S258574

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF BUTTE, 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

Third Appellate District, Case No. C071785
Yolo County Superior Court, Case No. CV-2009-1258
The Honorable Daniel P. McGuire, Judge Presiding

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF & AMICUS CURIAE BRIEF OF SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF THE RIVER, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, AND FRIENDS OF THE EEL RIVER IN SUPPORT OF PLAINTIFFS AND APPELLANTS COUNTY OF BUTTE, COUNTY OF PLUMAS, et al.

E. Robert Wright (SBN 51861)
Sierra Club California
909 12th Street, Suite 202
Sacramento, CA 95814
Tel: (916) 557-1104 Fax: (916) 557-9669
Email: bwrightatty@gmail.com

Attorney for Amici Curiae Sierra Club, Center for Biological Diversity, Friends of the River, California Sportfishing Protection Alliance and Friends of the Eel River

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Amici Curiae Sierra Club, Center for Biological Diversity, Friends of the River, California Sportfishing Protection Alliance and Friends of the Eel River request leave pursuant to rule 8.520(f) of the California Rules of Court to file the attached Amicus Curiae brief.

The Sierra Club is a national non-profit organization of more than 800,000 members, roughly 166,000 of whom live in California. The Sierra Club is dedicated to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and encouraging humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club was an intervenor in the Federal Energy Regulatory Commission (FERC) relicensing proceedings of Oroville Dam. The Sierra Club joined in an Amicus letter (October 29, 2019) requesting this Court to grant the Petition for Review in this case.

The Center for Biological Diversity (the "Center") is a non-profit organization whose mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public health. The Center has more than 825,000 members and online activists with offices in California and other states. The Center works through science, law, and creative media to secure a future for all species hovering on the brink of extinction. The Center has been a party to many California Environmental Quality Act (CEQA) lawsuits where project approvals threaten conservation interests due to the lack of adequate environmental review. The Center has a particular interest in ensuring that the substantive requirements of CEQA are applied to the fullest extent possible to protect

the environment, including the mandate that California public agencies must fully disclose, analyze, and mitigate a project's significant environmental effects, and adopt feasible alternatives to minimize or avoid these effects.

Friends of the River (Friends) was founded in 1973, and incorporated under the non-profit laws of this State. Friends has more than 2,000 members dedicated to the protection, preservation, and restoration of California's rivers, streams, and aquatic ecosystems. Friends' members have aesthetic, recreational, and spiritual interests in the scenery, habitats, and species protected by vigorous application and enforcement of CEQA. Friends was an intervenor in the FERC relicensing process for the Oroville Dam Facilities. Friends raised in intervention papers the need to armor the emergency spillway. The State Water Contractors downplayed the risk and argued that relicensing was the wrong forum to address such issues. Friends' warning was ignored by FERC and DWR, leading to the evacuation of about 188,000 persons during the spillway erosion emergency of February 2017. Friends joined in an Amicus letter (October 29, 2019) requesting this Court to grant the Petition for Review in this case.

California Sportfishing Protection Alliance (CSPA) is a non-profit public benefit fishery conservation organization incorporated under the non-profit laws of this State in 1983 to protect, restore, and enhance the state's fishery resources and their aquatic ecosystems. CSPA is actively involved in the conservation of the San Francisco Bay-Delta estuary, and Sierra fishery resources, which are protected through vigorous enforcement of CEQA. CSPA carries out a substantial portion of its advocacy through hydropower relicensing proceedings before FERC and associated water-quality certification proceedings before the Water Board. CSPA was an intervenor in the FERC relicensing process for the Oroville Facilities.

CSPA joined in an Amicus letter (October 29, 2019) requesting this Court to grant the Petition for Review in this case.

Friends of the Eel River (FOER) is a grass-roots, non-profit, 501(c)(3) corporation organized pursuant to the laws of the state of California. FOER has more than 1,000 members, working to restore the Eel River and its tributaries to a state of natural abundance. FOER has worked to curtail water diversions and other practices harming the Eel River watershed and its threatened salmon and steelhead fisheries. Consistent with this mission, FOER has actively participated in the relicensing of the Potter Valley Project, a federally licensed dam, on the Eel River. FOER is concerned that CEQA preemption would curtail the obligation of the state and other public agencies to conduct full CEQA review before proceeding with any application to continue operation of the Potter Valley Project. FOER also, was the lead plaintiff in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, *cert. denied,* 138 S.Ct. 1696 (2018), which is the most cited and discussed preemption decision by the parties in *this* case. FOER joined in an Amicus letter (October 29, 2019) requesting this Court to grant the Petition for Review in this case.

The proposed amicus curiae brief will assist this Court in deciding the issues presented for review by focusing on the far-reaching effects this Court's decision will have beyond the dispute between the parties in this case. Amici curiae are not affiliated with any party to this action. There are no parties, counsel, persons, or entities to identify pursuant to California Rule of Court 8.520(f)(4) (A) and (B.) Amici curiae write to offer an environmental perspective on the significant public policy issues at stake given the issues presented for review.

August 26, 2020

Respectfully requested,

By: 

E. Robert Wright

Attorney for Amici Curiae Sierra Club, Center for Biological Diversity, Friends of the River, California Sportfishing Protection Alliance, and Friends of the Eel River

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

California Cases

Federal Statutes

California Statutes

Regulations

AMICUS CURIAE BRIEF OF SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF THE RIVER, CALIFORNIA SPORTFISHING PROTECION ALLIANCE AND FRIENDS OF THE EEL RIVER

I. ISSUES PRESENTED FOR 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. INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Power Act (FPA) does not preempt application of the California Environmental Quality Act (CEQA) when the State is acting on its own behalf—and exercising its discretion—in deciding to pursue licensing for a hydroelectric dam project.

The FPA likewise does not preempt state court challenges to an environmental impact report (EIR) prepared under CEQA to comply with the federal water quality certification under section 401 of the federal Clean Water Act.

This *amicus* brief is in support of the position of Plaintiffs and Appellants Counties of Butte and Plumas. Like the Counties, Defendant and Respondent Department of Water Resources (DWR) also contends the application of CEQA is not preempted here. (DWR Answer Brief filed June 9, 2020.)

The public interest, and indeed, the safety, of Californians living downstream from existing and possible future dams will be protected by a

holding by this Court that CEQA is *not* preempted when the State decides to pursue dam project licensing.

The FPA does not preclude the State from evaluating its hydroelectric dam project under CEQA in deciding whether to pursue licensing instead of just, for example, "tossing a coin."

The State's decision to pursue licensing is upstream of, meaning it precedes, FERC's administration of the licensing process.

Preemption of the State's internal decision-making whether to pursue licensing would raise Constitutional issues.

The issues before this Court do not include the adequacy of the environmental review or the available remedies should the lower courts ultimately conclude DWR has failed to proceed in the manner required by CEQA.

And finally, preemption of state court challenges to an EIR prepared to comply with federal water quality certification, would conflict with the decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 712.

III. ARGUMENT

A. THE FEDERAL POWER ACT (FPA) DOES NOT PREEMPT APPLICATION OF CEQA WHEN THE STATE PURSUES DAM PROJECT LICENSING.

This section addresses the first of the two issues presented for review. That is, to what extent does the FPA preempt application of CEQA when the state exercises its discretion to pursue dam project licensing? The answer is there is no preemption when the State acts on its own behalf in pursuing dam project licensing.

1. The public interest and public safety will be protected by a holding that CEQA is not preempted.

The public interest, and indeed, the safety, of Californians living downstream from existing and possible future dams will be protected by a holding by this Court that CEQA is *not* preempted when the State decides to pursue dam project licensing.

Required subjects for an EIR under CEQA include identification and description of "[d]irect and indirect significant effects of the project on the environment," and include, among other things, "relevant specifics of … *health and safety problems* caused by the physical changes" of the project. (14 Cal. Code Regs. (CEQA Guidelines) § 15126.2(a) [emphasis added].) See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 520.) As an example of the need for CEQA scrutiny of potential public safety issues when the State decides to pursue licensing for a dam, the Counties pointed out that "Butte County's EIR comments also criticized DWR for understating the risk of 'catastrophic flooding in and downstream of Oroville' from a 'failure or uncontrolled spill' at Oroville Dam. (AR H 000235.)" (Plaintiffs' Opening Brief on Merits p. 21.) The State Water Contractors (SWC) Answering Brief accuses the Counties of raising "the 2017 Oroville spillway problems to inflame issues… ." (SWC Answering Brief p. 19 fn.6.)

The "2017 Oroville spillway problems" led to the evacuation of about 188,000 persons during the spillway erosion emergency of February 2017. Whether CEQA issues pertaining to public safety are present in *this* CEQA case is *not* the issue. The first issue presented for review in this Court is whether CEQA's application is preempted when the State decides to pursue dam project licensing. If that issue is answered in the affirmative, public safety would be included among the environmental issues involved in pursuing dam licensing, which would in the future *avoid* CEQA scrutiny.

If CEQA is to be applicable to anything, CEQA review of public safety issues that could result in catastrophic flooding and loss of life should be at or near the top of the list.

The consequences of holding CEQA preempted by the FPA go far beyond this particular case. Californians would be deprived by preemption of the searching CEQA scrutiny of the many profound environmental issues, including public safety, raised whenever the State decides to pursue dam licensing.

Beyond public safety, dams have adverse impacts on endangered and threatened fish species and their designated critical habitats. Dams replace a stretch of a flowing river by a reservoir. Reservoir operations alter flows and temperatures downstream. Diversions from rivers as part of project operations reduce freshwater flows downstream of the diversions. In addition to the direct adverse impacts, there should be project benefits such as providing irrigation water during the summer. But even those project benefits may also have adverse impacts such as generating selenium runoff by irrigating drainage-impaired lands.

The point is that the discretionary decision to pursue dam licensing has numerous environmental consequences that in the public interest, should remain subject to CEQA scrutiny. Such scrutiny includes possible judicial review in California's state courts. This Court was clear in *Friends of the Eel River v. North Coast Railroad Authority (Eel River)* (2017) 3 Cal.5th 677, 713, *cert. denied,* 138 S.Ct. 1696 (2018):

> CEQA is enforced with powerful remedies to ensure that the review process is completed appropriately and the various findings are made before projects go forward. Litigants, including members of the public, may apply to courts to order agencies to void, either in whole or in part 'any determination, finding, or decision … made without compliance' with CEQA.

If CEQA does not apply when the State pursues dam licensing, no other requirement of state or federal law can ensure that this scrutiny is applied to the State's decision.

2. The FPA does not preempt the State from making rational decisions whether and on what terms and conditions to pursue dam project licensing.

This Court *explained twice* in *Eel River*, 3 Cal.5th 677, 691, 724, that a private owner would not be required to decide to go forward with a project under the laws at issue there by, for example, "tossing a coin." An owner can instead proceed rationally by making its decisions based upon its own internal guidelines so long as there is not conflict with federal law. This freedom to make rational decisions under one's guidelines belongs to the State, as owner of a project, as well. The State "as owner may make its decisions based on its own guidelines rather than some anarchic absence of rules of decision. And we have already established that CEQA is an internal guideline governing the processes by which state agencies may develop or approve projects that may affect the environment." (*Eel River*, 3 Cal.5th at 724.) When, like here, the State is itself the owner of the subject property—the Oroville Dam—"application of CEQA in this context constitutes self-governance on the part of a sovereign state and at the same time on the part of an owner." (*Eel River*, 3 Cal.5th at 723.)

Subheading b. in this Court's *Eel River* decision, 3 Cal.5th 677, 725, is entitled "*The* Gregory-Nixon *rule."* As explained by *Eel River*, 3 Cal.5th at 733, "the presumption established in *Nixon* and *Gregory*" is "that federal preemption does not trench on essential state sovereignty and self-governance without unmistakably clear language to that effect …" Moreover, "[w]here owners are free from regulation, this freedom belongs to both public and private owners." (*Eel River,* 3 Cal.5th at 733.)

Nixon v. Missouri Municipal League (2004) 541 U.S. 125 and *Gregory v. Ashcroft* (1991) 501 U.S. 452, are more recent than *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (1946) 328 U.S. 152, which was relied upon by the Third District Court of Appeal in raising and reaching its preemption decision in this case. *This* case involves a state project subject to California's internal self-governance. In contrast, *First Iowa* and its progeny, including *California v. FERC* (1990) 495 U.S. 490, involved state regulation of private projects not owned by the State. The more recent cases decided an issue governing here, preemption analysis where the internal, sovereign concerns of the State is an issue that was not present in *First Iowa.*

Moreover, "[t]he FPA does not contain an express preemption clause." (*Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.* (2d Cir. 2012) 673 F.3d 84, 95 [rejecting FPA preemption claim].) In contrast to the FPA, the railroad statute at issue in *Eel River* contained an express preemption provision, creating "exclusive" jurisdiction in the federal Surface Transportation Board. (See *Eel River,* 3 Cal.5th 677, 706, quoting 49 U.S.C. § 10501(b).) That makes *this* an easier case than *Eel River.*

In addition, the FPA actually contains a saving section, which specifically preserves the application of state laws and water rights, FPA section 27, 16 U.S.C. section 821:

> 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 Oroville Dam project, owned and operated by DWR, is the linchpin of the State Water Project. The project delivers large quantities of municipal and irrigation water under water rights under the authority of the State's

water rights system. These are proprietary rights expressly preserved by the FPA's saving section.

There is no unclear or ambiguous, let alone *unmistakably clear*, language in the FPA hinting, suggesting, or mandating that public and/or private dam owners cannot have laws, regulations, or guidelines to guide their discretion as to whether and how to pursue dam licensing.

Strengthening this jurisprudence, the presumption of considerable state autonomy was highlighted when the U.S. Supreme Court decided *Virginia Uranium, Inc. v. Warren* (*Virginia Uranium*) (2019) 587 U.S.__, 139 S.Ct. 1894, last year. The Atomic Energy Act afforded the Nuclear Regulatory Commission broad authority over the nuclear fuel lifecycle. Despite that, six members of the Supreme Court in two separate opinions held the Act did *not* preempt a Virginia law *banning* uranium mining. Justice Gorsuch joined by two justices authored the judgment of the Supreme Court. He emphasized that "[t]he preemption of state laws represents 'a serious intrusion into state sovereignty.'" (139 S.Ct. at 1904.)

Clearly, the State is free to make its decision whether to pursue dam licensing and if so to determine project objectives, alternatives, mitigation measures, and project design pursuant to its own guidelines, including CEQA.

3. The decision to pursue licensing is "upstream" of licensing proceedings under the FPA and is not preempted.

Justice Ginsburg, joined by two justices, authored the opinion concurring in the judgment in *Virginia Uranium*, 139 S.Ct. 1894. She explained, "A state law regulating an upstream activity within the State's authority is not preempted simply because a downstream activity falls within a federally occupied field." (139 S.Ct. at 1914-15.)

The State decision to pursue dam licensing is "upstream" of, in other words it precedes, the involvement, or control of FERC over the ultimate outcome of what is being pursued.

"Law is not required to abandon common sense." (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-17.) In addition to being contrary to California and U.S. Supreme Court precedent and the plain language of the FPA, it would be contrary to common sense to conclude the FPA prohibits the State from requiring a rational process including CEQA analysis, in exercising its discretion in deciding to pursue dam licensing.

This Court is understandably concerned about "the overzealous displacement of state law to a degree never contemplated by Congress." (*People v. Rinehart* (2016) 1 Cal.5th 652, 661, *cert. denied,* 138 S.Ct. 635 (2018.)

Finally, the dissent in *Virginia Uranium*, authored by Chief Justice Roberts and joined by two justices, is not inconsistent with our argument here. As explained by the Chief Justice, the basis for the dissent was, "States may not legislate with the purpose and effect of regulating a federally preempted field." (139 S.Ct. 1894, 1920.) No such issue is present in this case. CEQA applies to all discretionary public projects. It was not adopted with a focused purpose directed at dam projects subject to licensing proceedings under the FPA, and the state actions at issue here are not federally pre-empted

Thus, all the opinions in the recent *Virginia Uranium* decision support rejecting preemption in this case.

4. Preemption here would raise Constitutional issues.

CEQA applies "to discretionary projects proposed to be carried out or approved by public agencies … ." Pub. Res. Code § 21080(a.) "A discretionary project is one subject to "judgmental controls," i.e., where the agency can use its judgment in deciding whether and how to carry out the

project." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.)

Deciding whether and how to carry out the project is exactly what DWR did, and what was required to be the subject of the EIR. These initial State decisions precede any control by FERC.

The U.S. Supreme Court explained this well in *Bond v. United States* (2011) 564 U.S. 211, 225:

> Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, see *New York* [*v. United States* (1992)], 505 U.S. [144], at 155–159, 112 S.Ct. 2408, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States.

"State legislatures are *not* subject to federal direction." (*Printz v. United States* (1997) 521 U.S. 898, 912 (Emphasis in original).) CEQA is a creature of the state legislature. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." (*New York v. United States* (1992) 505 U.S. 144, 162.)

The Constitution "'confers upon Congress the power to regulate individuals, not the States.'" (*Murphy v. Nat. Collegiate Athletic Assn.* (2018) 138 S.Ct. 1461, 1471, citing *New York v. United States*, 505 U.S. at 166.) "In sum, regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States. "'(*Murphy*, 138 S.Ct. at 1481.)

Our nation and our State of California established governments of laws, not rulers. Congress did not and would not have attempted to require States to make their discretionary decisions involved in pursuing dam

licensing in an arbitrary way or under an anarchic absence of rules of decision.

Were Congress to attempt to require the States to make decisions whether to apply for dam licensing by "some anarchic absence of rules of decision," (*Eel River,* 3 Cal.5th 677, 724) that would raise the Constitutional issue of impermissible interference with state sovereignty.

Congress itself, in the federal Administrative Procedure Act, requires reviewing courts to hold unlawful and set aside federal administrative decisions "found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law … ." 5 U.S.C. § 706(2)(A.)

Congress did not attempt to raise or implicate Constitutional issues in the FPA. Congress did not attempt to trample common sense by precluding the States from making their discretionary decisions pursuant to rational internal guidelines. Congress did not attempt to require the States to make arbitrary and capricious—as opposed to rational–discretionary decisions.

5. The issue here is not the adequacy of the environmental review of this project or the available remedies.

The State Water Contractors spend time and space on what they call the "extensive consideration of environmental impacts, including federal environmental review under NEPA." (SWC Answering Brief, pp. 13-26, heading p. 22.) This case, however, is at this time not about the adequacy or inadequacy of the consideration of environmental impacts. This case instead is about whether the California state courts are preempted from determining, specifically, the adequacy or inadequacy of the consideration of environmental impacts under CEQA by the State as owner and operator of a dam project.

The State Water Contractors also spend time arguing about remedies. (SWC Answering Brief, pp. 43-45.) The questions presented here, however, are not about remedies. The issue of remedies would be for the trial court or the Court of Appeal if this Court holds the application of CEQA is not preempted. Should the Court of Appeal affirm the trial court ruling, there would be no remedies issue, as there would be no remedies. Should the Court of Appeal find CEQA violations and reverse, the Court of Appeal and the trial court would then be in position to determine the issue of remedies pursuant to the guidance provided by CEQA, see Public Resources Code § 21168.9, and pursuant to the traditional "equitable powers of the court." (Pub. Res. Code § 21168.9(c).)

The State Water Contractors also argue that most of DWR's discretionary decisions were made before the Final EIR was certified on July 22, 2008. (SWC Answering Brief, pp. 45-46.) The public agency is not supposed to foreclose the possibility of project alternatives or mitigation measures prior to certification. Typically, preliminary decisions are made, such as for example, to set forth the proposed project, with the release of a Draft EIR for public review and comment and decision-maker review. The way CEQA is set up, however, is to provide a 30-day window to challenge the adequacy of a Final EIR, following the filing of a Notice of Determination which follows the certification of the EIR.

These issues presented by the State Water Contractors belong, if anywhere, in the CEQA merits litigation. They are not relevant to the preemption issues that are the subject of the defined review by this Court.

B. STATE COURT CHALLENGES TO AN EIR PREPARED TO COMPLY WITH FEDERAL WATER QUALITY CERTIFICATION UNDER SECTION 401 OF THE FEDERAL CLEAN WATER ACT ARE NOT PREEMPTED.

This section addresses the second of the two issues this Court said are presented for review. That is, whether the FPA *federally* preempts state court challenges to an EIR prepared under CEQA to comply with federal water quality certification under section 401 of the *federal* Clean Water Act (CWA.)

No parties, not even the State Water Contractors, dispute that CEQA compliance is required rather than preempted for water quality certification. "It is undisputed that issuance of the Water Board's 401 certification required compliance with CEQA." (State Water Contractors Answering Brief, at p. 56, filed June 9, 2020.)

The law is settled under CEQA that a CEQA case must be filed following the lead agency's—here DWR—certification of the EIR. Judicial review of that same EIR is not meant to be duplicated months or years later in a new case when a responsible agency—here the State Water Resources Control Board—makes its decision utilizing the EIR prepared earlier by the lead agency. There is nothing to be usefully added to the Opening and Reply briefs by the Counties in their dismantling of the State Water Contractors' argument to the contrary. Out of an abundance of caution, however, it appears appropriate to address the Court of Appeal decision regarding CWA section 401 certifications and the FPA.

Although the Court of Appeal also did not question that water quality certification requires CEQA compliance, it conflated the FERC licensing process under the FPA with a *separate* federally mandated process under the CWA. The federal CWA delegates to the states the responsibility to certify that federal actions (such as FERC licensing) that cause a discharge of water conform to state law.[1] (33 U.S.C. § 1341.)

[1] "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with

FERC licensing *triggers* this separate review by the states, but *this separate review is not part of the FPA licensing process*. This review is an operation of state law, performed by state agencies, and the CEQA process is an integral and legally required part of that operation. And under the Clean Water Act, the certification then becomes a condition on the FPA license.

The license applicant and FERC cannot usurp the role of the State under the Clean Water Act simply by choosing a certain type of licensing process. While the *goal* of the Alternative License Process (ALP), a FPA licensing process created in FERC regulations, may be to reach an outcome that satisfies requirements of the CWA, the State must still *evaluate* the outcome of the ALP through the filter of the CWA.[2] 33 U.S.C. § 1341(a)(1). As a result of this evaluation, the designated state agency may certify the proposed outcome, deny certification, or impose further conditions that must be included in the new project license. (*American*

---

any applicable effluent limitations and other limitations, … and with any other appropriate requirement of State law set forth in such certification, and shall become a condition of any Federal license or permit subject to the provisions of this section."

[2] The Settlement Agreement (SA) explicitly acknowledges the State's independent authority at Section 4.5 (Water Quality Certification). Section 4.5.1 states:

> The Parties shall respectfully request that the California State Water Resources Control Board accept and incorporate, without material modifications, as conditions to the Section 401 Certification, all the PM&E measures stated in Appendix A of the Settlement Agreement that are within the California State Water Resources Control Board's jurisdiction pursuant to Section 401 of the CWA and the Porter Cologne Water Quality Control Act. The Parties shall further request that the California State Water Resources Control Board not include as conditions to the Section 401 Certification additional conditions that are inconsistent with this Settlement Agreement.

Rivers, Inc. v. FERC, 129 F.3d 99, 107-111 (2d Cir. 1997.) CEQA is required precisely in order to support the State's evaluation.

In Discussion Section A ("The Federal Licensing Procedure"), the Court of Appeal further conflated different authorities under different statutes (FPA, NEPA, CWA, CEQA), and assigned a role to both the ALP and the Settlement Agreement (SA) that would accord them supremacy under all of these statutes.[3] The Court of Appeal decision imprecisely summarized the Alternative Licensing Process in stating the following:

> 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, agree to the terms of relicensing in a [Settlement Agreement]. [*internal citation omitted*]. (*County of Butte* Petition Exh. A at 9.)
>
> … The ALP substitutes the environmental report, normally required in an application to FERC, with a "Preliminary Draft Environmental Assessment (PDEA)." (*Id.* at 10.)
>
> … Thus the program in Appendix A [of the Settlement Agreement] 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. (*Id.* at 11.)

---

[3] One source of overreach is that the Court of Appeal conflated the Alternative Licensing Process (ALP) as a general process with its particular application in the Oroville Settlement Agreement. *County of Butte* Petition Exh. A at 10 states, "[t]he 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 internal quote is a cite *to the Settlement Agreement*, not to the statute. Nowhere in the statute does it say that the purpose *of the ALP* is to "resolve all issues that have been or could have been raised."

That is not all that is required. What the ALP does in order to meet the requirements of the FPA does not fulfill the requirements of the National Environmental Policy Act (NEPA.) The Preliminary Draft Environmental Assessment is a document required by FERC under its implementation of the FPA not for its implementation of NEPA. The PDEA (founded, in this case, on the SA) is *the licensee's summary* of the proposed license conditions and the environmental effects of these proposed conditions. The PDEA forms *the basis* for FERC's environmental review under NEPA (defining the Proposed Action under NEPA, possibly as modified by FERC staff). The PDEA does not substitute for a NEPA document. FERC's Environmental Impact Statement (EIS) in the present record confirms this. FERC could not issue a license without a NEPA document.

Equally, the Settlement Agreement, a contractual agreement among non-regulatory entities, cannot substitute itself for the jurisdictional state agency's evaluation of adequacy under the CWA, as discussed above.

The Court of Appeal further conflated what it called the "program" of the Settlement Agreement with a program (as opposed to project) analysis under CEQA. (*County of Butte* Petition Exh. A at 11) Under this conflation, the "program" of the SA would become a surrogate for a program EIR under CEQA as well as NEPA. All that would be left to analyze under CEQA would be certain individual elements that would require future construction, or similar elements: "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." (*Id.* at 18 (emphasis in original.) This is incorrect. For purposes of certification, CEQA review is far from an afterthought. It is legally required support for a

certification. Moreover, CEQA in the context of certification does not support only those elements or details that were otherwise not analyzed in relicensing. CEQA must support all of it.

The U.S. Supreme Court stated clearly in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 712:

> § 401(d) [of the Clean Water Act] is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

Throughout this case, the State Water Contractors have argued that the actions incident to relicensing have been analyzed in various documents specific to relicensing, and that such analysis eliminates the need to address them both in certification and in CEQA. This is also incorrect. Like the certification, the CEQA process must analyze the "activity as a whole."

In his concurrence with the U.S. Supreme Court's *Jefferson County* opinion, Justice Stevens added a succinct explanation, 511 U.S. at 723,

> For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, *e.g.*, § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

(affirming that issues a state may address in certification are not limited to the issues raised in FERC's licensing proceeding).

This case deals with CEQA compliance and judicial review of actions to support state certification under state law in state courts. Plaintiffs' action in state court was directed at deficiencies under state law, not at the federal timeline. Plaintiffs argued that CEQA was needed to review the environmental effects for purposes of issuing a water quality

certification and, as discussed above, for the decision making purposes of a state agency, not to conflict with the federal analysis of the "effects of relicensing."

IV. CONCLUSION

This Court should reverse the decision below and remand this case with directions to rule on the merits of Plaintiffs' and Appellants' CEQA claims.

Dated: August 26, 2020

Respectfully submitted,

By: E. Robert Wright

E. ROBERT WRIGHT

Attorney for *Amici Curiae* Sierra Club, Center for Biological Diversity, Friends of the River, California Sportfishing Protection Alliance and Friends of the Eel River

CERTIFICATE OF COMPLIANCE

In accordance with Rules 8.520(b)(1) and 8.204(b)(4), California Rules of Court, I certify that this *Amicus Curiae* Brief, together with its application for leave to file this brief, is in at least 13-point proportional type and contains 5,673 words, including footnotes, but excluding this certification and the other exclusions referenced in Rule of Court 8.204(c)(3).

Dated: August 26, 2020

Respectfully submitted,

By: _____

E. ROBERT WRIGHT

Attorney for *Amici Curiae* Sierra Club, Center for Biological Diversity, Friends of the River, California Sportfishing Protection Alliance, and Friends of the Eel River

PROOF OF SERVICE

County of Butte et al. v. Department of Water Resources et al.

Supreme Court of the State of California, Case No. S258574

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the foregoing action. My business address is Center for Biological Diversity, 1212 Broadway, Suite 800, Oakland, California 94612. My email is trettinghouse@biologicaldiversity.org.

On August 26, 2020, I served a true and correct copy of the following document:

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF & AMICUS CURIAE BRIEF OF SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF THE RIVER, CALIFORNIA SPROTFISHING PROTECTION ALLIANCE, AND FRIENDS OF THE EEL RIVER IN SUPPORT OF PLAINTIFFS AND APPELLANTS COUNTY OF BUTTE, COUNTY OF PLUMAS, et al.

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

[x] **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.

[x] **BY FIRST CLASS U.S. MAIL:** By placing a true and correct copy thereof in sealed envelope(s). Such envelope(s) were addressed as shown below. Such envelope(s) were deposited for collection and mailing following ordinary business practices with which I am readily familiar.

[x] STATE: I declare under penalty of perjury under the law of California that the foregoing is true and correct.

Executed on August 26, 2020 at Oakland, California.

Theresa Rettinghouse

SERVICE LIST

County of Butte et al. v. Department of Water Resources et al.

Supreme Court of the State of California

VIA TRUEFILING Bruce Alpert County of Butte, County Counsel 25 County Center Drive Oroville, CA 95965 balpert@buttecounty.net *Attorneys for Plaintiff and Appellant County of Butte*	**VIA TRUEFILING** David R. E. Aladjem Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814 daladjem@downeybrand.com *Attorneys for Real Parties in Interest and Respondents San Bernardino Valley Municipal Water District; and, Alameda County Flood Control & Water Conservation District, Zone 7*
VIA TRUEFILING Ellison Folk Edward Terry Schexnayder Shute Mihaly and Weinberger LLP 396 Hayes Street San Francisco, CA 94102 Folk@smwlaw.com Schexnayder@smwlaw.com *Attorneys for Plaintiff and Appellant County of Butte*	**VIA TRUEFILING** Roger B. Moore Law Office of Roger B. Moore 337 17th Street, Suite 211 Oakland, CA 94612 rbm@landwater.com *Attorneys for Plaintiff and Appellant County of Butte; County of Plumas; and, Plumas County Flood Control and Water Conservation District*
VIA TRUEFILING R. Craig Settlemire County of Plumas, County Counsel 520 Main Street, Room 302 Quincy, CA 95971 CSettlemire@countyofplumas.com *Attorneys for Plaintiff and Appellant County of Plumas; and, Plumas County Flood Control and Water Conservation District*	**VIA TRUEFILING** Joshua Patashnik Aimee Feinberg Deputy Solicitors General Linda L. Gandara Deputy Attorneys General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102-7004 Josh.Patashnik@doj.ca.gov *Attorneys for Defendant and Respondent* DEPARTMENT OF WATER RESOURCES

VIA TRUEFILING Carolyn Nelson Rowan Office of the Attorney General 1300 I Street, Suite 125 Sacramento, California 9587 4 carolyn.rowan@doj.ca.gov Attorneys for Defendant and Respondent DEPARTMENT OF WATER RESOURCES	**VIA TRUEFILING** Thomas M. Berliner Jolie-Anne Shappell Ansley Paul J. Killion Duane Morris LLP One Market, Spear Street Tower, Suite 2200 San Francisco, CA 94105-1127 tmberliner@duanemorris.com jsaAnsley@duanemorris.com pjkillion@duanemorris.com *Attorneys for Real Parties in Interest and Respondents State Water Contractors Inc.; Alameda County Flood Control & Water Conservation District, Zone 7; Kern County Water Agency; San Bernardino Valley Municipal Water District; Santa Clara Valley Water District; and, Metropolitan Water District of Southern California*
VIA TRUEFILING Court of Appeal of the State of California Third Appellate District 914 Capitol Mall, Fourth Floor Sacramento, California 95814 Case No. C071785	**VIA MAIL** Honorable Daniel P. Maguire Yolo County Superior Court 1000 Main Street Woodland, California 95695 Case No. CV20091258

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BUTTE, COUNTY OF v. DEPARTMENT OF WATER RESOURCES (STATE WATER CONTRACTORS)**
Case Number: **S258574**
Lower Court Case Number: **C071785**

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

2. My email address used to e-serve: **jbuse@biologicaldiversity.org**

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

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	8-26-20 Final Amicus brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jennifer Henning California State Association of Counties 193915	jhenning@counties.org	e-Serve	8/26/2020 3:00:04 PM
E. Wright Friends of the River 51861	bwright@friendsoftheriver.org	e-Serve	8/26/2020 3:00:04 PM
David Aladjem Downey Brand LLP 152203	daladjem@downeybrand.com	e-Serve	8/26/2020 3:00:04 PM
Roger Moore Law Office of Roger B. Moore 159992	rbm@landwater.com	e-Serve	8/26/2020 3:00:04 PM
Thomas Berliner Duane Morris LLP 83256	tmberliner@duanemorris.com	e-Serve	8/26/2020 3:00:04 PM
Edward Schexnayder Shute Mihaly & Weinberger LLP 284494	schexnayder@smwlaw.com	e-Serve	8/26/2020 3:00:04 PM
Bruce Alpert Office of County Counsel 075684	balpert@buttecounty.net	e-Serve	8/26/2020 3:00:04 PM
Joshua Patashnik Office of the Attorney General 295120	josh.patashnik@doj.ca.gov	e-Serve	8/26/2020 3:00:04 PM
Russell Hildreth Office of the Attorney General 166167	russell.hildreth@doj.ca.gov	e-Serve	8/26/2020 3:00:04 PM

Matthew Goldman California Dept of Justice, Office of the Attorney General 113330	Matthew.Goldman@doj.ca.gov	e-Serve	8/26/2020 3:00:04 PM
Carolyn Rowan Office of the Attorney General 238526	Carolyn.Rowan@doj.ca.gov	e-Serve	8/26/2020 3:00:04 PM
Jolie-Anne Ansley Duane Morris LLP 221526	JSAnsley@duanemorris.com	e-Serve	8/26/2020 3:00:04 PM
Aimee Feinberg California Dept of Justice, Office of the Attorney General 223309	Aimee.Feinberg@doj.ca.gov	e-Serve	8/26/2020 3:00:04 PM
Ellison Folk Shute, Mihaly & Weinberger 149232	folk@smwlaw.com	e-Serve	8/26/2020 3:00:04 PM
Victoria Domantay Duane Morris	VCDomantay@duanemorris.com	e-Serve	8/26/2020 3:00:04 PM
Paul Killion Duane Morris LLP 124550	PJKillion@duanemorris.com	e-Serve	8/26/2020 3:00:04 PM
Adam Keats Law Office of Adam Keats, PC 191157	adam@keatslaw.org	e-Serve	8/26/2020 3:00:04 PM
Courtney Covington Office of the State Attorney General 259723	courtney.covington@doj.ca.gov	e-Serve	8/26/2020 3:00:04 PM
R. Settlemire Office of the County Counsel 96173	csettlemire@countyofplumas.com	e-Serve	8/26/2020 3:00:04 PM
John Buse Center for Biological Diversity 163156	jbuse@biologicaldiversity.org	e-Serve	8/26/2020 3:00:04 PM

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.

8/26/2020

Date

/s/Theresa Rettinghouse

Signature

Buse, John (163156)

Last Name, First Name (PNum)

Center for Biological Diversity

Law Firm