California Supreme Court Holds In 5-2 Decision, Over Chief Justice's Strong Dissent, That Federal Power Act Does Not Fully Preempt CEQA's Application to FERC's Licensing Process for State-Owned and Operated Hydroelectric Projects

By Arthur F. Coon on August 7, 2022

In a 5-2 opinion filed August 1, 2022, a divided California Supreme Court held the Federal Power Act ("FPA"; 16 U.S.C. § 791a et seq.) does not "occupy the field" and *entirely* preempt CEQA's application to the state's participation, as applicant and hydroelectric facility owner/operator, in the Federal Energy Regulatory Commission ("FERC") licensing process the FPA requires to operate such facilities. *County of Butte v. Department of Water Resources* (2022) ___ Cal.5th ___, Case No. S555874. Acknowledging the result would likely be different if a *private* party were the license applicant, the Court applied a narrower type of direct conflict preemption, based on a state entity being the facility owner/operator/applicant. The majority did agree with the Third District Court of Appeal that the Counties challenging the State Department of Water Resources' ("DWR") EIR, prepared in connection with its application to renew a 50-year license to operate its Butte County Oroville dam and related hydroelectric facilities, could not seek to unwind a settlement agreement prepared as part of FERC's application process and proceedings; nor could they seek to enjoin DWR from operating under the proposed (but not yet issued) license – a request for relief the Counties initially pursued, but apparently abandoned at oral argument before the Supreme Court. The Court's majority acknowledged such actions would contravene FERC's "sole jurisdiction" over licensing process disputes and be preempted under longstanding federal law. (18 C.F.R. § 4.34 (i)(6)(vii); *First Iowa Coop. v. Federal Power Comm'n* (1946) 328 U.S. 152, 164 ("*First Iowa*").)

But the Supreme Court majority parted ways with the Court of Appeal, and with a lengthy concurring and dissenting opinion authored by Chief Justice Tani Cantil-Sakauye, in holding there was still some role for CEQA and some life left in the Counties' state court CEQA litigation challenging DWR's EIR, which analyzed the environmental impacts of operation of its facilities under the pending FERC settlement

agreement/application and a FERC staff-proposed alternative. In refusing to find the FPA "categorically" preempted CEQA's application in FERC licensing proceedings that involve state-owned and operated facilities, the Court held that an EIR under CEQA properly serves as an "informational source for DWR's decisionmaking as to whether to request particular terms from FERC as it contemplates the license [citation] or to seek reconsideration of terms once FERC issues the license [citations]," and also "about potential [mitigation] measures that may be outside of or compatible with FERC's jurisdiction." The majority reasoned "[n]othing in the FPA suggests Congress intended to interfere with the way the state as owner makes these or other decisions concerning matters outside FERC's jurisdiction or compatible with FERC's exclusive licensing authority." (Citing primarily to its own decision in *Friends of the Eel Reiver v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 724 ("*Eel River*"), my July 31, 2017 post on which can be found *here*.) The bottom line is that state agency applicants for FERC hydropower licenses must still comply with CEQA, as well as the "paramount" Federal law governing such applications, and the CEQA process must be allowed to "play out" until, at some point, it crosses the "conflict preemption" line.

The Chief Justice's powerful concurring and dissenting opinion saw things very differently, and would have held there is no legally permissible role for CEQA, its mandatory mitigation measures, or its authorized enforcement litigation to play in the FERC licensing process – regardless of whether the applicant is a state entity or private party. The 38-page dissent is noteworthy not only because it is substantially longer (and, in my view, better reasoned) than the majority's opinion, but because it was authored by the departing Chief Justice – who would seem to be a fairly authoritative source on this topic since she also authored the *Eel River* opinion on which the majority opinion's reasoning heavily rests. Based on a thorough analysis of the relevant federal preemption precedents and CEQA itself, the dissent makes a compelling case that controlling Federal law holds the FPA "occupies the field" of hydropower regulation to the exclusion of all state laws, including CEQA, except for a "narrow band of regulation" involving state regulation of proprietary water rights. The dissent reasoned that CEQA, a powerful and mandatory regulatory statute operating in areas duplicative of FERC's FPA licensing authority, "stands as a clear obstacle to the Congressional objective of vesting exclusive control over hydropower licensing and regulation in FERC."

The Background Facts, Licensing and CEQA Processes, and Litigation: A "Bleak House" Timeline

DWR's license to operate the Oroville facilities was issued in 1957 for a 50-year term set to expire in 2007. While it "began public preparations" to apply to FERC for renewal in late 1999, DWR has yet to obtain a new license and operates under annual interim licenses to this very day. Under an alternative licensing process ("ALP") then allowed by FERC regulations, which was initiated in 2001, DWR cooperated with stakeholders to develop a "settlement agreement" (effectively a first draft of the license proposed to be issued by FERC) that was concurrently vetted through a 5-year process involving dozens of organizations and NEPA review through a preliminary draft environmental assessment ("PDEA") consisting of 700 pages and 1,500 pages of appendices; in 2006, the settlement agreement, which contained, inter alia, an appendix with 40 pages of provisions governing the facilities' operation that the parties intended the FERC license to include, was signed by over 50 parties. Notably, these parties did not include Butte and Plumas Counties, which were dissatisfied by its terms. The settlement agreement and PDEA were submitted to FERC essentially as DWR's application. (While the majority opinion is unclear as to the exact timing, it appears a formal relicensure application of some sort was submitted to FERC at some point between mid-2005 and 2006.)

FERC then prepared its own 500-page draft Environmental Impact Statement ("EIS") pursuant to NEPA in late 2006, analyzing the environmental and other effects of: (1) the proposed action (i.e., operation of the facilities under the settlement agreement); (2) a no-action alternative (operation under the existing

license); and (3) a staff alternative (operation under the settlement agreement, as modified and augmented by FERC staff), the latter being the EIS's "preferred alternative." While DWR had issued a joint CEQA/NEPA notice of preparation years earlier in 2001, it didn't undertake any further CEQA procedures, including EIR preparation, until *after* it submitted its application/settlement agreement to FERC; in mid-2007, in the midst of the FERC proceedings, it issued its own DEIR analyzing the impacts of the same three alternatives considered in FERC's draft EIS. The EIR stated that DWR undertook CEQA procedures because the State Water Resources Control Board ("SWRCB") required an EIR in connection with DWR's related CWA § 401 water quality certification request application, and because CEQA review could inform DWR's decision whether to accept the settlement agreement-based license or the FERC staff-proposed alternative. (In other words, DWR at the SWRCB's urging determined that CEQA applied to its discretionary actions and that it had to comply – unless, perhaps, some superior preemptive law commanded otherwise.)

In mid-2008 – notably already past expiration of its 50-year license – DWR issued a Final EIR ("FEIR") and correspondingly adopted a six-page slate of mitigation measures as conditions of project approval, along with a Mitigation Monitoring and Reporting Program ("MMRP"), which it claimed would reduce construction and operational project impacts in various areas, including biological and paleontological resources, noise, air quality, public health and safety, and geology and soils, to a less-than-significant level.

In August 2008, Butte and Plumas Counties filed writ petitions challenging DWR's CEQA compliance in connection with the relicensing on numerous grounds, and sought to enjoin "DWR's project" and all physical activities under it. That CEQA litigation consumed about four years in the state trial court; the SWRCB, in the meantime, relied on DWR's EIR and FERC's EIS to grant the CWA § 401 water quality certification in late 2010. (Unmentioned by the Court was that the SWRCB's water quality certification action appears to have occurred beyond the one-year federal deadline for taking that action.)

After the trial court ultimately rejected the Counties' EIR challenges on their CEQA merits – in mid-2012 – the Counties appealed. In the first round of appellate litigation, the Court of Appeal held the County appellants' challenges to the settlement agreement were preempted by FERC's exclusive jurisdiction, and their challenges to the SWRCB's water quality certification were premature (as it had not yet been issued when the actions were filed). After the Supreme Court granted review and retransferred to the Court of Appeal for reconsideration, in light of the *Eel River* decision, the Court of Appeal reconsidered and reached the same conclusion – complete preemption barred the litigation entirely – in round two on remand.

The Supreme Court's Grant of Review And Majority Opinion

The Supreme Court wasn't done with the matter. In late 2019, it granted review of the Court of Appeal's second decision on two issues: (1) does the FPA preempt CEQA's application when the state is acting on its own behalf and exercising its discretion in pursuing relicensing of a hydroelectric dam?, and (2) does the FPA preempt state court challenges to an EIR prepared under CEQA to comply with CWA § 401? In its majority opinion authored by Associate Justice Goodwin Liu – issued after another 2-1/2 years following its grant of review – the Court declined to address the second issue as "not properly presented" and decided only the first issue, holding that the FPA preempts CEQA's application in *some* respects in this context, but not "entirely" as the Court of Appeal had ruled.

After giving brief tutorials on the FPA and CEQA statutory schemes – from which I was shocked to learn, from page 13 of the Slip Opinion, that an EIR "must include" discussion of "the economic and social effects of the project" – the majority opinion begins its supremacy clause/preemption analysis. The

majority emphasizes the "high threshold" required to demonstrate that a state law conflicts with or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" so as to be preempted, and invokes a "presumption that, in the absence of unmistakably clear language, Congress does not intend to deprive the state of sovereignty over its own subdivisions to the point of upsetting the usual constitutional balance of state and federal powers." (Quoting *Eel River,* at 690.)

Acknowledging that *First Iowa* and *California v. FERC* (1990) 495 U.S. 490 held "that state regulatory efforts that conflicted with the exclusive federal licensing authority granted by the FPA were preempted[,]" either under a conflict or field preemption analysis, and that the Ninth Circuit in *Sayles Hydro Assn. v. Maughan* (9th Cir. 1993) 985 F.2d 451 ("*Sayles Hydro*") similarly applied field preemption, the Supreme Court majority nonetheless felt unconstrained to write on what it viewed as a clean legal slate. It distinguished all those cases as involving the licensing of a *private* applicant entity, and because none had "considered whether Congress intended to occupy the field to the extent of precluding a state from exercising authority over its own subdivision license application." It emphasized that they "each involved state regulation of private parties rather than the type of self-government discussed in *Eel River*, which is also at issue here." The majority further stated: "None of these cases defined the [pre-empted] field to include the state's prerogative to govern the work of its own agency in a manner that does not conflict with federal law."

The majority reasoned that just because the FPA's savings clause had repeatedly been interpreted by federal courts to narrowly apply only to matters involving state regulation of proprietary water rights did not mean that other unmentioned state powers were preempted; it again relied on its own *Eel River* decision which "found an explicit and broad preemption clause [in the Interstate Commerce Commission Termination Act of 1995 ("ICCTA")] insufficiently clear to overcome the presumption that Congress did not intend to preempt a state's internal decision making under CEQA, even if it intended to preempt the state's regulation of private parties in the same context." And the Court found nothing in the federal precedents supporting "defining the preempted field to include the specific conduct at issue today."

Finding no indication Congress intended FPA preemption to reach so far as to entirely preempt application of CEQA to DWR's actions, the majority stuck to its *Eel River* guns even though that case involved an entirely different federal statute and regulatory scheme. Per the Court: "our reasoning in *Eel River* did not hinge on the [railroad] industry's deregulation; rather, it was based on what the federal scheme permitted the state as owner to do as a result of that deregulation – namely, make its own choices about its project, guided by an EIR." The majority hewed closely, too, to *Eel River's* insistence that "citizen" litigation to enforce CEQA was all part of the state's "self-governance," rejecting real party State Water Contractors' contrary arguments.

While holding the FPA didn't categorically preempt CEQA, the Court did agree with the Court of Appeal (and the Counties, who at the eleventh hour abandoned their injunctive relief claims) that "no state court can issue a remedy that conflicts with the federal law" or "interfere with the federal licensing process" – such as challenging the terms of the settlement agreement reached through the ALP or enjoining the issuance of (or actions authorized by) a FERC license. Nonetheless, upholding the enforcement of state law requiring an EIR and condoning litigation challenging the sufficiency of that EIR remained fair game in the majority's eyes; the Court was willing to let the 14-year long litigation challenge continue even further because "[a]t this stage of the proceedings review of [DWR's] EIR does not interfere with FERC's jurisdiction or exclusive licensing authority." In this regard, the Court observed that federal law allows public or private applicants to *amend* their license applications or seek *reconsideration* after a license is issued, and that no law "limits an applicant's ability to analyze its options or the proposed terms of the license before [taking such actions]." In other words, where there remains any public agency discretion to

act that could be guided by an EIR, there must also be CEQA compliance whether it occurs during and as part of the FERC licensing process or not.

In a statement I found curious, almost making CEQA compliance and litigation sound like benign and voluntary *choices* of the applicant state agency, the Court wrote: "DWR *can* undertake CEQA review, including *permitting* challenges to the EIR it prepares as part of that review, in order to assess its options going forward." (Emph. added.) (I say curious because, if CEQA applies as a matter of law, then neither DWR nor any other public agency subject to CEQA has any choice *other* than to comply with it, and in the process *necessarily* subject itself to CEQA enforcement litigation.) Per the Court, though, this is merely the state's "mak[ing] its decisions based on its own guidelines" and is "a far cry from the conflicting state regulations imposed on private actors at issue in *First Iowa* and *California v. FERC*." Indeed, per the majority's rather rosy vision of the CEQA process, and correspondingly narrow view of preemption in this "state-as-owner" context: "A CEQA challenge to the Department's EIR is not inherently impermissible, nor is it clear that any mitigation measures will conflict with the terms of the license ultimately issued by FERC." In the majority's optimistic view, the EIR *may* contain mitigation measures that are compatible with or fall outside FERC's exclusive licensing authority, and where they aren't, or don't, FERC can always exercise its discretion to accept or reject any CEQA mitigation measures for incorporation into the license as it pleases, thus "preempting any particular applications or enforcement mechanisms of CEQA that conflict with [its] authority." Simple, right?

The majority opinion blithely dismisses the dissent's assertion that the CEQA litigation added *years of delay* to FERC's issuance of the (still-unissued) license as "mere conjecture," claiming such delay is common in FERC proceedings for other reasons, and that in any event "there is little reason to assume future litigation will be as prolonged." While claiming the litigation is nearly concluded, it simultaneously rejects "[a]t this stage, any concerns about conflicting mitigation measures [as being] exaggerated or at least premature." And while the Court rejects challenges to the settlement agreement as preempted, it embraces litigation challenges to DWR's EIR as not preempted since "a compliant EIR can still inform the state agency concerning actions that do not encroach on FERC's jurisdiction."

The majority opinion essentially treats CEQA as a sacred cow and bends over backwards to avoid finding it entirely preempted. If its theoretical and impractical supporting arguments appear to have been written by a life-long legal academic with no CEQA practice experience, and no judicial experience dealing with CEQA prior to being appointed to the California Supreme Court – well, that's probably because they were. (Regrettably, Justice Lui's majority opinion also gets a fundamental CEQA point wrong when it states an EIR must discuss "economic and social effects," but, hopefully, that error will be treated as a typo and not taken seriously by any courts, litigants, or CEQA practitioners.)

The Concurring and Dissenting Opinion

Chief Justice Cantil-Sakauye's concurring and dissenting opinion, joined by Justice Corrigan, was by comparison a breath of fresh air, combining astute legal analysis with common sense and practical insight. Taking issue with the majority's conclusions about the "scope and consequences" of CEQA preemption under the U.S. Constitution's supremacy clause, and quite correctly characterizing CEQA as a "powerful regulatory statute," it concluded CEQA is entirely preempted by the FPA either under "field preemption" or because, even absent a direct conflict, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The U.S. Supreme Court has consistently held the FPA reflects Congress's intent to "occupy the field" of hydropower regulation; and while it did not identify the statute by name, the Ninth Circuit held nearly 30 years ago in *Sayles Hydro* that CEQA was preempted in connection with FPA FERC licensure proceedings. Further, the FPA's savings clause has consistently been interpreted by the federal precedents to limit states to a "narrow

band" of regulation (involving regulation of proprietary water rights only) that no one contends includes CEQA. Indeed, CEQA's key feature – its "mitigation mandate" – is a regulatory tool that inevitably conflicts with FERC's exclusive FPA authority as a "competing state regulatory regime" that poses a "direct obstacle" to "the congressional purpose and objective of vesting unchallenged regulatory authority over hydropower in FERC."

The dissent further found CEQA's private enforcement provisions – i.e., CEQA litigation – also "stand as an inevitable impediment to the congressional purpose of granting to FERC exclusive control over the hydropower licensing process." FERC's regulations were clearly designed to *obviate* state environmental review statutes, which the dissent found result in state proceedings that add nothing but delay – in this case, 12 years and counting – to the licensing process. Here, the dissent pointed out that two complete EIR equivalents (the PDEA and FERC's EIS under NEPA) had been prepared in the FERC licensing process *before* DWR elected to prepare a third under CEQA – only to study the very same project and project alternative impacts the first two had! But for the ensuing litigation delay from challenges to the EIR, all prerequisites to issuance of a license by FERC were met in 2010, well over a decade ago.
The dissent supported its conclusions by undertaking its own thorough analysis of CEQA, preemption generally, FPA preemption and the FPA savings clause, and relevant federal case law, delving into far greater detail than the majority opinion's rather cursory treatment of the preemption precedents. The dissent pointed out the flaws in the majority's analysis, in particular its failures to appreciate that the Ninth Circuit's *Sayles Hydro* decision directly held CEQA was preempted by the FPA, and the reality that CEQA compliance and litigation stand as very real obstacles to the exercise of FERC's exclusive licensing jurisdiction. Per the dissent, given FERC's licensing process, "preparation of an EIR is redundant and unnecessary to ensure proper consideration of environmental concerns" and CEQA's judicial review provisions are "entirely inconsistent with an efficient licensing process."

The Chief Justice also slammed the majority's unjustified reliance "on DWR's status as a public entity and ***my*** decision in *Eel River* to justify its decision to impose limited preemption in these circumstances." (Emph. added.) Let that sink in: the Justice who wrote *Eel River* is explaining it did not find partial preemption, but instead found CEQA exempt from preemption under an entirely different statute (ICCTA) and a regulatory regime that resulted in a "deregulated zone" in which CEQA therefore properly played a vacuum-filling role in the state entity's planning for operation of its rail line; by direct contrast, FERC has exercised its exclusive right to regulate operation of hydropower facilities under the FPA and its implementing regulations, and there is no "deregulated zone" or infringement of any state sovereign "self-governance" function.

While correctly recognizing the preemption issue is one of federal law, the dissent also stressed the unworkable and impractical nature of the majority's decision as demonstrating the wisdom of its own conclusions that the FPA-mandated FERC licensing procedures "occupy the field" to the exclusion of CEQA. CEQA's civil enforcement mechanisms are allowed by the majority to proceed as long as they don't seek to interfere with FERC licensing proceedings, but FERC need pay them no heed and its issuance of a license will effectively moot them. CEQA adds nothing to the process. As a practical matter, if CEQA compliance precedes issuance of the FERC license, DWR will be unable to determine which mitigation measures it adopts will ultimately be consistent with the terms of the FERC license, leading to DWR potentially being subject to two binding, yet inconsistent, sets of regulations – one under state and one under federal law, one of which it will be forced to violate. A declaration that a mitigation measure is unenforceable could also invalidate the lead agency's CEQA approval, potentially rendering project operation unlawful under state law even though authorized by federal law.

In my view, the key insight of the dissent missed by the majority is that CEQA compels the imposition of binding feasible mitigation measures, and that such mitigation measures are environmental *regulations* in

all but name. Per the dissent, CEQA was enacted to govern *state* law projects and approvals and was not designed to operate as subordinate to a superior federal regulatory scheme; it does not contemplate partial preemption or severance of its informational functions from its regulatory mitigation mandate, nor can any agency implement it without necessarily exposing its compliance to lengthy and disruptive state court litigation.

In sum, the dissent finds the majority's ruling has no sound doctrinal basis, nor even any practical benefit, since a CEQA study of the project to be licensed is wholly redundant given the environmental analysis (including under NEPA) already undertaken as part of the federal FERC licensing process. There is no need to conduct the same environmental review three times. Because of CEQA's mandatory nature, the majority's ruling also runs the risks that public agencies will be required to duplicate federal (or their own) environmental studies, interfering with licensing proceedings and creating their own conflicting regulatory scheme through CEQA's compelled adoption of mitigation measures.

Conclusion and Implications

In my view, the dissent is "spot on" and the 5-2 majority decision has little in the way of legal support or practical benefit to commend it. In deciding a preemption issue governed by the U.S. Constitution and federal statutes and case law, it relies primarily on a prior *state* court decision – *Eel River* – that dealt with a different federal statute (ICCTA) that had a materially different regulatory scheme (favoring railroad deregulation and leaving the state-owned project at issue in a regulatory void); moreover, *Eel River* was written by the same justice – Chief Justice Cantil-Sakauye – who here filed a robust dissent vigorously and meticulously explaining how the majority erred in applying her decision and ignored and misconstrued the controlling federal precedents involving the different statute (FPA) actually involved here. The federal cases repeatedly find the FPA (and its narrow savings clause) have a broadly preemptive effect on state regulation in the same field – including CEQA, the application of which *Sayles Hydro* holds is completely preempted by field preemption in this context. I agree with the Chief Justice that CEQA, as applied here, is redundant, duplicative, unnecessary to fill any genuine informational purpose, and inherently in conflict with FERC's federal licensing scheme and its purposes, objectives, and methods.

I'll close quoting the Chief Justice, since she said it best: "The absence of any meaningful regulatory or practical justification for DWR's invocation of CEQA reveals the majority's opinion for what it is: The preservation of state regulatory authority for its own sake. The proper role of our court in the application of the [United States] Supreme Court's supremacy clause jurisprudence should be to *prevent* such vain assertions of state power, not to promote and facilitate them." Well said, and happy retirement, Chief, you made your fellow King Hall alums proud, and your wisdom and contributions to California's high court will be remembered and missed!

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