SUPREME COURT
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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.

After a Decision by the Court of Appeal
Third Appellate District
Case No. C071785
Appeal from the Yolo County Superior Court, Case No. CVCV091258
The Honorable Daniel P. Maguire, Judge Presiding

PLAINTIFFS' OPENING BRIEF ON THE MERITS

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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?

PRELIMINARY STATEMENT

The Oroville Dam is the largest earthen dam in the United States. First licensed in 1957, the dam and its associate Oroville Facilities are a central feature of California's State Water Project. Although subject to the Federal Energy Regulatory Commission's ("FERC") jurisdiction over electric generating facilities, the Oroville Facilities also provide statewide water delivery and storage, and are operated for other purposes, including flood control, recreation, and protection of fish and wildlife.

The Oroville Facilities initial 50-year FERC license expired in 2007. California's Department of Water Resources—the facilities' owner and operator—is charged with determining whether, and upon what terms, it will seek a new long-term license. In California, that determination requires DWR to assess the facilities' environmental impacts under the California

Environmental Quality Act, Public Resources Code section 21100 et seq. ("CEQA"). Because a new FERC license will allow operations for another fifty years, an accurate assessment of the environmental conditions under which the Oroville Facilities will operate—including increasingly frequent periods of extreme drought and flooding—is critical to understanding how relicensing will affect California's environment and water resources.

Until the Court of Appeal ruled, sua sponte, that the Federal Power Act preempted CEQA here, no party to this case ever questioned DWR's obligation to comply with CEQA, nor has FERC questioned that obligation. For good reason. Compliance with the CEQA is a core element of California's self-governance. Under this Court's decision in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal. 5th 677, 705, courts must presume "that Congress would not alter the balance between state and federal powers without doing so in unmistakably clear language." No such clear statement exists in the Federal Power Act. Indeed, the Act specifically reserves the States' powers "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses." (16 U.S.C. § 821.)

Nonetheless, relying on case law interpreting the preemptive reach of the Federal Power Act over the licensing of privately-operated dams, the Court of Appeal held that applying CEQA to DWR's project was a regulatory action that the Federal Power Act preempted. However, the

requirement that state agencies comply with CEQA when assessing environmental impacts of state projects is not regulatory action. It is an essential expression of California's sovereignty, protected under the U.S. Constitution's federalist system.

Notably DWR, opposes preemption and supports adjudicating the merits even though it prepared the Environmental Impact Report ("EIR") challenged here. "[B]ased on the reasoning" of *Friends of the Eel River*, DWR recognized that the Court of Appeal "has jurisdiction to reach the merits" and "the Federal Power Act should not be read to preempt the State from requiring one of its own agencies—here, DWR—to comply with CEQA in undertaking its own project." (DWR's Opening Supplemental Brief, filed May 23, 2019, at p. 8.) The State Water Resources Control Board ("State Board") likewise opposes preemption on these grounds.

Additionally, the Federal Power Act does not, and cannot, preempt state court challenges to an EIR prepared for federal water quality certification under section 401 of the federal Clean Water Act, 33 U.S.C. § 1341. Section 401 requires federal license applicants, such as DWR, to obtain state certification that a project complies with state water quality standards. Certification must include conditions meeting both Clean Water Act requirements and "any other appropriate requirements of state law." (33 U.S.C. § 1341(d).)

Congress reserved this authority solely to the States, and FERC does not have jurisdiction to reject the conditions of a state 401 certificate. (See, e.g., *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 712-22 ("*Jefferson County*").) Instead, state law challenges to a state's 401 certificate must be brought in state court. Accordingly, the Federal Power Act does not preempt challenges to an EIR prepared to comply with section 401 certification.

For over 11 years, Butte County, Plumas County, and Plumas County Flood Control and Water Conservation District ("the Counties") have pursued this action to ensure that DWR comply with CEQA, and ensure that the substantial environmental impacts of DWR's project are analyzed and mitigated. This Court should reverse the Court of Appeal's decision and remand this case with directions to rule on the merits of the Counties' CEQA claims.

STATUTORY BACKGROUND

I. The Federal Power Act

Congress enacted the Federal Power Act, 16 U.S.C. § 791 et seq., to create "a broad federal role in the licensing and development of hydroelectric power" throughout the country. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 957.) The Act authorizes FERC to act as the primary regulator of hydroelectric projects and issue licenses for project construction and operations. (16 U.S.C.

§ 797.) Congress's delegation of authority to FERC, however, does not determine the extent to which Congress intended the Federal Power Act to preempt state law. (*California v. FERC* (1990) 495 U.S. 490, 496-97.)

Although the U.S. Supreme Court has interpreted the Act to generally preempt state regulation of hydroelectric projects (*id.* at p. 502), FERC's jurisdiction over those projects is not plenary. The Federal Power Act "establishes a dual system of control," split between the FERC and the States. (*First Iowa Hydro-Electric Cooperative v. Federal Power Com.* (1946) 328 U.S. 152, 167.) The Act does not affect state powers in areas where Congress has not expressly regulated, or where the U.S. Constitution reserves authority exclusively for the States. (*Ibid.*) For instance, the Federal Power Act does not address, much less constrain, a State's internal decisions when seeking a new FERC license for a public hydroelectric project. The Act also expressly preserves state authority over "proprietary" water uses, including projects that serve municipal and irrigation purposes. (See *County of Amador*, *supra*, 76 Cal.App.4th at pp. 958-60 [discussing 16 U.S.C. § 821].)

II. The Clean Water Act

Section 401 of the federal Clean Water Act establishes a system of cooperative federalism for maintaining water quality when federal agencies license or permit projects. (33 U.S.C. § 1341.) Congress authorized state agencies to "certify" whether the proposed actions would comply with the

Clean Water Act and "any other appropriate requirement of State law." (*Id.* § 1341(d).)

The Federal Power Act does not preempt a State's requirements adopted for a water quality certification under section 401. The U.S. Supreme Court has broadly interpreted state authority under section 401(d) to ensure compliance with state water quality objectives. (*Jefferson County, supra*, 511 U.S. at pp. 713-14.) "Not a single sentence, phrase or word in the Clean Water Act purports to place any constraint on a State's powers to regulate the quality of its own waters more stringently than federal law may require." (*Id.* at p. 723 (J. Stevens, concurring).) Rather, "the Act recognizes States' ability to impose stricter standards." (*Ibid.*) The Clean Water Act therefore requires FERC to accept and incorporate into a license any water quality conditions that a State imposes on a hydroelectric project through section 401. (*American Rivers, Inc. v. FERC* (2d Cir. 1997) 129 F.3d 99, 107.)

III. The California Environmental Quality Act

CEQA prescribes a "meticulous process designed to ensure that the environment is protected." (*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 911.) That process generally applies to any public agency discretionary determination regarding a "project." (Pub. Resources Code § 21080(a); Cal. Code Regs. tit. 14 ("CEQA Guidelines") § 15002(i).) A "project" is an activity undertaken,

supported, or approved by a public agency that may cause a physical change in the environment. (Pub. Resources Code § 21065; CEQA Guidelines § 15378.) Consequently, CEQA's procedures apply both when agencies regulate private projects and when agencies independently pursue public projects. (*Friends of the Eel River*, *supra*, 3 Cal.5th at pp. 711-12; see also *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112 [CEQA applies when an agency uses "its judgment in deciding whether and how to carry out the project"].)

If a project might have a significant effect on the environment, CEQA requires a lead agency to prepare an "EIR" to study the project's potential impacts. (Pub. Resources Code §§ 21100, 21151; CEQA Guidelines § 15063(a), (b).) An EIR, like the one DWR prepared here, also must identify project alternatives and mitigation measures that would reduce the severity of the project's significant environmental impacts. (CEQA Guidelines §§ 15126.4, 15126.6.) The EIR's discussion of project alternatives and mitigation is the "the core of the EIR." (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162.) If an agency approves a public project with significant environmental impacts, it must incorporate all feasible mitigation measures into the project. (Pub. Resources Code §§ 21002, 21081(a)(1), (b).)

Even if a project does not require mitigation, an EIR serves as a "document of accountability," which ultimately protects "informed self-government" in California. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512.) CEQA's "foremost principle" is that "the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Id.* at p. 511 (citation omitted).)

STATEMENT OF THE CASE

I. The Oroville Dam

DWR owns and operates the Oroville Facilities. Developed as part of the State Water Project, the facilities serve as a keystone of California's water storage and delivery system. (Administrative Record ("AR") C000033.) The Oroville Facilities are "operated for flood management, power generation, water quality improvement in the Sacramento-San Joaquin Delta, recreation, and fish and wildlife enhancement." (AR G000128.)

The central feature of the Oroville Facilities is the Oroville Dam, the largest earthen dam in the United States, which is located on the Feather River in Butte County. (AA 11:95:2369[1]; AR G002501-02.) The dam was first licensed in 1957 and constructed between 1961 and 1968. (AA

[1] Citations to the Appellants' Appendix ("AA") appear herein as "AA [volume]:[tab]:[page number]."

11:95:2369.) It "blocks access to 66.9 miles of high-quality habitat for anadromous fish," including salmon and steelhead. (AA 11:95:2369.) Its operation further impairs regional water quality (AR G002440), imposes ecological and economic costs on Butte County (AR G002538-2606), and creates risks for fisheries and other resources in Plumas County (AR H000363-70).

II. DWR's Relicensing Efforts

DWR is both the project proponent and CEQA lead agency for the Oroville Facilities relicensing project. (AR C001740; see also Pub. Resources Code § 21067 ["'Lead agency' [is] the public agency which has the principal responsibility for carrying out or approving a project."].) DWR's 50-year federal license to operate and maintain the Oroville Facilities (FERC Project No. 2100) expired on January 31, 2007. (AR C000033.) Since then, the Oroville Facilities have operated on temporary licenses, which renew annually by operation of law. (See 16 U.S.C. § 808(a)(1).) FERC has not issued a decision on DWR's pending license application.

In 2001, FERC granted DWR permission to use FERC's Alternative Licensing Process, 18 C.F.R., section 4.34(i), to pursue a new license. (AR B000617-18.) That process authorizes certain "alternative procedures for pre-filing consultation and the filing and processing of an application" for a new license. (18 C.F.R. § 4.34(i).)

Neither state nor federal agencies anticipated that the Alternative Licensing Process would supersede CEQA's application to DWR's relicensing decisions. Instead, DWR proceeded with the environmental review required by state law. In 2001, DWR issued a combined NEPA and CEQA scoping notice, which acknowledged that the Alternative Licensing Process would incorporate requirements of NEPA, CEQA, and comply with other "State and federal resources agencies [sic] approval and permitting processes." (AR C000027, C000033, C000216.)

In 2003, DWR issued an amended scoping notice recognizing that an EIR may be required, both for the State Board's decision-making "over Section 401 Water Quality Certification" *and* "to support decision-making by DWR." (AR C001739.) The notice recognized that "all the requirements of NEPA and CEQA must eventually be satisfied." (AR C001740.) DWR then undertook the role of "Lead Agency in preparing the EIR for the relicensing of the Oroville Facilities and for use by the SWRCB in issuing Section 401 Water Quality Certification." (*Ibid.*)

In January 2005, DWR submitted its initial application to FERC to renew the Oroville license for another 50 years. (AR B066039-50.) Butte County expressed concerns about the extensive environmental impacts that would occur if the Oroville Facilities continued operating for another half-century. (AR C001817-19.)

In March 2006, DWR filed a proposed Settlement Agreement with FERC (AR D000422), which replaced DWR's initial application and became the new proposed project for DWR's CEQA evaluation. The Settlement Agreement includes an Appendix A, which incorporates all of the protections, mitigations, and enhancement measures DWR believed to be necessary for the operation of the Oroville Facilities under a new FERC license. (AR D000835.) The Settlement Agreement also contains an Appendix B, which includes matters that are beyond FERC's jurisdiction, and therefore will not be part of a new license. (*Ibid.*) DWR's EIR analyzed the environmental impacts of matters contained in both Appendices A and B. (AR C001264.)

The Settlement Agreement also stated an intent to resolve among the parties "all issues . . . including 401 Certification, NEPA and CEQA" requirements that might arise during DWR's efforts to obtain permits and other approvals associated with the new project license, while also recognizing that "several regulatory and statutory processes are not yet completed." (AR D000432.)[2] The Settlement Agreement acknowledges that before FERC issues a new project license, "each Public Agency shall participate in the relicensing proceeding, including environmental review

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[2] Butte and Plumas Counties were unable resolve their concerns with DWR, and were excluded from final discussions culminating in the Settlement Agreement. (AR F002488-96, H001095.)

and consideration of public comments, as required by applicable law." (AR D000434.) Additionally, most of the contractual obligations under the Settlement Agreement would not become fully effective until after DWR's "affirmative acceptance of a Final New Project License" issued by FERC. (AR D000429.)

In May 2007, DWR circulated its Oroville Facilities Project Draft EIR. (AR G000004.) The project includes DWR's proposed terms and conditions for relicensing the Oroville Facilities. (AR A000015; G000130.) Beyond generating hydroelectric power, DWR's project objectives also required DWR to meet other commitments and requirements analyzed in the EIR, including decisions affecting water supply, flood control, and protection of Delta water quality and fisheries. (AR G000128, G000190-91.) To meet the project's objectives, DWR needed to show it could continue generating electric power while complying with multiple "statutory, contractual water supply, flood management, and environmental commitments," as well as fishery, water quality, and other obligations. (AR A000013; see also AR G000128, G000158, G000160-63 [describing project objectives].)

DWR planned to "use the [Final EIR] and any supplemental CEQA documents to make all necessary decisions for acceptance and implementation of the new FERC Project License" and implementation of the Settlement Agreement. (AR G000110, G000134.) DWR's EIR also

confirmed that it was the only environmental review document informing the State Board's section 401 water quality certification for the Oroville Facilities, as well as other discretionary decisions by responsible and trustee agencies. (AR G000110, G000134.)

The Counties submitted detailed EIR comments, identifying significant unaddressed environmental impacts and a deficient assessment of alternatives and mitigation. (AR G002406-813, G002817-91.) The Counties' comments criticized DWR's decision to test project performance under only a portion of the past century's range of hydrologic conditions, noting that leading scientists, including DWR's own, had discredited this assumption due to the wider range of flood and drought conditions expected in the new century. (AR H000216-33, H000367-68, H000491-92, H000385-94, L001040-44.) 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 H000235.) Other commenters likewise identified significant unaddressed risks in DWR's EIR during both flood and drought conditions. (H000385-94, H000415-81, H000489-95.)

In July 2008, DWR certified the Final EIR and issued its Decision Document approving the Oroville Facilities project. (AR A000003-102.) The Final EIR refused further study, and perpetuated many of the errors identified by EIR comments. For instance, the Final EIR did not study a

broader range of hydrologic conditions or analyze a climate-resilient project alternative, but instead assumed a selective range of last century's hydrologic conditions were "expected to continue for the foreseeable future." (AR H000133.)

DWR's Decision Document, however, confirmed DWR's obligation to comply with CEQA as lead agency for the Oroville Facilities project. (AR A000033, A000059.) After considering the EIR and other pertinent information, "the Director will determine whether to approve the Proposed Project." (AR A000007.) The Decision Document also clarified that DWR's discretion over the project would not usurp FERC's still-unmade decision over the proposed license. Although approval "will not lead to immediate implementation" of the Settlement Agreement, if FERC issues a new license, "DWR will have 30 days to decide whether to accept the license and license conditions." (AR A000008.) If FERC's license is for the proposed project or for the FERC staff alternative analyzed in the EIR, "no additional analysis under CEQA is required and the DWR Director may accept the license." (*Ibid.*)

III. After a Trial on the Merits, the Court of Appeal Rules, Sua Sponte, that the Federal Power Act Preempts this Case.

In 2008, the Counties filed CEQA petitions in Butte County Superior Court, which were consolidated and transferred to Yolo County Superior Court. (AA 1:1:1-28 (Butte County petition), 1:3:30-43 (Plumas

County petition).) The trial court adjudicated the merits of DWR's CEQA compliance in June 2012 and ruled in DWR's favor. (AA 14:124:3046-63.)

Throughout the merits briefing in the trial court and on appeal, DWR and Real Parties in Interest State Water Contractors, et al. ("SWC") defended the necessity and adequacy of the EIR without questioning state court jurisdiction over this action. (See, e.g., AA 1:22:0176-0221, 1:23:0195-0221, 11:94:2304-65, 1:98:2444-506; SWC Respondents' Brief, filed May 31, 2013, at pp. 10-13, 89; DWR Respondents' Brief, filed June 24, 2013, at pp. 3, 8-15, 22, 120.)

However, the Third District Court of Appeal issued an order sua sponte directing the parties to brief whether the proscription on state "veto power" over hydroelectric projects subject to the Federal Power Act, and DWR's Settlement Agreement under FERC's Alternative Licensing Process, preempted the Counties' CEQA challenge. (April 11, 2016 Order at pp. 2-3.) The Third District then held that Federal Power Act preemption barred the Counties from challenging the Oroville Facilities EIR.

The Counties petitioned for review. This Court granted the Counties' petition and transferred the matter back to the Third District with instructions to "reconsider the case in light of *Friends of the Eel River*." (*County of Butte v. Dept. of Water Resources* (2019) 245 Cal.Rptr.3d 411, 411.)

IV. Following Transfer, DWR Rejects Preemption, but the Court of Appeal Again Rules that this Case Is Preempted.

After transfer, the Counties and DWR agreed that *Friends of the Eel River* removed this case from the Federal Power Act's preemptive sphere, and that state courts have jurisdiction to adjudicate the Counties' CEQA action. (See DWR Supplemental Opening Brief, filed May 23, 2019, at p. 8.) Accordingly, DWR asked the Court to "address[] the merits" of the Counties' CEQA claims. (*Id.* at p. 19.)

The Court of Appeal declined and once again concluded that the Federal Power Act preempts this case. Its new opinion attempts to distinguish *Friends of the Eel River* by contrasting the deregulatory purpose of the Interstate Commerce Commission Termination Act ("ICCTA") with FERC's regulatory authority over environmental protection. (Opinion on Transfer, filed Sept. 5, 2019, at pp. 25-26 ("Opinion").) The Opinion states that the "unmistakably clear" statement requirement applied in *Friends of the Eel River* does not extend to the Federal Power Act (*id.* at pp. 26-27), and concludes that even when applied to public projects like DWR's, "CEQA laws . . . are regulatory acts pure and simple" (*id.* at p. 29).

The Opinion also applies preemption to the EIR's role informing the State Board's water quality certification. The Opinion states that any "environmental predicate" to certification is subject to FERC review (*id.* at

p. 5), and that CEQA review for water quality compliance can await a later "implementation" stage (*id.* at p. 19).

The Counties filed their second Petition for Review on October 15, 2019.[3] The Court granted review on December 11, 2019.

STANDARD OF REVIEW

Federal preemption of state law presents a question of statutory interpretation that this Court reviews de novo. (*In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.)

ARGUMENT

I. The Federal Power Act Lacks an Unmistakably Clear Congressional Statement of Intent to Preempt State Self-Governance.

Under the U.S. Constitution's federalist system, the States "retained 'a residuary and inviolable sovereignty,'" through which they "remain independent and autonomous within their proper sphere of authority." (*Printz v. United States* (1997) 521 U.S. 898, 919, 928.)

Fundamental to this sovereignty is the States' authority to constitute and govern their political subdivisions. "Through the structure of its government . . . a State defines itself as a sovereign." (See *Gregory v. Ashcroft* (1991) 501 U.S. 452, 460.) Consequently, "[t]he number, nature

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[3] Amicus letters supporting the petition were filed by the California Association of Counties; Friends of the River, California Sportfishing Protection Alliance, Friends of the Eel River, and the Sierra Club; and the California Water Impact Network and AquAlliance.

and duration of the powers conferred upon [subdivisions] . . . rests in the absolute discretion of the State." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254-55 [quoting *Hunter v. Pittsburgh* (1907) 207 U.S. 161, 178-79].)

Courts are highly reluctant to interfere with this essential sovereignty by reading congressional enactments to "interpos[e] federal authority between a State and its . . . subdivisions." (*Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140-41; see also *Parker v. Brown* (1943) 317 U.S. 341, 351 ["an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress"].) If Congress intends to alter the usual balance of powers between the States and Federal Government, "it must make its intention to do so *unmistakably clear in the language of the statute*." (*Gregory, supra*, 501 U.S. at p. 460 (quoting *Atascadero State Hospital v. Scanlon* (1985) 473 U.S. 234, 242; emphasis added); *City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618, 631, abrogated on other grounds.) This heightened clear statement rule operates with greater force than other clear statement requirements (*John v. United States* (9th Cir. 2001) 247 F.3d 1032, 1042-43 (Tallman, J., concurring)) and avoids potential constitutional infirmities that could arise from reading "federal legislation . . . to trench on the States' arrangements for conducting their own governments" (*Nixon, supra*, 541 U.S. at p. 140).

For these reasons, in *Friends of the Eel River*, this Court unequivocally held that federal law does not preempt CEQA's application to California agency decisions about whether and how to pursue publicly owned and operated projects. Such decisions "constitute[] self-governance on the part of a sovereign state and at the same time on the part of an owner." (*Friends of the Eel River*, *supra*, 3 Cal.5th at p. 723; see also *City of Columbus v. Ours Garage and Wrecker Service, Inc.* (2002) 536 U.S. 424, 437 ["Whether and how" a State exercises its discretion in allocating responsibilities to its subdivisions "is a question central to state self-government."].) "CEQA prescribes how governmental decisions will be made when public entities . . . are charged with approving, funding—*or themselves undertaking*—a project with significant effects on the environment." (*Friends of the Eel River*, *supra*, 3 Cal.5th at p. 712 [citing Pub. Resources Code § 21065].) Thus, the Legislature's determination to require CEQA compliance for DWR's public projects reflects California's sovereign control over its subdivisions.

DWR's actions here are prototypical exercises of discretion over a public project with significant effects on the environment. The relicensing of the dam is not mandatory. (See 16 U.S.C. § 808 [discussing possible relicensing scenarios, including the Federal government taking over the dam or issuing a new license to a different licensee].) DWR *chose* which project to pursue, and its EIR was necessary to inform the agency's