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Relicensing of Oroville Facilities: California Supreme Court Creates Additional Opportunity to Consider Modern Hydrological Findings at the Cost of a Coherent Preemption Doctrine

INTRODUCTION

In August 2022, the California Supreme Court issued a decision in the case *County of Butte v. Department of Water Resources*, in which the majority held that the California Environmental Quality Act (CEQA) is only partially preempted by the Federal Power Act (FPA).[1] The case concerned the California Department of Water Resources' (DWR) application for a new fifty-year license to operate the "Oroville Facilities."[2] These facilities are located in Butte County and comprise

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1 Cnty. of Butte v. Dep't of Water Res., 514 P.3d 234 (Cal. 2022).

2 *Id.* at 237.

inter alia the Oroville Dam and the Edward Hyatt Powerplant.[3] They serve several purposes, such as water supply and power generation.[4] The Court held that CEQA is not preempted by FPA if DWR, a public agency, uses it as a form of self-governance to assess its options throughout the licensing process, which is conducted under the authority of the Federal Energy Regulatory Commission (FERC).[5] This partial preemption established by the majority was described as a "shocker" and was heavily criticized in the dissent.[6] The majority opinion relied on *Friends of the Eel River v. N. Coast R.R. Auth.* to establish its doctrine of partial preemption.[7] *Eel River* stated that in assessing whether a federal statute preempts state regulation of state-owned property, it should be presumed that, when there is no unambiguous language indicating otherwise, the federal statute does not intend to strip the state of its sovereignty over its own entities.[8] In the dissent in *County of Butte*, the author of the majority opinion in *Eel River* herself harshly criticized this use of *Eel River*. This Article will (1) summarize the majority opinion, (2) present the reasoning of the dissent, and (3) critically analyze the arguments forwarded by both. The analysis will explain that the applicability of CEQA could have the desirable effect that modern hydrological findings are not ignored in DWR's decision-making. Nonetheless, this Article will also show that, because the majority ignored binding precedent, this case was wrongly decided.

I
PRESENTATION OF THE MAJORITY OPINION

A. Facts and Procedural History

As part of its application for a new license for the operation of the Oroville Facilities, DWR produced an Environmental Impact Report (EIR), as it was obliged to do under CEQA.[9] Instead of undergoing the

3 Answer Brief on the Merits of the Dep't of Water Res. at 23–24, Cnty. of Butte v. Dep't of Water Res., 514 P.3d 234 (Cal. 2022) (No. S258574).

4 *Id.*

5 *Cnty. of Butte*, 514 P.3d at 246–48.

6 *California Water Law and Policy Publication Update*, LexisNexis (Dec. 2023), https://support.lexisnexis.com/printandcd/downloads/83013_28_december23.pdf [https://perma.cc/LPX4-RKC9].

7 Friends of the Eel River v. N. Coast R.R. Auth., 399 P.3d 37 (Cal. 2017).

8 *Id.* at 43, 53.

9 *Cnty. of Butte*, 514 P.3d at 237, 252; CAL. PUB. RES. CODE § 21100(a).

traditional relicensing process, DWR undertook the alternative licensing process (ALP).[10] The ALP consolidates the prefiling consultation and several environmental review processes into a single process and aims to facilitate better communication among the different stakeholders.[11] The ALP participants reached a settlement agreement, part of which DWR submitted to FERC as a proposal for the new license.[12] The Counties of Butte and Plumas (hereinafter "the Counties") participated in the ALP, but refused to sign the settlement agreement.[13] Instead, they filed writ petitions contesting the adequacy of the EIR that DWR had prepared.[14] They stated that the EIR does not comply with CEQA, inter alia, because it relies only on historic hydrological data.[15] The challenge to the EIR included a request to rescind the settlement agreement and "to enjoin DWR from operating the Oroville Facilities under the proposed license."[16] These requests can be explained by the fact that the settlement agreement was, inter alia, based on the challenged EIR. Furthermore, the Counties challenged the EIR in a broader way, irrespective of the ALP and the proposed FERC license.[17]

The trial court concluded that DWR's EIR was sufficient, and the Counties appealed.[18] The Court of Appeals held that the claims under CEQA were preempted by the FPA and were premature in part.[19] After that, the California Supreme Court granted the Counties' petitions for review and remanded the case to the Court of Appeals with instructions to reassess it in consideration of the precedent set by *Eel River*.[20] The Court of Appeals reiterated its ruling that the Counties' claims were preempted by the FPA and were, in part, premature.[21]

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10 *Cnty. of Butte*, 514 P.3d at 238.

11 *Id.*; 18 CFR § 4.34 (i)(2)(i), (ii), (iv).

12 *Cnty. of Butte*, 514 P.3d at 238–39.

13 *Id.* at 238.

14 *Id.* at 237.

15 *Id.*; Appellants' Corrected Supplemental Opening Brief at 25–26, Cnty. of Butte v. Dep't of Water Res., 306 Cal. Rptr. 3d 860 (Ct. App. 2023) (No. C071785).

16 *Cnty. of Butte*, 514 P.3d at 237.

17 *Id.*

18 *Id.*

19 *Id.*; Cnty. of Butte v. Dep't of Water Res., 241 Cal. Rptr. 3d 720, 723, 732 (Ct. App. 2018).

20 *Cnty. of Butte*, 514 P.3d at 237.

21 *Id.*; Cnty. of Butte v. Dep't of Water Res., 252 Cal. Rptr. 3d 435, 440, 456 (Ct. App. 2019).

B. Summary of the Majority Opinion

The California Supreme Court again granted review to clarify (1) whether CEQA is preempted by the FPA when the state uses it to analyze its own options for action throughout the hydroelectric relicensing proceedings and (2) whether the FPA preempts a state court challenge of an EIR that was produced in accordance with CEQA to receive a certification under Section 401 of the Clean Water Act (CWA).[22] With reference to the decision of the Court of Appeals and the parties' briefs, the Court refused to address the second issue.[23] This affirmed, inter alia, that Section 401 CWA constitutes an exception to the broad preemptive effect of the FPA and, therefore, allows for CEQA application.[24] Since the Court did not elaborate on issue two, this Article will not address it. Regarding issue one, the majority stated that the FPA preempts a CEQA challenge to the environmental sufficiency of a settlement agreement regarding federal licensing of state-owned hydroelectric facilities because injunctive relief would interfere with FERC's sole jurisdiction over the licensing process.[25] In this regard, it affirmed the Court of Appeals' opinion. To justify this finding, the majority pointed out that the FPA mainly aims at encouraging the development of U.S. hydropower resources.[26] To accomplish this objective, the FPA centralizes regulatory power in the federal government so state regulation cannot create obstacles to hydropower development.[27] However, during oral argument, even the Counties acknowledged that their challenge to the settlement agreement was preempted and stated "that they are no longer seeking injunctive relief that would interfere with the federal licensing process."[28] Accordingly, this issue was not contested anymore at the time the majority decided the case. Therefore, the majority focused on whether the Counties could—more generally—challenge the sufficiency of the EIR, which also serves the general purpose of informing DWR's decision-making regarding the relicensing process.[29]

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22 *Cnty. of Butte*, 514 P.3d at 239, 241.

23 *Id.*

24 Appellants' Corrected Supplemental Opening Brief, *supra* note 15, at 18–19.

25 *Cnty. of Butte*, 514 P.3d at 237.

26 *Id.* at 246.

27 *Id.*

28 *Id.*

29 *Id.* at 237; Plaintiffs' Opening Brief on the Merits at 35, *Cnty. of Butte*, 514 P.3d 234 (Cal. 2022) (No. S258574) (State Water Contractors; regarding DWR's options for action

It held that the Counties could indeed challenge the EIR under CEQA, and therefore affirmed that CEQA is partially applicable.[30] To reach this conclusion, the Court pointed out that applying CEQA to a state agency that develops state property is not conventional regulatory behavior, but self-governance by a sovereign state as owner.[31] Additionally, it argued that Congress presumably did not intend to preempt the state's environmental review of its own project, and that further CEQA review could be informative as to matters not encroaching on federal jurisdiction.[32] Finally, the Court held that concerns about conflicting mitigation measures were premature.[33]

To support its finding of (partial) applicability of CEQA, the majority cited *Eel River*, where the Court established the presumption that federal law does not preempt state regulation of state-owned property unless the federal law clearly expresses intent to do so.[34] The majority opinion claimed that Section 27 of the FPA—as interpreted in *First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n*, *California v. FERC*, and *Sayles Hydro Ass'n v. Maughan*—does not show the necessary unambiguous intent of Congress to preempt the environmental analysis a public entity—as opposed to a private actor—might conduct on its own project.[35] Section 27 is a so-called savings clause that "saves" the states' authority over proprietary water rights from federal preemption. Furthermore, it held that neither the FPA's language nor its legislative history indicates that it preempts the present use of CEQA by a state entity via field preemption.[36] State law is preempted via field preemption when there is clear congressional intent to occupy a legislative field entirely and the given state law falls within this field.[37]

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throughout the relicensing process); Plaintiffs' Reply Brief on the Merits at 26–27, *Cnty. of Butte*, 514 P.3d 234 (Cal. 2022) (No. S258574) (State Water Contractors).

30 *Cnty. of Butte*, 514 P.3d at 234.

31 *Id.* at 246.

32 *Id.* at 237.

33 *Id.* at 247.

34 *Id.* at 243 (quoting *Friends of the Eel River*, 399 P.3d 37, 53 (Cal. 2017)).

35 *Cnty. of Butte*, 514 P.3d at 244–45; First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 175–76 (1946); California v. FERC, 495 U.S. 490, 497–99, 505–06 (1990); Sayles Hydro Ass'n v. Maughan, 985 F.2d 451, 454–55 (9th Cir. 1993) (The Ninth Circuit decision in *Sayles Hydro Ass'n* is however not binding on the California Supreme Court. *See* State Water Contractors' Consolidated Response to Amicus Curiae Briefs at 26, *Cnty. of Butte v. Dep't of Water Res.*, 514 P.3d 234 (Cal. 2022) (No. S258574).).

36 *Cnty. of Butte*, 514 P.3d at 245.

37 *Id.* at 250 (Cantil-Sakauye, C.J., concurring and dissenting).

But CEQA could also be inapplicable because of conflict preemption. Conflict preemption is assumed when "compliance with both state and federal law is impossible, (citation omitted) or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[38] The possibility that CEQA is inapplicable because of conflict preemption appears relevant to the majority with respect only to the adoption of mitigation measures under CEQA that actually conflict with the license issued by FERC.[39] However, at the time the Court issued its opinion, FERC had not issued the final license. Therefore, the Court considered the claim of conflict preemption as premature.[40]

In summary, the majority opinion explains the applicability of CEQA by distinguishing between private entities and governmental subentities. Application of CEQA to the latter is not regulatory but constitutes a form of self-governance. The majority derived from *Eel River* that there is a strong presumption that governmental entities may govern themselves. This would be different only if a statute expressly required it, which is supposedly not the case for the FPA in general and Section 27 in particular.

II
PRESENTATION OF THE DISSENT

The dissent concurred that FPA preempts a CEQA challenge to the environmental sufficiency of the settlement agreement reached through ALP. However, it disagreed with the majority's finding that DWR can apply CEQA to analyze its steps forward in FERC licensing proceedings, as this use of CEQA is preempted both by field preemption and conflict preemption.[41]

The dissent pointed out that the U.S. Supreme Court has repeatedly interpreted the FPA to show clear congressional intent to occupy the whole field of hydropower licensing.[42] In *Sayles Hydro*, the Ninth Circuit held that CEQA is preempted by the FPA.[43] States have very

38 Cal. v. ARC Am. Corp., 490 U.S. 93, 100–01 (1989) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

39 *See Cnty. of Butte*, 514 P.3d at 247–48.

40 *Id.* at 247.

41 *Id.* at 250 (Cantil-Sakauye, C.J., concurring and dissenting).

42 *Id.*

43 Sayles Hydro Ass'n v. Maughan, 985 F.2d 451, 455 (9th Cir. 1993); *Id.* (pointing out that CEQA was not mentioned by name in *Sayles Hydro*).

limited authority to legislate regarding hydropower, given to them by Section 27, the FPA's savings clause.[44] *First Iowa*, *California v. FERC*, and *Sayles Hydro* all stated that this savings clause comprises the authority to determine proprietary rights in the use of water only.[45] According to these opinions, state regulation that does not fall within the scope of Section 27 is preempted.[46] The dissent clearly held this against the majority, who claimed that the FPA would not indicate that the authority of the states is limited to the matters expressly mentioned by Section 27. Moreover, the dissent countered the majority opinion's distinction between public and private entities by noting that when Congress preempts a field, this preemption applies regardless of the identity of the targeted party.[47]

The dissent further claimed that the application of CEQA is preempted by the FPA via conflict preemption regardless of whether the mitigation measures directly conflict with the terms of the eventual FERC license.[48] This is because CEQA's application by DWR conflicts with the FPA's objective of giving FERC exclusive control over hydropower licensing and regulation.[49] CEQA mandates the adoption of mitigation measures and their enforcement through a mitigation monitoring program.[50] And in the present case, it is inevitable that the mitigation measures prescribed in the EIR will overlap, at least in part, with the authority that the FPA confers on FERC.[51] This is because the project covered by the EIR and the subject of the FERC license are virtually identical, as they both concern the operation of the Oroville Facilities under the conditions of the proposed license.[52] The application of CEQA creates a regulatory scheme at the state level that competes with FERC's authority, which contradicts FPA's the purpose of granting exclusive regulatory authority over hydropower to FERC.

Additionally, the dissent found a second obstacle to Congress's objective of vesting exclusive control over the hydropower licensing

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44 *Cnty. of Butte*, 514 P.3d at 253 (Cantil-Sakauye, C.J., concurring and dissenting).

45 *Cnty. of Butte*, 514 P.3d at 244–45; First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152, 175–76 (1946); California v. FERC, 495 U.S. 490, 497–99, 505–06 (1990); *Sayles Hydro*, 985 F.2d at 454–55.

46 *Id.*

47 *Cnty. of Butte*, 514 P.3d at 256 (Cantil-Sakauye, C.J., concurring and dissenting).

48 *Id.* at 257–58.

49 *Id.*

50 *Id.* at 242.

51 *Id.* at 257.

52 *Id.*

process in FERC: CEQA's private enforcement provisions.[53] The dissent also argued that CEQA's private enforcement mechanism is not provided for in the ALP and impedes the efficiency of the licensing proceedings.[54] Furthermore, FERC is not bound by the outcome of such proceedings before a state court and does not need to wait for their outcome to issue its license.[55] The fact that FERC is not bound by the outcome of civil proceedings under CEQA indicates that the applicability of CEQA is of limited added value.

The dissent then went on to heavily criticize the majority's reliance on *Eel River* to establish its doctrine of partial preemption. *Eel River* did not assert partial preemption of CEQA, but held that CEQA was completely exempted from preemption by the Interstate Commerce Commission Termination Act of 1995 (ICCTA),[56] leaving the Railroad Authority's proposed project unregulated by federal authorities.[57] The *Eel River* court then held that the application of CEQA to a private rail carrier's project would be preempted as this would have the undesired effect of submitting railroad transportation to regulation.[58] A state agency's application of CEQA to its own project, on the other hand, would only qualify as a form of self-government.[59] The applicability of CEQA in *Eel River* was also based on the court's assumption that interference in the state's management of its own subdivisions is permitted only if a federal law clearly requires it, which the ICCTA does not.[60] The dissent distinguished the present case, asserting there is no deregulation with respect to hydropower permitting and that the FPA indeed demonstrates a clear congressional intent to preempt the application of CEQA by state agencies.[61]

The dissent also strongly criticized the practical implications of the majority's decision. The majority stated that mitigation measures that contradict the final FERC license are preempted.[62] However, the majority overlooked the fact that federal preemption relies on an

53 *Id.* at 258.
54 *Id.*
55 *Id.* at 262.
56 *Id.* at 259.
57 *Id.*
58 Friends of the Eel River v. N. Coast R.R. Auth., 399 P.3d 37, 59–60 (Cal. 2017).
59 *Id.* at 65.
60 *Id.* at 66–67.
61 *Cnty. of Butte*, 514 P.3d at 260–61 (Cantil-Sakauye, C.J., concurring and dissenting).
62 *Id.* at 247–48, 262.

appropriate court to declare it.[63] Two inconsistent regulations would bind DWR until a court holds that the mitigation measures are preempted.[64]

The main criticism of the dissent, however, is that CEQA analysis of the project is unnecessary because, prior to the EIR, two virtually identical environmental assessments had already been prepared.[65] First, the dissent stated that the ALP seems to be designed to make state environmental assessments superfluous.[66] As part of the ALP, DWR had to produce a preliminary draft environmental assessment (PDEA), a document that examines the likely environmental impact of the relevant project.[67] Here, DWR prepared a 700-page PDEA which was supported by 1,500 pages of appendices.[68] The dissent claimed that the content of the PDEA was materially identical to that of an EIR prepared under CEQA.[69] It is also likely that environmental concerns played an important role during the parties' negotiations of the ALP.[70] Second, the dissent pointed out that the National Environmental Policy Act (NEPA) obliged FERC to prepare an Environmental Impact Statement (EIS).[71] According to the dissent, the EIS fulfills the same informational requirements as the EIR.[72] Neither DWR nor the majority were able to name any deficiencies in the PDEA or the EIS that were then covered by the EIR under CEQA.[73] Therefore, the dissent concluded that by declaring CEQA applicable, the majority "upset[] the proper application of the rules of preemption" without giving "any persuasive reason for preserving state environmental review."[74] According to the dissent, not only did CEQA proceedings not contribute anything to the licensing proceedings, but they have seemingly caused a delay of at least twelve years.[75]

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63 *See id.* at 262.

64 *Id.*

65 *Id.* at 263–64.

66 *Id.*

67 *Id.* at 238.

68 *Id.*

69 *Id.* at 263.

70 *Id.*

71 *Id.* at 239.

72 *Id.* at 263. However, a NEPA analysis does not render a CEQA analysis superfluous: Plaintiffs' Reply Brief on the Merits, *supra* note 29, at 19 (quoting Nelson v. Cnty. of Kern, 118 Cal. Rptr. 3d 736, 755–58 (Ct. App. 2010)).

73 *Cnty. of Butte*, 514 P.3d at 263–64 (Cantil-Sakauye, C.J., concurring and dissenting).

74 *Id.*

75 *Id.* at 250.

III
ANALYSIS

A. The Dissenting Opinion's Convincing Arguments

The dissent succeeds in demonstrating that the partial applicability of CEQA is inconsistent with *First Iowa*, *California v. FERC*, and *Sayles Hydro*. These cases held that Congress—with the exception of proprietary water rights allocation—intended to occupy the whole field of hydropower licensing. By stating that Section 27 does not necessarily provide an exclusive list of the rights preserved to the states,[76] the majority simply ignores binding Supreme Court precedents which clearly establish that the proprietary water rights mentioned in Section 27 "are all the states get."[77] Furthermore, the dissent's argument that "if Congress occupies a field, it does so regardless of the identity of the party affected by the state regulation" is also persuasive.[78]

The Supreme Court has held that the primary purpose of the FPA is to grant the federal government exclusive jurisdiction over hydropower licensing. The dissent underscores this holding, arguing persuasively that the application of CEQA with its binding mitigation measures must be preempted because it would run counter to the FPA's primary purpose. Moreover, the current case is distinguishable from *Eel River* in that no hydropower licensing deregulation has taken place, and that the FPA implicitly but clearly mandates that states may not apply CEQA to manage their subdivisions. While it seems acceptable that FERC is not bound by the outcome of CEQA civil proceedings, it is very problematic that mitigation measures that conflict with a FERC license are not "self-preempting," meaning unless an appropriate court declares them as preempted, public agencies are bound by conflicting regulations under state and federal law.[79] It is also problematic that federal courts will most likely not adopt the majority's partial preemption doctrine, which will result in different litigation results in state and federal jurisdictions.[80] The dissent also critically highlighted that CEQA analysis was not necessary since two virtually

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76 *Id.* at 244.

77 Sayles Hydro Ass'n v. Maughan, 985 F.2d 451, 454 (9th Cir. 1993) (citing both First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152 (1946) and California v. FERC, 495 U.S. 490 (1990)).

78 *Cnty. of Butte*, 514 P.3d at 256 (Cantil-Sakauye, C.J., concurring and dissenting).

79 *Id.* at 262.

80 *Id.* at 263.

indistinguishable environmental reports had already been drafted. The costs of drafting an EIR and the potential resulting CEQA litigation can be very high, and in the case of DWR—a state agency—are ultimately paid for by the taxpayer.[81] Therefore, it is important to consider whether drafting an EIR actually brings additional value.

B. Arguments in Favor of the Majority and Against the Dissent

The additional value of the EIR might, in fact, weigh in the majority's favor because both the PDEA and the EIS failed to consider future-oriented hydrological data that takes climate change into account. Neither DWR nor the majority opinion named any shortcomings of the PDEA that were then revealed by the EIR. However, the Counties heavily criticized that DWR refused to analyze the project under modern hydrological findings concerning drought, flood, and precipitation conditions.[82] These findings were in part developed by DWR's own scientists and were expected to be relevant to the project over the fifty-year term of the license.[83] The EIR explicitly based this refusal on the assumption that the level of hydrological range experienced in the twentieth century would continue during the future fifty-year term of the project.[84] However, when DWR certified its EIR, there was a consensus among scientists, including those working for DWR, that this assumption was wrong.[85] And surprisingly, even before

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81 JENNIFER HERNANDEZ ET AL., IN THE NAME OF THE ENVIRONMENT 11, 16, 32 (Holland & Knight 2015), https://issuu.com/hollandknight/docs/ceqa_litigation_abuseissuu?e=16627326/14197714 [https://perma.cc/T9CQ-CZND]; M. Nolan Gray, *How Californians Are Weaponizing Environmental Law*, THE ATL. (Mar. 12, 2021), https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/ [https://perma.cc/KQ45-KLWV]; BAE URBAN ECONOMICS, CEQA IN THE 21ST CENTURY 28–38 (2016), https://rosefdn.org/wp-content/uploads/2016/08/CEQA-in-the-21st-Century.pdf [https://perma.cc/BPM3-EZM8].

82 Appellants' Corrected Supplemental Opening Brief, *supra* note 15, at 25; Appellants' Opening Brief at 20–28, Cnty. of Butte v. Dep't of Water Res., 241 Cal. Rptr. 3d 720 (Ct. App. 2018) (No. C071785); for a study of the future changes of hydrological conditions, see Erin Dougherty et al., *Future Changes in the Hydrologic Cycle Associated with Flood-Producing Storms in California*, 21 J. HYDROMETEOROLOGY 2607 (2020).

83 Appellants' Corrected Supplemental Opening Brief, *supra* note 15, at 25.

84 *Id.* at 27.

85 *Id.* at 27–28; However, respondent State Water Contractors, Inc. repeatedly argued that the hydrological data considered in the EIR was sufficient and that DWR correctly found that further consideration of potential climate change impacts would have been too speculative: State Water Contractors, Inc. et al.'s Supplemental Response Brief and Objections to Appellants' Supplemental Brief at 20–24, Cnty. of Butte v. Dep't of Water Res., 306 Cal. Rptr. 3d 860 (Cal. Ct. App. 2023) (No. C071785); Respondents Brief of Real

the EIR was certified, DWR had already refused to consider only historic hydrology for two other project reviews.[86] Moreover, when DWR certified the EIR in 2008, there had already been several federal court decisions declaring the reliance on virtually identical twentieth-century hydrological conditions to be scientifically untenable.[87] Even more remarkably, these federal court decisions concerned projects that had planning horizons much shorter than the fifty-year period covered by DWR's certification.[88] In conclusion, future hydroclimatic conditions are an important factor that was not considered in previous environmental reports. Here, the EIR (as revised after the Counties' proceedings) would be the only formal opportunity to take new hydrological conditions into account.

The importance of considering future-oriented hydrological data is also emphasized by the devastating spillway of the Oroville Dam in 2017. This spillway was caused, among other factors, by an atmospheric river, that is, a hydrological phenomenon, and those atmospheric rivers are expected to become more intense and more frequent in a future climate.[89] This incident led to the evacuation of 188,000 downstream residents.[90] The costs for dam repairs amounted up to $1 billion, with additional and unknown private costs.[91] Accounting for these dramatic consequences, it appears irresponsible to exclude the changing hydrological conditions in an EIR.[92] In comparison to the potentially catastrophic impact on lives and

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Parties in Interest State Water Contractors et al. at 16–41, Cnty. of Butte v. Dep't of Water Res., 241 Cal. Rptr. 3d 720 (Ct. App. 2018) (No. C071785).

86 Appellants' Corrected Supplemental Opening Brief, *supra* note 15, at 29.

87 *Id.* at 29–30.

88 *Id.* at 30.

89 Dougherty et al., *supra* note 82, at 2608; Allison C. Michaelis et al., *Atmospheric River Precipitation Enhanced by Climate Change: A Case Study of the Storm That Contributed to California's Oroville Dam Crisis*, 10 EARTH'S FUTURE, 1, 1–2 (2022); Kasha Patel, *How Climate Change Will Make Atmospheric Rivers Even Worse*, WASH. POST (Jan. 12, 2023, 6:00 AM), https://www.washingtonpost.com/weather/2023/01/12/climate-change-atmospheric-rivers-rain/ [https://perma.cc/H8VV-7LSG]; IPCC, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 1134 (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_FullReport_small.pdf [https://perma.cc/DHG9-ETMQ].

90 Michaelis et al., *supra* note 89, at 2.

91 *Id.* at 9.

92 *See also*, Ian James, *Oroville Dam Unprepared for Climate Change, Critics Warned Years Before Crisis*, DESERT SUN (Feb. 15, 2017, 12:34 PM), https://www.desertsun.com/story/news/environment/2017/02/14/dangerously-false-oroville-dam-isnt-prepared-global-warming-2008-lawsuit-says/97903842/ [https://perma.cc/YWN9-98SU].

economic resources from such disasters, the criticism concerning the costs and delay an additional EIR would cause seems less significant. It is true that the preparation of an EIR and subsequent litigation can be costly.[93] However, when EIRs contribute to avoiding damage payments that go up to $1 billion, they are well worth it.[94]

Furthermore, the dissent seems to overlook that the creation of an EIR in the proceedings was necessary anyway.[95] The parties to this case agreed upon three facts: (1) the Water Board needed to comply with CEQA when issuing a certification under CWA Section 401; (2) the Water Board needed to prepare an EIR to inform its water quality certification decision; and (3) DWR prepared its EIR not only to inform its own decision-making regarding the Oroville Facilities project but also to inform the decision of the State Board regarding the 401 certification.[96] When the State Board issued its 401 certification, it relied on DWR's EIR.[97] If DWR's EIR did not exist, the State Board would have been required to prepare its own EIR. Therefore, there is no scenario in which the State would not have been obliged to prepare an EIR as part of the Oroville relicensing process.

Another aspect that weighs in favor of the majority is the striking inconsistency in the reasoning of Justice Cantil-Sakauye in *Eel River* and the present case. In *Eel River*, Justice Cantil-Sakauye held that the application of CEQA to the project of a private rail carrier would constitute regulation of railroad transportation and is therefore preempted.[98] On the other hand, if a state entity is required to apply CEQA to its own rail project, this would qualify only as self-governance.[99] In the latter scenario, Justice Cantil-Sakauye did not consider the application of CEQA to be a form of regulation.

Then, in the dissenting opinion to the present case, Justice Cantil-Sakauye expressly held that the mitigation measures mandated by CEQA constitute a regulatory regime, even though CEQA was also

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93 HERNANDEZ ET AL., *supra* note 81; Gray, *supra* note 81; BAE URBAN ECONOMICS, *supra* note 81.

94 *See* Appellants' Corrected Supplemental Opening Brief, *supra* note 15, at 28 (stating that the exclusion of climate change-adjusted data might lead to costly decisions).

95 *Id.* at 18–19.

96 *Id.*

97 *Id.* at 19.

98 Friends of the Eel River v. N. Coast R.R. Auth., 399 P.3d 37, 52–53 (Cal. 2017).

99 *Id.* at 71–72.

applied by a state agency to its own project.[100] Justice Cantil-Sakauye contradicts her own holding from *Eel River* in the present case, and she does so without any explanation.

Finally, the dissent failed to prove its contention that the relicensing proceedings were actually prolonged by the application of CEQA.[101] The dissent listed no evidence to support this assertion, and the majority correctly pointed out that numerous delays were requested without any connection to CEQA.[102] Moreover, there are many other relicensing applications that were submitted to FERC before the Section 401 certification was issued for the Oroville Facilities in 2010, that are still awaiting review by FERC.[103]

CONCLUSION

To conclude, this case was wrongly decided insofar as it ignores the precedent it is bound by. *First Iowa*, *California v. FERC*, and *Sayles Hydro* clearly mandate the complete preemption of CEQA in the present hydropower licensing process. *Eel River* might have established that it is tenable to further differentiate within field preemption based on the identity of the affected party. However, *Eel River* also held that a federal statute preempts the application of state law by a state to its own entities only when there is "unmistakably clear" congressional intent of preemption. The FPA, as interpreted by the Supreme Court, shows such clear intent to broadly preempt any state law within the field of hydro licensing. Furthermore, the doctrine of partial CEQA preemption can also not be based on *Eel River*, since CEQA was held to be fully preempted in that case. However, the majority's consent to a CEQA analysis would have one very significant benefit: it could—by the help of the Counties' challenges to the current EIR—have the result that "new" hydrological conditions likely induced by climate change will no longer be ignored in the relicensing proceedings.

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100 Cnty. of Butte v. Dep't of Water Res., 514 P.3d 234, 257–58 (Cal. 2022) (Cantil-Sakauye, C.J., concurring and dissenting).

101 *Id.* at 250.

102 *Id.* at 248–49.

103 *Id.* at 248.