Bay Planning Coalition

CEQA Case Law Update

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Exemptions/ Ministerial Projects/ Streamlining

County of Mono v. LADWP (2022) 81 Cal.App.5th 657

- Mono County & Sierra Club challenge to LADWP proposed agricultural leases in Mono County.
- **Highlights** Project Approval v. Implementation
- **2010 Leases** for 6,100+ acres, used existing structures/facilities exemption (15301).
  - "availability of water for use in connection with the premises leased herein . . . is conditioned upon the quantity in supply at any given time. . . .;"
  - "paramount right" of LA to discontinue the supply of water "at any time;" and
  - supply is "dependent on water availability" and the water (and rent) can be reduced in dry years.

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County of Mono v. LADWP (continued)

- **2018 Proposed Dry Leases** provided LA "shall not furnish irrigation water" and "Lessee shall not use water supplied to the leased premises as irrigation water."
  - LA was performing an environmental evaluation
  - 2010 leases would be in holdover status until complete.
  - LA would be spreading water on leased properties based on operational needs /snow surveys, amount was similar to 2016 (e.g. 0.71 AF/acre).
- County/Sierra Club sued and simultaneously LADWP issued NOP for EIR.
- LA argued 2018 allocation was under 2010 leases and statutory period ran.
- **Trial court held** that LA committed to a project without CEQA review when it proposed a change in water use in the Proposed Dry Leases and then implemented that change in the 2018 water allocations. It required LA to maintain status quo and provide water consistent with annual fluctuation/5-year baseline, calculated to 3.2 AF/acre.

County of Mono v. LADWP (continued)

Court of Appeal Reversed:

- **Extra Record Evidence:** LADWP Declaration on water diversions in 2019 and 2010. The First Appellate District held:
  - Decision at issue was "ministerial or informal" (lower-level staff decision), governed by PRC 21168.5 and CCP 1085, thus no bar to the trial court's consideration of the declaration. It was also directly relevant to the CEQA claims.
  - Could have excluded it as untimely, but it did not exclude on that basis and then relied upon it for the remedy—*this was inconsistent and improper*.
  - Remedy is to either exclude for all purposes or admit for all purposes, since no prejudice to County and relevant to claims, Court of Appeal admitted it.

County of Mono v. LADWP (continued)

Court of Appeal Reversed:

- Court undertook a contractual analysis of the "plain language" of 2010 leases.
- **Held:** "2018 allocation was not a turning point towards a low-water policy or the Proposed Dry Leases, but rather the latest in a string of discretionary water allocations that the 2010 Leases allowed Los Angeles to make."
- "Plain language" of 2010 leases accorded LA the "right to do precisely what Mono County contends it did: curtail water deliveries" in order to increase water deliveries to LA's residents.
- Tillemans' Declaration contradicted Mono County's argument as water allocations in 2019 and 2020 showed LA did not yet implement any low or zero-water policy.
- **Statute of Limitations**: 2018 water allocation was pursuant to 2010 leases, thus the action was time-barred. The SOL period "is not retriggered on each subsequent date the [agency] takes some action toward implementing the project." Moreover, reductions in 2014, 2015, and 2016 put County on notice of LA's position on reducing allocations—yet no prior lawsuits filed.

Citizens' Committee to Complete the Refuge v. City of Newark (2021) 74 Cal.App.5th 460

21166/Subsequent Review

- Challenge to City of Newark's use of GC § 65457's CEQA exemption for approval of residential subdivision claiming subsequent EIR required due to impacts on endangered salt marsh harvest mouse/wetlands habitat.
  - **Gov Code 65457** – residential development consistent with a specific plan for which an EIR was certified is exempt, absent circumstances under PRC 21166.
- **2010 Specific Plan EIR** allowed up to 1,260 units. Petitioner challenged and City adopted recirculated EIR, clarifying programmatic level analysis in Area 4 (where harvest mouse wetlands located) based on max level and assumption of filling of all wetlands.
- **2019 Approval** of 469-lot subdivision in Area 4, with dedication of ~100 acres to City. City prepared consistency checklist, concluded no PRC 21166 factors.

Photo Credit: Bjorn Erickson/USFWS

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Citizens' Committee to Complete the Refuge v. City of Newark (continued)

Petitioners argued three project changes required SEIR:

(1) Subdivision proposes to fill only uplands and not wetlands (inhibiting wetland migration),

(2) It omits golf course (allegedly depriving mouse of "escape habitat"), and

(3) Includes riprap to armor upland acres next to wetlands (allegedly increasing predation by rats nesting closer to its habitat).

Court of Appeal upheld exemption:

- RDEIR addressed loss of upland escape habitat finding it was LTS because uplands were degraded and finding not dependent on golf course for escape.
- Project would provide far fewer units, indicating a lesser impact.
- New use of rip rap did not constitute a "substantial project change" requiring "major revisions" because the EIR/REIR already examined rat predation on the mouse and Petitioners cited no evidence that riprap would "substantially increase" such predation.

Citizens' Committee to Complete the Refuge v. City of Newark (continued)

- **Sea Level Rise Argument**: Petitioners claimed changed circumstances and new information on SLR required SEIR because of wetland migration to upland areas.
  - **Held:** SLR is not "new" and should have been raised in 2010 or in response to REIR. REIR anticipated that rate of SLR was uncertain and could be accelerating.
- **Deferred Mitigation**: Petitioners claimed that City's hydrology report included "deferred mitigation" because it said City would take **adaptive approach** to managing SLR flooding of the project toward the end of the century (such as by building levees or floodwalls to protect the raised and filled residential areas).
  - **Held**: SLR is not an impact caused by the project, City's adaptive responses to it "are not mitigation measures and not governed by the rules concerning deferred mitigation."
  - The adaptive strategy was also not a reasonably foreseeable future project requiring analysis, argument was belatedly raised and City's potential responses to uncertain environmental conditions 50-80 years from now cannot be considered part of their current project.

Mission Peak Conservancy v. SWRCB (2022) 72 Cal.App.5th 873

Ministerial Review

- Challenge to registration with SWRCB for a small domestic use on an Alameda County property, claiming form contained materially false information and that approval was "discretionary" and required CEQA review.
  - **Context**: Water Rights Permitting Reform Act of 1988 permits eligible persons to acquire right to appropriate up to 10 AF/YR of water for domestic use by completing a registration process with the State Board.
- Trial Court sustained Board's demurrer, without leave to amend.
- **Held:** Board's registration process was indeed a ministerial act, not discretionary, and therefore exempt from CEQA.
  - "[m]inisterial projects involve 'little or no personal judgment by the public official as to the wisdom or manner of carrying out the project.' (Guidelines, § 15369.)"
  - Test is whether the law governing agency's decision gives it authority to require changes that would lessen the project's environmental effects.

Mission Peak Conservancy v. SWRCB (continued)

- Board's statutory authority to impose general conditions applicable to all registrations is not the same as authority "to place conditions on the . . . registration to lessen its environmental effects."
  - The Board applies a checklist of fixed criteria and registration is automatically deemed complete if it meets these criteria.
- Mission Peak also claimed that CDFW has discretion to impose conditions that could ameliorate the project's environmental impacts" and therefore the process is discretionary. Court disagreed, *another agency's discretionary authority* for its review cannot be imputed to the Board.
- Finally, Mission Peak's arguments that the Board erred in approving the registration because it did not meet program requirements, was "simply an argument that the Board made an erroneous ministerial decision" and is not a basis for a CEQA claim. "***CEQA does not regulate ministerial decisions—full stop***."

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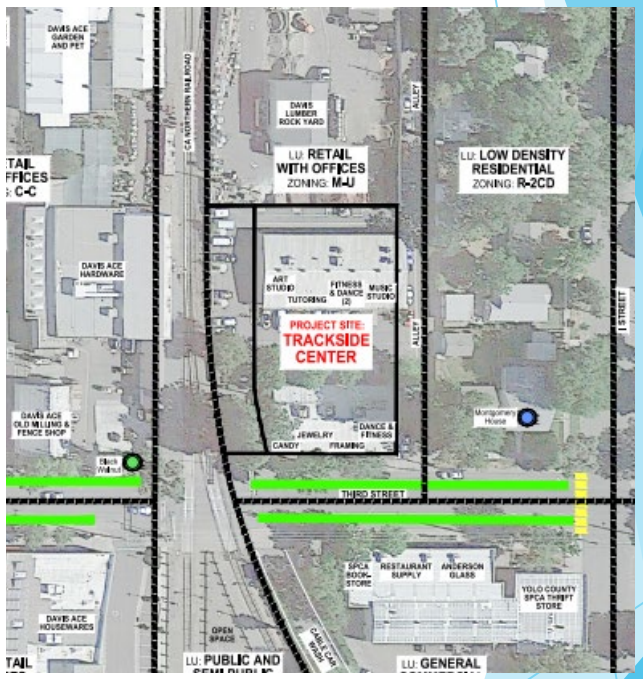
Old East Davis Neighborhood Assn. v. City of Davis (2021) 73 Cal.App.5th 895

Sustainable Communities Strategy

- Challenge to "Trackside Project," a 4-story mixed-use development in "transition area" between the Downtown Core and Old East Davis residential neighborhood.
- Site subject to the Core Area Specific Plan (CASP) and the Downtown and Traditional Residential Neighborhoods Design (DTRN) Guidelines.
- Project's Sustainable Communities Environmental Assessment/Initial Study (SCEA) and City Staff Report concluded the project was consistent with GP and CASP policies and DTRN Guidelines. City approved.
  - SCEA study is a streamlined environmental review permitted for projects qualifying as transit priority projects.
- Petitioner claimed project failed to meet requirements for SCEA and was inconsistent with planning documents.
- **Trial Court** granted the petition in part reasoning that the project did not meet the general plan's "fundamental policy" that it be a transition property. **Both parties appealed.**



Trackside Revised Plans, Contextual Map (Sep. 2016)

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Old East Davis Neighborhood Assn. v. City of Davis (continued)

- **Held: Trial court failed to afford appropriate deference to city's consistency determination.** A general plan consistency determination will only be reversed if it is unreasonable based on all the evidence in the record.
  - As the body that adopted the policies, the city "has unique competence to interpret those policies when applying them in its adjudicatory capacity."
  - A city council's determination that a project is consistent with the General Plan carries "a strong presumption of regularity."
- Policy at issue – **"transition" – was largely amorphous** and trial court **erred in applying a formulistic approach**. There was no relevant formula, instead the policy rested on subjective criteria and the project didn't violate relevant quantitative standards.
- The dispute was a question of conflicting evidence: *do the step-backs, mass shifting, extra wide alley, and other factors create an "appropriate scale" that is "sensitive to the area's traditional scale and character*"?

Old East Davis Neighborhood Assn. v. City of Davis (continued)

Issues Forfeited

- Petitioner's cross-appeal raised three issues with the SCEA that were raised in the trial court, but the judgment did not address. Court held these were forfeited because Petitioner did not challenge the trial court's tentative.
- Petitioner also argued the project did not meet the requirements for relying on a SCEA because of impacts to historic resources and that the city's findings under PRC 21155.2, were not supported by substantial evidence. Court rejected these arguments, concluding that petitioner relied on the wrong statutory provision in claiming the project did not qualify for a SCEA and failed to raise its challenge to the City's findings in its opening brief.

G.I. Industries v. City of Thousand Oaks (2022) __Cal.App.th__

- Project – City's awarding of 15-year franchise agreement for solid waste disposal services. City staff determined the project was exempt from CEQA per CEQA Guidelines section 15301 (existing facilities), 15308 (regulatory agency action for the protection of the environment), and 15061(b)(3) (common sense)
- Council agenda did not initially mention CEQA determination. G.I. Industries (a business competitor of the company awarded the contract) sent a comment letter claiming the new agreement would result in potential environmental impacts. On the day of the hearing, City posted a supplemental item on the agenda regarding the exemption.
- By separate actions, Council approved the exemption and approve the project. G.I. Industries sent a 30-day "cure and correct" letter claiming a Brown Act violation. The City did not respond and G.I. sued

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G.I. Industries v. City of Thousand Oaks (2022) __Cal.App.th__

- Trial court granted dismissal finding that since CEQA does not require a public hearing for an exemption determination, Brown Act notice was not required.
- Held: Brown Act applied to City's CEQA determination that project was exempt, and City's action violated Brown Act. Court extended *San Joaquin Raptor Rescue Center v. County of Merced* that held that agency's decision to adopt a CEQA document (ND or EIR) must be described as a separate item when considered at public hearing
- Court of Appeal said Cal. Constitution requires broadly construing Brown Act and that earlier cases finding no public hearing requirement for exemption did not address Brown Act.
- Takeaways: If an agency at a regular public hearing is approving a project that is subject to staff's determination of a CEQA exemption, agency must give notice of the CEQA exemption on its agenda. Holding is premised on the fact that agency's decision-making body has the ultimate authority to make exemption determinations.

Environmental Impact Reports

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Buena Vista Water Storage District v. Kern Water Bank Authority (2022) 76 Cal.App.5th 576

- Project - Divert and store Kern River's unappropriated flood flows in certain wet years, up to 500,000 acre-feet-per-year
- Buena Vista argued that the EIR's project description is unstable because it relies on an open-ended limit of up to 500,000 acre-feet of water and didn't quantify existing water rights
- Trial Court granted petition holding EIR's project description and baseline inadequate, and EIR did not adequately assess impacts on senior rights holders and on groundwater during long-term recovery operations

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Buena Vista Water Storage District v. Kern Water Bank Authority (2022) 76 Cal.App.5th 576

- Court of Appeal reversed on all grounds
- The project description and baseline adequate as it had to be sufficiently flexible to account for changing conditions; precise amount could not be determined, since that will vary from year to year
- Quantification of existing water rights unnecessary as that is a complex proceeding.
- Existing water rights are not impacted, and EIR provided measurements of water historically diverted and estimating, based on these historic records, how much water the Kern River Bank Authority could have diverted from the basin under baseline conditions
- Substantial evidence supported EIR's conclusion that the project would not adversely affect the long-term recovery of the groundwater basin as the project would add to groundwater supplies and have net benefit on aquifers

League to Save Lake Tahoe, et al. v. County of Placer (2022) 75 Cal.App.5th 63

- 760-unit residential development that also set aside 6,000 acres permanently
- Trial court found in favor of County on all issues except wildfire risk
- Court of appeal reversed on various issues

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League to Save Lake Tahoe, et al. v. County of Placer (2022) 75 Cal.App.5th 63

- Upheld County thresholds on air and water quality (not required to use TRPA thresholds)
- EIR failed to adequately evaluate water quality impacts
- Recirculation not required due to change in GHG methodology because conclusion was the same
- EIR impermissibly deferred GHG mitigation
- Wildfire evacuation analysis found adequate
- Traffic – LOS v. VMT? Mitigation?
- Energy analysis deficient because EIR did not look at renewable energy – found this PROCEDURAL

Ocean Street Extension Neighborhood Association v. City of Santa Cruz (2022) 73 Cal.App.5th 985

- City prepared an EIR for 32-unit housing project and issued permit granting variation from zoning code slope regulations
- Neighbors challenged under CEQA and Zoning Code
- Trial Court upheld EIR but found
- City violated Zoning Code

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Ocean Street Extension Neighborhood Association v. City of Santa Cruz (2022) 73 Cal.App.5th 985

- **Initial Study** – Impacts that are less than significant with mitigation may be discussed in the initial study and NOT in the EIR, if EIR provides sufficient information
- **Mitigation** – Petitioners failed to exhaust on deferred and vague mitigation claim, plus the effectiveness of mitigation measures was supported by substantial evidence
- **Project Objectives/Alternatives** – Project objectives were NOT overly specific, and the City justified its decision to reject smaller alternatives
- **Traffic** – Challenge to LOS mooted by switch to VMT
- **Zoning Code** – City did not violate the municipal code by granting PDP without also requiring compliance with the conventional slope modification regulation procedures. Ordinance allows variation and City must be afforded deference in interpreting its own code (YAY!)

Save Civita Because Sudberry Won't v. City of San Diego (2021) 72 Cal.App.5th 957

- Project was about a connector roadway discussed at programmatic level in draft EIR for a community plan amendment that allowed for a new major road, but did not analyze construction of the road itself
- Recirculated EIR added project-level analysis of the road construction
- Issue -The level of detail with which a recirculated EIR must describe how it differs from the draft EIR

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Save Civita Because Sudberry Won't v. City of San Diego (2021) 72 Cal.App.5th 957

- Guidelines § 15088.5(g) requires a lead agency to "summarize the revisions made to the previously circulated draft EIR"
- The final EIR included structural change, but relied on same data, discussion, conclusions, and mitigations; it just did not provide strikeout-level detail
- City's failure to include more description was not prejudicial as description of changes made since the prior draft EIR clearly described the extent and nature of the changes in sufficient detail to inform the reader
- No reasonable person could have been misled as to the distinction between the nature of the projects

Save the El Dorado Canal v. El Dorado Irrigation District (2022) 75 Cal. App. 5th 239

- Project proposed replacing 3-mile stretch of open and unlined ditch to a buried pipeline along the existing ditch, which passed through several private properties
- Agency instead approved an alternative placing the pipe across District-owned property for a portion of the pipeline to reduce construction impacts and need for private easements
- Challenges to the EIR's project description, hydrological, biological, and wildfire impact analyses for the chosen alternative

Save the El Dorado Canal v. El Dorado Irrigation District (2022) 75 Cal. App. 5th 239

- **Project Description**– EIR's description of chosen alternative was an adequate, complete, and good faith effort at full disclosure about the ditch, its relationship to the watershed's drainage system, and District's intent to abandon t existing ditch should it adopt the Blair Road Alternative

- Substantial evidence supported the EIR finding, based on facts and expert opinions, that Blair Road Alternative would not result in any significant impacts on the watershed drainage, riparian habitats and sensitive natural communities, conflict with local resource protection ordinances, tree mortality, and wildfire risks

Save the Hill Group v. City of Livermore (2022) 76 Cal.App.5th 1092

- **Project Description:** City's approval of an EIR for a residential development located in undeveloped area known as the Garaventa Hills. Project was submitted in 2011; later reduced in size to address public opposition. Approved in 2019. Adjacent to a wetland preserve which provides habitat for special status species.

- Suit: Petitioners claimed EIR was inadequate in failing to properly consider certain impacts, evaluation of the no-project alternative, or fully mitigate those impacts. Trial court found no-project analysis was inadequate, but Petitioners failed to exhaust administrative remedies.
First District Court of Appeal reversed.

Save the Hill Group v. City of Livermore (2022) 76 Cal.App.5th 1092

- Exhaustion: Petitioners exhausted claims as to the no-project alternative. Comments did not specifically refer to the EIR's no-project alternative, City was "fairly apprised" of claim because they expressed concerns about the destruction of habitat and supported keeping the project site in its present condition rather than approve the project. City Council had an interest in exploring a feasible acquisition/preservation option, was advised not to consider the no-project alternative by the City Attorney due to takings liability concerns.

- No-Project Alternative: Re-issued FEIR lacked critical information to support informed decisionmaking. It failed to consider availability of funding to permanently conserve the project site. EIR improperly dismissed the no-project alternative as "not reasonably foreseeable" because it was already zoned for residential development, which the court noted was always subject to change.

- Compensatory mitigation site: Petitioners claimed mitigation site for wetlands habitat was inadequate, because it was already protected under the City's general plan. Court found mitigation requirement would create a permanent easement, something the general plan does not provide, and required a replacement site should the selected location be found inadequate for the identified species.

Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700

- **Project Description:** 110 acres owned by Martha Co.
  - 1974, County amended zoning to reduce residential density and preclude construction on ridge and upland greenbelt.
  - 1976, Martha brought takings suit, resulting in a Stipulated Judgment allowing development of no fewer than 43 homes with some on ridge/greenbelt; some land dedicated to County as open space; letter clarified that EIR was still necessary
  - County would not approve project and sued to void 1976 Judgment. Court rejected suit and new Stipulated Judgment in 2007 requiring County to follow terms of 1976 Judgment and to prepare EIR
  - 2008 Application, 2011 EIR; size of development area decreased, open space increased; 2017, EIR certified and project approved with statement of override
  - Tiburon Open Space Comm. Sues over EIR

Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700

- Suit claims EIR process improperly "truncated" since County determined it had to approve project per 1976 and 2007 judgments. (Tiburon joined petitioners). Trial court ruled in County's favor. COA denied appeal.
- Held: CEQA is flexible and scope is adjusted based on legal limitations placed on an agency's discretionary authority.
  - 32-unit alternative was legally infeasible due to stipulated judgments
  - Traffic analysis was a good-faith attempt at full disclosure without measuring during "midafternoon school rush"
  - Redlegged frog: County mitigation plan was reasonable even though component involved participation by neighbor who refused to cooperate
  - Water tank and fire flow mitigation: county's plan for mitigation (including approve for reduced fire flow, smaller homes and upgrade of lines) was reasonable
  - Temporary road construction: project included temporary road for construction workers, challengers claimed safety risks. Court that while EIR evaluated such risks, it was not required to because CEQA does not "regulate environmental changes that do not affect the public at large."

We Advocate Thorough Environmental Review v. City of Mount Shasta (2022) 78 Cal.App.5th 629

- **Project Description:** City approval of wastewater permit (in its role as a responsible agency) based on EIR for a water bottling plant. (EIR was certified by County of Siskiyou.)
- The City found that there were no unmitigated adverse impacts relating to the alternative waste discharge disposal methods. No other findings were adopted.
- The Third District Court of Appeal found City's findings were inadequate. While responsible agencies "generally consider only the effects of those parts of the project that they decide to carry out or approve," such agencies are still required to adopt all necessary findings as to significant effects associated with the agency's permit that are identified in a certified EIR (PRC § 21081).
- Agency must include a "brief explanation" of the rationale for that finding. Because the EIR identified several potentially significant impacts associated with the discharge of wastewater into the City's sewer system, the findings are required.

We Advocate Thorough Environmental Review v. County of Siskiyou (2022) 78 Cal.App.5th 683

- **Project Description:** County approval of the revival of a non-operational water bottling plant.
- **Allegations**: County violated CEQA by (i) providing an inaccurate project description, (ii) relying on impermissible narrow project objectives, (iii) improperly evaluated several project impacts, and (iv) approved a project inconsistent with the County's general plan.
- The trial court rejected all claims. The Third District Court of Appeal reversed in part. In the published portion of the decision, the appellate court held that (1) the project objectives were impermissibly narrow, and (2) recirculation was required based on disclosure in the Final EIR of nearly 2X the GHG from DEIR.
- Project objectives: the court found the project objectives were defined in a manner that precluded any alternatives but the proposed project. E.g., objectives such as siting "the proposed facility at the Plant . . . to take advantage of the existing building, production well, and availability and high quality of existing spring water on the property," and "utiliz[ing] the full production capacity of the existing plant based on its current size," rendered the alternatives section of the EIR an "empty formality."
- GHG analysis: court found that the increase in GHGs from 35K metric tons/yr in the DEIR to 61K in the FEIR necessitated recirculation. GHG increase did not lead to a change in the ultimate conclusions of a significant unavoidable impact, the failure to recirculate "wrongly deprived the public of a meaningful opportunity to comment on a project's substantial environmental impacts."

Pre-emption

County of Butte v. Dept. of Water Resources (2022) ___Cal.5th___ (Case No. S258574)

- **Project Description**: State Dept. of Water Resources application to renew 50-year license to operate Butte Co. Oroville Dam and hydroelectric facilities.
- **Held:** Federal Power Act (FPA) does not occupy the field to entirely preempt CEQA application to state's participation as an applicant and hydroelectric facility owner/operator in the Federal Energy Regulatory Commission (FERC) licensing process.
  - Rejected County challenge to unwind settlement agreement prepared as part of FERC process; nor stop DWR from operating under license (to be issued) since such actions would contravene FERC's sole jurisdiction over licensing and was preempted.
  - Granted appeal in finding there was a role for CEQA to the extent EIR analyzed impacts of operating facilities under FERC settlement agreement and FERC staff-proposed alternative.

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County of Butte v. Dept. of Water Rsources (2022) ___Cal.5th___ (Case No. S258574)

- EIR serves as an informational source for DWR's decisionmaking as to whether to request particular terms from FERC as it contemplates the licence or to seek reconsideration of terms once FERC issues the license; and about potential mitigation measures that may be outside of or compatible with FERC's jurisdiction
- Noting in the FPA suggests Congress intended to interfere with way state as owner makes these or other decisions concerning matters outside FERC's jurisdiction or compatible with FERC's exclusive licensing authority
- State applicants for FERC hydropower licenses must still comply with CEQA as well as the paramount Federal law governing such applications; but CEQA law must be allowed to "play out" until it crosses the preemption line
- Dissent by Chief Justice Tani Cantil-Sakauye argued no role for CEQA regardless of whether applicant is state or private party because FPA occupies the field of hydropower regulation (except where state regulation of proprietary water rights is involved); attempt to distinguish *Eel River* decision.

Thank you!

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