation of the Settlement Agreement." (OBM, p. 20, see also pp. 22, 27.)

- DWR's decision whether to "pursue a different licensing procedure." (OBM, p. 35.)

- DWR's decision whether to accept or reject the FERC issued license within 30 days of issuance. (OBM, p. 35.) Or to "abandon or transfer a license that FERC has issued." (*Ibid.*)

For several reasons, the Counties' effort to repackage this case as one about discretionary DWR decisions fails.

First, most of the purported "discretionary decisions" were made years before the Final EIR, which was certified on July 22, 2008. (AR A000102.) Specifically, the decision to use the ALP was made before November 16, 2000 (AR B000571-572); the decision to file the notice of intent to file an application for a new license was made before January 9, 2002 (AR B068710-68717); the decision to file an initial relicensing application with FERC was made before January 19, 2005 (AR G000168); the development of the Settlement Agreement under the collaborative Alternative Licensing Process happened in 2001-2006, it was signed by DWR on March 21, 2006, and it was submitted to FERC on March 24, 2006. (AR G000108.) In short, the July 22, 2008 EIR was not, and could not have been, the basis for any of these "discretionary decisions" by DWR.[15]

Second, the Counties' petitions never claimed that DWR failed to conduct CEQA before making any of these pre-Settlement Agreement decisions. ((AA1 {1} pp. 0001-28; AA1 {3} pp. 0030-43.) And the time to raise such challenges has long since passed. (Pub. Resources Code § 21167(a).)

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[15] A timeline of the key events for the Oroville Facilities relicensing is attached to the back of this brief.

Third, the Counties' suggestion that DWR had discretion to reject, abandon or transfer the Oroville license is incorrect as a matter of law. When FERC issues a final license to DWR, unlike the options open to a typical, unsatisfied licensee, DWR may only: (1) seek rehearing before FERC under FERC regulations within 30 days; and (2) if still dissatisfied, appeal the FERC license in federal court. (16 U.S.C. § 825l; 18 C.F.R. § 385.713.) In addition to these options, a typical licensee may also seek to reject, surrender a FERC license. (16 U.S.C. § 799; 18 C.F.R. §§ 6.1, 6.2)

But DWR is not a typical licensee. Under Water Code section 11464, which is applicable only to the DWR, DWR is foreclosed from undertaking any act to divest itself of title or ownership of any "water right, reservoir, conduit, or facility for the generation, production, transmission, or distribution of electric power, acquired by the department…." (Wat. Code, § 11464.) [16] In other words, DWR occupies a position unique among hydropower operators because it cannot—as a matter of law—surrender its hydropower facilities.

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[16] The full provision states: "No water right, reservoir, conduit, or facility for the generation, production, transmission, or distribution of electric power, acquired by the department *shall ever be* sold, granted, or conveyed by the department so that the department thereby is divested of the title to and ownership of it." (Wat. Code, § 11464 [emphasis added].) The Counties make *no* mention of Water Code section 11464 in their brief, although the State Water Contractors briefed Section 11464 in the Court of Appeal and to this Court. (See, e.g., SWC Answer to Petition for Review filed November 4, 2019, pp. 18, 39.)

The record also demonstrates that DWR could not have reasonably contemplated using the Final EIR as a basis for accepting or rejecting (or abandoning or surrendering) the FERC license when issued. The DWR Decision Document for the Final EIR states that under federal law DWR would have 30 days to determine whether to appeal the FERC decision to issue the license (i.e. "accept the license or license conditions") and noted that only if the license is inconsistent with either of the alternatives studied in the Final EIR would additional CEQA review be required. (AR A000008.) But the Final EIR contains no analysis of an alternative of surrendering an issued FERC license for Oroville. (AR G000208-249 [Description of Alternatives Under Consideration], G000250-254 [Alternatives Considered But Rejected from Further Study].) Further, if additional CEQA review is required, meeting a 30-day deadline to complete a revised EIR would be impossible. (See Pub. Resources Code, § 21091; Cal. Code Regs., tit. 14, §§ 15072, 15073, 15105 [establishing minimum times for public review].)

Fourth, the Counties' suggestion that the CEQA EIR was necessary to support DWR discretion as to whether to amend the license or implement the Settlement Agreement is without basis in the record. As to purported amendments post-filing, the only alternatives analyzed in the current license are the ones already before FERC. No amendments or other alternatives were analyzed. ((AR G000208-249.) As to implementation of the Settlement Agreement, the Counties requested no relief.

In sum, the Counties' contention that CEQA was necessary to support various DWR discretionary decisions is merely an after-the-fact, scatter-shot attempt to distract from the actual posture of this case. The Counties cannot now create a case that does not exist to avoid preemption, nor ask this Court to retroactively amend the Counties' pleadings below to assert remedies they never sought.

c. The Counties Are Trying to Use CEQA to Collaterally Attack the Proposed License, Which Is Preempted.

Instead of pursuing their federal remedies, the Counties are using CEQA to collaterally attack the Settlement Agreement itself, an agreement that is at the heart of the approved federal licensing process. Using CEQA, they seek a writ requiring DWR to withdraw the proposed license, i.e. the Settlement Agreement, and attempt to halt the FERC licensing process pending CEQA review, in order to place additional mitigation measures as conditions on the license. The relief requested is preempted because final conditions on the license—with one exception under the Clean Water Act discussed below—are within the regulatory province of FERC under its comprehensive planning authority. (16 U.S.C. §§ 797(e), 10(a), 10(j).)

In *Friends*, this Court held that state environmental permitting or preclearance regulations that have the effect of halting a project within the regulatory domain of a federal agency pending environmental compliance are categorically preempted. (*Friends, supra*, 3 Cal. 5th at pp. 691, 716-717.) Allowing a state,

as a project owner, to use CEQA to interfere with the FERC licensing process in order to impose additional conditions on a federal license is essentially an end-run around Congress' regulatory scheme, which granted FERC the final authority to place conditions on a license. If permitted, it would nullify Congress' 1986 amendments to the FPA (Sections 4e, 10(a), and 10(j)) and vest in a state an effective veto over FERC's final license authority.

Because the Counties' CEQA challenge and requested relief directly invades the regulatory domain of FERC, it is preempted. (*Friends*, *supra*, 3 Cal.5th at p. 691; see also 2019 Opinion, p. 6.)

3. The Narrow Savings Clause under Section 27 of the FPA Is Not at Issue in this Case.

Misstating both the applicable facts and law, the Counties for the first time suggest the narrow exception to federal jurisdiction under Section 27 of the FPA is applicable here. (OBM, p. 10 [citing 16 U.S.C. § 821], see also OBM, pp. 37-39.) Section 27 (16 U.S.C. § 821) provides:

> 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.

The Counties argue that because the Oroville Facilities serve multiple uses, Section 27 permits state regulation of the Oroville Facilities through CEQA. (OBM, pp. 37-39.) This novel construction is utterly without support. In *First Iowa,* the

Supreme Court held that Section 27 applies only to proprietary water rights, reading the broadest possible negative pregnant into this "savings clause." (*First Iowa, supra*, 328 U.S. at pp. 175-176; see also *California v. FERC*, *supra*, 495 U.S. at pp. 497-498; *Sayles Hydro*, *supra*, 985 F.2d at p. 454 ["The rights reserved to the states in this provision are all the states get."].) Proprietary water rights are not at issue in this proceeding. And nothing in Section 27, or the federal case law construing it, extends this savings clause to a situation where proprietary water rights are not at issue.

The Counties seek to support their argument with *County of Amador, supra,* 76 Cal.App.4th 931, but the decision follows *First Iowa*. In *County of Amador*, a CEQA challenge was brought against a water agency's and irrigation district's plans to acquire the consumptive water rights to three high Sierra lakes for which the agencies prepared an EIR and later a supplemental EIR. (*Id.* at pp. 940-943.) Later, during the pendency of the case, the project changed into a plan to also purchase a hydroelectric project ("Project 184") from Pacific Gas & Electric at the same lakes, the purchase of which was exempt from CEQA. (*Ibid.*) Plaintiffs amended their CEQA action to include challenges to the acquisition of Project 184, which were consolidated into one writ petition. (*Id*. at p. 943.) El Dorado Irrigation District responded that plaintiffs' challenge to the operation of Project 184 was preempted by the FPA. (*Id*. at p. 957.)

The appellate court first noted that, while Section 27 "might be interpreted as a broad delegation of powers to the

state" on its face, the meaning of the provision and the preemptive effect of the FPA are not issues of first impression. (*Id*. at pp. 959-960.) Instead, United States Supreme Court precedent had already construed Section 27 to apply only to proprietary water rights. (*Id*. at p. 959 [citing *First Iowa* and *California v. FERC*].) However, because Project 184 involved a shift in consumptive use of water, it involved proprietary water rights and the court determined that Section 27 applied and there was no preemption. (*Id*. at pp. 959-961.) As the court noted, "this conclusion does not interfere in any way with FERC licensing procedures," which were not involved in the case. (*Id*. at pp. 940-43, 961-962.)

In contrast, here a federal licensing process and the issuance of a federal license are directly involved, but proprietary water rights are not at issue. The fact that the Oroville Facilities serves many purposes does not provide a Section 27 "backdoor" for the application of CEQA to a federal licensing process.

In addition, Section 27 was never raised by the Counties below as a basis for application of CEQA, nor have the Counties ever contended that proprietary water rights are at issue. Section 27 provides no basis to escape preemption in this case.

4. Because the Proposed License Terms (the Settlement Agreement) Have Been Submitted to FERC, the Only Path to Challenge Conditions on the License is Through FERC or the Federal Courts.

Congress expressly crafted the FPA to provide states with the power to *recommend* environmental conditions on a license but not the power to *impose* such conditions on a license.

(*California v. FERC, supra*, 495 U.S. at p. 499.) As the Ninth Circuit observed in *Sayles Hydro*, "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 *Sayles Hydro*, a FERC license had been issued to applicants to build and operate a small hydroelectric project, but the Water Board refused to issue a water rights permit, instead requiring a series of reports and studies on the project on a wide range of environmental concerns, including recreation, aesthetics, archaeology, sport fishing, cultural resources, and fiscal concerns, most or all of which had been addressed by FERC when issuing its license. (*Sayles Hydro, supra*, 985 F.2d at p. 453.) The Ninth Circuit determined that since requiring environmental impact reports (CEQA documents) had nothing to do with determining proprietary water rights, federal preemption barred the state requirements. (*Id*. at p. 455.) The Ninth Circuit stated that with "occupy the field" preemption, the federal role is so pervasive that no room is left for the states to supplement, preventing state regulation. (*Id*. at pp. 455-456.)

At this juncture, the terms of the Settlement Agreement (executed before the EIR challenged here was issued) do not permit DWR to withdraw from the Agreement submitted to FERC as the proposed license. The Settlement Agreement has already been submitted to FERC. Thus, the only available

remedies to the Counties are those under federal law. At this point, the Counties may seek rehearing before FERC once the license is issued, and if unsuccessful, may also appeal the FERC license in federal court. (18 C.F.R. § 385.713; 16 U.S.C. § 825l.) In addition, both Counties participated in the NEPA process and they may have a federal remedy challenging the environmental review of the Settlement Agreement in FERC's Final EIS. (AR E001351-1352; 5 U.S.C. §§ 701 et seq. [Administrative Procedures Act].) What the Counties may not do, however, is collaterally attack the Settlement Agreement submitted to FERC as the proposed license.

B. The Answer to Issue No. 2: The Federal Power Act Does Not Preempt State Court CEQA-Based Challenges to the 401 Water Quality Certification, but this Action is Not a State Court Challenge to the 401 Certification, Which is Now Final.

1. Through the Clean Water Act, Congress Created a Certification Process Limited in Scope Apart From the FPA, in Which States Have a Role on Final License Conditions.

FERC-licensed hydropower projects are also subject to Section 401 of the Clean Water Act. (33 U.S.C. § 1341(a); 2019 Opinion, pp. 5-6.) This provision requires that any applicant for a federal license or permit to conduct an activity that may result in a discharge into navigable waters request a water quality certification from the State in which the discharge will occur. (33 U.S.C § 1341(a).) This certification is intended to provide States with the opportunity to review the discharge and impose

conditions necessary to ensure the discharge is protective of the State's water quality standards. If this certification is timely granted, FERC may issue the license, and it is statutorily required to include any terms and conditions contained in the certification in the license. (See 33 U.S.C. § 1341(d); *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 722; *American Rivers, Inc. v. F.E.R.C.* (2d Cir. 1997) 129 F.3d 99, 111.) Licensees also must apply for a new Section 401 certification each time the hydropower project is relicensed. (See *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.* (2006) 547 U.S. 370, 374-75; 33 U.S.C. § 1341(a)(1).)

A State receiving a request to issue a 401 certification is required to act within a reasonable period of time, which shall not exceed one year, or the certification requirements of Section 401 are deemed waived. (*Ibid.*; *Hoopa Valley Tribe v. F.E.R.C.* (D.C.Cir. 2019) 913 F.3d 1099, 1101, cert. denied *sub nom.* ("*Hoopa Valley Tribe*") [holding that FERC was arbitrary and capricious for failing to find that the States had waived Section 401 authority]; *California Trout v. Hoopa Valley Tribe* (2019) 140 S.Ct. 650, cert. denied.) "[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." (*Hoopa Valley Tribe, supra*, 913 F.3d at p. 1101 [quoting *Alcoa Power Generating Inc. v. F.E.R.C.* (D.C. Cir. 2011) 643 F.3d 963, 972].) Delays in issuance of state 401 certifications can postpone implementation of environmental and other public benefits that would come through settlement and

FERC's issuance of the new license. (See, e.g., *Hoopa Valley Tribe, supra*, 913 F.3d at p. 1105 [noting that "had FERC properly interpreted Section 401 and found waiver when it first manifested more than a decade ago," implementation of the settlement agreement "might very well be underway"].)

In California, pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13000 et seq.), the Water Board is designated as the state water pollution control agency for Clean Water Act compliance purposes and is authorized to issue 401 certifications. (Wat. Code, § 13160.) The Water Board issued a 401 Water Quality Certificate for the Oroville Facilities relicensing on December 15, 2010. (AA11 {95} p. 2369-2418.)

It is undisputed that issuance of the Water Board's 401 certification required compliance with CEQA. (Cal. Code Regs., tit. 23, § 3856(f).) Specifically, before issuing a 401 certification, the Water Board, as the "responsible agency" under CEQA, was required to review the environmental impacts on matters within its jurisdiction—here water quality—and to review feasible mitigation measures or alternatives within the agency's powers. (Cal. Code Regs., tit. 14, §§ 15096(f), (g).)

Here, the Water Board certified that it had independently reviewed the record, including the Final EIR prepared by DWR, and made the findings required by Public Resources Code section 21081, adopting both a statement of overriding considerations and a mitigation, monitoring and reporting plan. (AA11 {95} pp. 2384-2385.); Cal. Code Regs., tit. 14, §§ 15091, 15093, 15096(h).) The 401 certification for the Oroville Facilities relicensing

became final 30 days after issuance, and it was subsequently submitted to FERC on February 1, 2011. (Wat. Code, § 13330; Water Board 2019 Request for Depublication, p. 3, fn. 1.) The Counties did not challenge the 401 certification.

2. The 401 Certification is Not at Issue in this Litigation Because the Counties Forfeited Their Opportunity to Challenge It.

The Counties brought this action in 2008, two years *before* the 2010 issuance of the 401 certification, and they challenged only the environmental sufficiency of the Settlement Agreement submitted to FERC, *not* the 401 process pending before the Water Board. (2019 Opinion, p. 6; AA11 {95} p. 2369-2418; AA1 {1} pp. 0001-28; AA1 {3} pp. 0030-43.) As acknowledged by the Water Board, DWR, and the Court of Appeal, the Counties' petitions are *not* a challenge to the issued 401 certificationor to the Water Board's process in issuing the 401 certification. (2019 Opinion, pp. 6-7, 20; Water Board's November 4, 2019 Request for Depublication, pp. 2-3; DWR November 4, 2019 Request for Depublication p. 2, fn. 2.) The Counties *dismissed* the Water Board from their action in 2009. (AA2 {29}, pp. 0284-0300.)

Once the 401 certificationwas issued, along with the Water Board's findings under CEQA, the Counties did *nothing*. They did not seek reconsideration from the Water Board, nor challenge the 401 certification, the Water Board's reliance on the Final EIR, or the Water Board's independent findings regarding environmental impacts under CEQA. (Wat. Code, § 13330; Cal. Code of Regs., tit. 23, § 3867.)

It is now too late for the Counties to challenge the 401 certification for Oroville, which became final 30 days after its issuance, and it may not be reconsidered or redone under the strict time limits of the Clean Water Act. (Wat. Code, §§ 13330, subds. (a), (d); 33 U.S.C. § 1341(a)(1); *Hoopa Valley Tribe, supra,* 913 F.3d at 1105.) Accordingly, while the 401 certification grants the state authority to weigh in on environmental issues under the Clean Water Act, and California has specifically authorized CEQA review to accomplish that task, the Counties here never challenged the 401 certification below, and it is too late to do so now.

In response, the Counties claim they only needed to challenge the EIR once, and only against DWR, rather than file a multiplicity of actions against each responsible agency. (OBM, p. 46 [citing *City of Redding v. Shasta County Local Agency Formation Com.* (1989) 209 Cal.App.3d 1169, 1181 ("*City of Redding*")].) But the case relied on for that contention, *City of Redding,* is not applicable. There, while a suit was pending against the lead agency, petitioners brought a separate suit against a responsible agency, the Local Agency Formation Commission ("LAFCO"). Petitioners alleged LAFCO should have independently determined the adequacy (or inadequacy) of the lead agency's decision not to certify the project and should have prepared its own EIR. (*Id.* at p. 1174.)

The appellate court held that under Public Resources Code section 21167.3, in a situation where an injunction or stay was not granted, LAFCO was required to accept the validity of the

negative declaration and could not step in and assume lead agency status. (*Id*. at p. 1181.) The court explained that the purpose of Public Resources Code section 21167.3 is to expedite CEQA review where a lawsuit is pending, by designating one forum for resolution, i.e., the court, not LAFCO. (*Ibid*. ["Redding would have the adequacy of Anderson's negative declaration determined by both LAFCO and the court. Such a dual determination would cause confusion and provoke additional time-consuming litigation."].)

Here, there is no allegation or claim against the Water Board that it should have prepared its own EIR, on the grounds the Final EIR prepared by DWR was inadequate. The Water Board is not a party to this action nor is there a separate action against the Water Board. The *City of Redding* case is off point. If the Counties believed the Water Board was proceeding contrary to law, they could have sued for failing to issue a 401 certification that addressed the substance of the issues about which the Counties were complaining. (Wat. Code, § 13330.)

In sum, neither the 401 certification nor the process by which the Water Board issued the 401 certification remains at issue in this case. Instead, the Counties' action is a collateral state law attack on the proposed license before FERC, and the FERC relicensing process itself. As such, this case does not implicate the issue of whether the FPA preempts state court CEQA-based challenges to a 401 certification.

V. CONCLUSION

As to Issue No. 1, the FPA preempts application of CEQA, even when the state is acting on its own in the exercise of self-governance, if the application of CEQA conflicts with federal law or, as here, if it invades the regulatory province of FERC. As to Issue No. 2, the FPA does not preempt state court challenges to an environmental impact report prepared under CEQA to comply with Section 401 of the federal Clean Water Act; however, Petitioners did not bring that challenge and have waived their right to challenge the 401 certification for the Oroville Facilities.

The State Water Contractors, as well as their member agencies who are parties to this litigation, respectfully request that the decision of the Court of Appeal be affirmed.

Dated: June 9, 2020

Respectfully submitted,

DUANE MORRIS LLP

By: /s/ Thomas M. Berliner
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Paul J. Killion
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Real Parties in Interest and Respondents
STATE WATER CONTRACTORS, INC., et al.

__**Timeline of DWR's Relicensing Actions and CEQA**__

- **November 16, 2000** — **DWR requests approval of Alternative Licensing Procedure (**AR B000571-572.)
- **January 11, 2001** — **FERC Approves DWR's use of Alternative Licensing Procedure (AR** B000617-619.**)**
- **January 9, 2002** — **DWR files Notice of Intent to File Application for New License (mandatory deadline - 5 years prior to license expiration) (**AR B068710-68717.)
- **January 19, 2005** — **DWR files initial relicensing application (mandatory deadline - 2 years prior to license expiration)** (AR G000168.)
- **March 24, 2006** — **Executed Settlement Agreement submitted to FERC as the Proposed License** (AR G000108; G000173-178; D000422-576.)
- **September 29, 2006** — **FERC issues Draft NEPA Environmental Impact Statement (AR E000033.)**
- **October 26, 2005** — **Initial Application for Section 401 Certification Submitted to State Water Resources Control Board (AR G001012.)**

- **January 31, 2007** — **FERC license expires (AR G000108.)**
- **May 18, 2007** — **FERC issues Final NEPA Environmental Impact Statement (AR E000815.)**
- **May 2007** — **DWR issues Draft CEQA Environmental Impact Report (AR G000001-3.)**
- **July 22, 2008** — **DWR Issues Decision Document and Certifies Final CEQA Environmental Impact Report (AR A000102.)**
- **August 21, 2008** — **The Counties file their Petitions for Writ of Mandate Pursuant to CEQA**
- **December 15, 2010** — **Water Board issues Section 401 Water Quality Certification (AA11 {95} p. 2369-2418.)**

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this Answering Brief on the Merits of State Water Contractors, Inc., *et al*. contains 1,2652 words, including footnotes, according to the Microsoft Word software, and not including the Tables of Contents and Authorities, the caption page, signature blocks, any attachments or this certification page.

Dated: June 9, 2020

/s/ Thomas M. Berliner
Thomas M. Berliner

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Supreme Court of California
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Electronically FILED on 6/9/2020 by Ines Calanoc, Deputy Clerk

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6/9/2020

Date

/s/Paul Killion

Signature

Killion, Paul (124550)

Last Name, First Name (PNum)

Duane Morris

Law Firm