

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

**In the matter of:
July 17, 2020 Water Quality Certification for Federal Permit Or License
for Yuba Water Agency
Yuba River Development Project (FERC No. 2246)**

**RESPONSE IN OPPOSITION OF
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE,
FRIENDS OF THE RIVER,
SIERRA CLUB MOTHER LODGE CHAPTER, AND
SOUTH YUBA RIVER CITIZENS LEAGUE
TO UNTIMELY PETITION FOR RECONSIDERATION
OF YUBA WATER AGENCY**

I. Introduction and Background

The California Sportfishing Protection Alliance, Friends of the River, Sierra Club Mother Load Chapter, and the South Yuba River Citizens League (collectively, CSPA et al.) respond in opposition to Yuba Water Agency (YWA)'s¹ August 14, 2020 filing² with the State Water Resources Control Board (State Water Board), comprised of a series of documents that YWA collectively styled as a “petition for reconsideration” of the Final Water Quality Certification (Certification) for the Federal Energy Regulatory Commission’s (FERC) relicensing of YWA’s Yuba River Development Project (FERC No. 2246 – YRDP). The State Water Board issued the Certification on July 17, 2020. YWA’s “petition for reconsideration” asks the State Water Board to “vacate that Certification in its entirety.”

As explained in Section I, the State Water Board should not process YWA’s filing as a petition for reconsideration because it is untimely. Instead, it should treat the filing as comments. CSPA et al. responds to YWA’s filing as comments and recommends further analysis to assist in resolution of the outstanding issues related to conditions necessary to protect water quality of the Yuba River. Even if waiver of the State Water Board’s authority is upheld, the analysis will nonetheless inform the State Water Board’s analysis in support of its update of the Bay-Delta Plan.

II. The State Water Board Should Reject the Petition as Untimely.

The California Water Code provides for reconsideration of the State Water Board’s final decisions either on the Board’s own motion or on the filing of a petition.³ However, according to

¹ Since it initiated the relicensing proceeding for the Yuba River Development Project under the name Yuba County Water Agency (YCWA), YCWA rebranded and changed its name to Yuba Water Agency (YWA). This Response in Opposition uses the more recent name.

² Yuba County Water Agency’s Petition for Reconsideration of July 17, 2020 Water Quality Certification for Federal Permit or License (Aug. 14, 2020), publicly available on FERC eLibrary at accession #20200821-5082.

³ Cal. Water Code § 1122.

Certification Condition 23, the Certification is not final for purposes of reconsideration pending reversal of FERC's order on reconsideration:

CONDITION 23. Issuance of this certification shall become effective upon the earliest of: a grant of rehearing of FERC's May 22, 2020 order finding waiver of the State Water Board's water quality certification authority; issuance of a judicial order overturning that order; or issuance of another judicial or administrative action finding that FERC improperly found waiver of the State Water Board's certification authority. Unless and until such action overturning FERC's finding of waiver, this certification shall not be considered a final action for the purposes of Water Code section 13160 regarding reconsideration or for administrative review.

Condition 23 makes clear the Certification is not a final agency action for purposes of reconsideration and will not be ripe for reconsideration “[u]nless and until” there is “judicial or administrative action ... overturning FERC's finding of waiver” of certification.

The State Water Board should not treat YWA's August 14 filing as a petition for reconsideration under Water Code section 1122. It should dismiss the petition without prejudice until such time that FERC's finding of waiver is overturned. In the alternative, the State Water Board should regard YWA's August 14 filing as *comments* on a certification that is not yet final.

On November 13, 2020, YWA filed suit against the Certification in both state and federal court.⁴ For the reasons described in these comments, YWA's requests for judicial review appear to be premature pending final action by the SWRCB and subsequent exhaustion of administrative remedies by YWA.

III. YWA's Procedural Objections Are Without Merit and Ignore YWA's Unclean Hands.

CSPA et al. do not respond to all of the procedural arguments in YWA's filing, given that these arguments are premature pending a decision on whether FERC's finding of waiver will be overturned. However, we do address its argument on CEQA.

The California Code of Regulations (CCR) 23 section 3856 states the requirements for a complete application for water quality certification. Subsection (f) states: “Although CEQA documentation is not required for a complete application, the certifying agency shall be provided with and have ample time to properly review a final copy of valid CEQA documentation before taking a certification action.” Since YWA has insisted that the Water Board must act on a certification in one year without fail (“one year means one year”),⁵ YWA without question failed to complete its requirements as an applicant for certification under State law. YWA does not dispute that it did not complete CEQA for the certification for the YRDP. YWA does not

⁴ See YWA web post, “Yuba Water Agency sues California water board to protect its future, the Yuba River and Yuba County” (November 13, 2020). Available at: <https://www.yubawater.org/CivicAlerts.aspx?AID=107>

⁵ Letter from Michael A. Swiger, Counsel to YWA, to Kimberly Bose, Secretary, FERC, “Yuba River Development Project, FERC Project No. 2246, Section 401 Water Quality Certification” (Aug. 22, 2019) requesting waiver of certification for YRDP, FERC eLibrary no. 20190822-5016, p. 4 (Request for Waiver).

dispute that it failed to initiate such a CEQA process. Since the requirement of an applicant is that it provide the certifying agency with a CEQA document such that that agency has “ample time” to review that document, YWA’s failure took place *before* YWA withdrew and resubmitted its application for certification in August 2018.

Yet YWA, which failed to initiate CEQA to support certification for two years before it requested waiver, brazenly claims that the Certification itself violates CEQA. YWA’s Statement of Reasons quotes the July 2020 amendment to Water Code § 13160 as follows:

The state board may issue the [water quality] certificate . . . before completion of the environmental review required under Division 13 (commencing with Section 21000) of the Public Resources Code [CEQA] if the state board determines that waiting until completion of that environmental review to issue the certificate . . . poses a substantial risk of waiver of the state board's certification authority under the Federal Water Pollution Control Act or any other federal water quality control law.⁶

YWA argues that since FERC has already waived certification, there is no “substantial risk” of waiver. YWA’s recent behavior, and the fact that the waiver is currently in litigation, demonstrate otherwise.

Assuming that a court overturns waiver on review, it is reasonable to assume that YWA will not initiate CEQA and will not complete CEQA within one year. Second, YWA’s Request for Waiver announced the novel theory that any denial without prejudice by the State Water Board of an application for certification violates Section 401’s one year deadline.⁷ However, FERC’s waiver of certification for the YRDP did not offer an opinion on this argument, instead stating that YWA’s prior withdrawal and resubmittal had already constituted waiver of the State Water Board’s authority to issue certification, rendering the later denial without prejudice legally void.⁸ Moreover, the EPA Final Rule on Section 401 appears to disallow denial without prejudice as an allowable state response to incomplete information in a record. Not forgetting that YWA opportunistically seized on the *Hoopa Valley Tribe v. FERC*⁹ ruling while the State Water Board awaited YWA’s initiation and completion of CEQA, or that YWA extensively invokes the EPA Final Rule in its Statement of Reasons, any and all of these facts pose a “substantial risk of waiver” that justifies issuance of the Certification for the YRDP prior to completion of CEQA.

YWA’s Statement of Reasons adds a parting shot in a footnote: “Whether the Delegated Certification could support any valid CEQA review is highly questionable.”¹⁰ YWA argues that there are so many open-ended conditions and conditions subject to modification that it would be difficult to identify a project description. Of course, it could always be the case where the applicant for certification is lead CEQA agency that the details of certification are unknown,

⁶ *Id.*, p. 19.

⁷ Request for Waiver, pp. 8-9.

⁸ 171 FERC ¶ 61,139, Order on Waiver of Certification, ¶27 (finding that waiver occurred on earlier application that YWA withdrew and resubmitted).

⁹ *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley Tribe*).

¹⁰ Statement of Reasons, p. 20, fn. 6.

particularly where the lead agency chooses an adversarial posture in relation to the certifying agency. The solution available to the lead agency is to identify and analyze a sufficiently broad range of alternatives to cover reasonable decisions the responsible agency might reach. YWA had no apparent difficulty in developing alternatives with which to *refute* the Certification, and it is not unreasonable that YWA could develop alternatives to support certification if YWA decided to carry out its CEQA responsibilities. Whether YWA would actually develop a range of alternatives that were collectively and individually defensible under CEQA is a different question that should be laid at the feet of YWA. It is worth remembering in this regard that YWA has clearly demonstrated the practice of presenting its own preferred alternative as the only reasonable alternative, with other alternatives stated as overreaches in order to support YWA's preferences.

As a responsible agency under CEQA, the State Water Board could, as well, supplement the CEQA analysis if needed to support a decision not analyzed in the lead agency's CEQA document. In the limiting case, the State Water Board could also if necessary supplement CEQA in the process of modifying a Condition.

YWA's chicken-and-egg silliness concerning CEQA further highlights YWA's failure over two years to exercise its rights by acting as lead agency in the development of a CEQA document. Had it chosen to follow the regulations regarding the CEQA responsibilities of an applicant for certification, YWA would have had ample opportunity to make its case for its own view of appropriate conditions for certification.

Contrary to the assertions of YWA,¹¹ the State Water Board will need a CEQA document in which to ground its analysis of conditions to protect the beneficial uses of the lower Yuba River. If waiver of certification is overturned on judicial review, the State Water Board as a responsible CEQA agency will need to make its needs clear to YWA as lead agency. If waiver is upheld, the State Water Board will need to house its analysis of the lower Yuba River in its own CEQA or substitute CEQA document for the Bay-Delta Plan. Notwithstanding YWA's obstructionism on CEQA, there is much work the State Water Board can start now to lay out the necessary components, including alternatives analysis, of the CEQA document it will ultimately require.

¹¹ See August 22, 2019 Letter of Michael A. Swiger, Counsel, Yuba County Water Agency, to Secretary Bose, FERC, eLibrary no. 20190822-5016 (Petition for Waiver), p. 7:

As a public agency of the State of California, YCWA understands the importance of CEQA but believes that FERC's exhaustive Final Environmental Impact Statement (EIS) for this federal relicensing already provides more than adequate environmental review. As lead agency under CEQA, YCWA would be relying largely on FERC's EIS to prepare a CEQA document. If FERC concludes that waiver has occurred, thus obviating the need for CEQA review in this case, there will be no genuine argument that the result of waiver is an inadequacy of environmental review. [Internal citations omitted.]

IV. YWA's Objections to Certain Certification Conditions Are Baseless.

A. YWA's Filing Creates a Speculative Strawman Flow Scenario Whose Refutation Has No More Validity than the What-If That YWA Imagines.

YWA's filing describes a dystopian, hypothetical future for YWA's service area and constituents that would result *if* the Board interpreted the conditions of certification unreasonably:

*The extensive technical analyses that YCWA is submitting with this Petition indicate that the Delegated Certification **could** have a nearly \$500 million impact over a 50-year FERC license term on YCWA and its capacity to support Yuba County's many disadvantaged communities – not counting hundreds of millions of dollars more in potential fish-passage costs and the economic impact on Yuba County's farmers from severely reduced surface-water supplies. The certification **could** compel YCWA to shoulder primary responsibility for improving fisheries habitat in the lower Yuba River, even though YCWA's technical work shows that the certification's terms actually **might** damage fish habitat conditions by, among other things, causing water temperatures to exceed key thresholds for salmon more often. One of the Delegated Certification's conditions, for example, **could** require YCWA to spend hundreds of millions of dollars to move fish above the federal government's Englebright Dam – which was built in the early 1940s to contain hydraulic mining debris. The Delegated Certification **presents a** dangerous financial **risk** to YCWA by **potentially** increasing annual expenses, and decreasing hydroelectric and water-sale annual revenues, by many millions of dollars in each direction. YWA filing, pp. 2-3 (bold added; italics in original).*

YWA (*id.* at 3) describes what *would* happen if any or all of these *hypothetical* events came to pass:

Facing such a serious pinch, YCWA would be forced to reduce its expenditures on flood damage reduction projects, habitat and watershed restoration, recreation, and community grants. Such an outcome would further burden vulnerable populations in Yuba County's disadvantaged communities.

For all YWA's speculation, the Certification on its face requires **no change** from YWA's proposed flow regime for the lower Yuba River. Condition 1 of the Certification gives YWA ten years to submit a report on the condition of fishery resources in the lower Yuba River, at which point the State Water Board *may* consider modifications to the flow requirements. YWA's "analysis" of what modifications the State Water Board may consider after 10 years is 120 pages of overheated rhetoric aimed at obliterating a strawman proposal.

In the FERC relicensing process, the California Department of Fish and Wildlife (CDFW), the U.S. Fish and Wildlife Service (USFWS), and the Foothills Water Network (FWN) coalition of non-governmental organizations used YWA's operations model to develop a joint flow recommendation. This flow recommendation developed an approach that would require

YWA to release a percent of the February-June unimpaired flow to the lower Yuba River.¹² The recommendation evolved so that a percent of unimpaired flow became a metric for evaluating the flows rather than as a flow requirement as such.¹³ The agencies and FWN specifically designed their recommendation so that there would be no losses of water to local irrigators except in an extreme drought year such as 1977, as would also be the case under YWA's flow proposal.¹⁴

YWA's strawman flow requirement starts with the flow recommendations that CDFW, USFWS and FWN jointly proposed in the FERC proceeding. Though CDFW and USFWS did not opine on the issue, FWN, in its Comments and Recommendations on the Draft Environmental Impact Statement (draft EIS) for the YRDP, stated its intention that these recommendations could serve to fulfill the Yuba River's flow contribution to the update of Bay-Delta Plan.¹⁵ Nonetheless, YWA's strawman flow proposal **adds** the CDFW-USFWS-FWN proposal to a hypothesized requirement for YWA to release 55% of the unimpaired flow every month every year.¹⁶ This allows YWA to erect and then refute a hypothetical worst-case or near-worst-case scenario, making both the State Water Board's Certification and its Bay-Delta Plan process appear unreasonable. There is nothing in YWA's strawman about Certification Condition 16 (Drought Management) or the statement in the State Water Board's July 6, 2018 *Framework for the Sacramento/Delta Update to the Bay-Delta Plan* that the Plan will contain provisions to address drought.¹⁷ Such a more even-handed approach would not fit the narrative.

YWA ascribes to the Certification a cost to YWA of up to \$500 million over 50 years, or \$10 million per year. Of this, YWA attributes 88% of this cost to its strawman flow proposal.¹⁸

¹² The starting approach, initiated by CSPA, roughly followed the approach suggested in State Water Resources Control Board, *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem*. (August 2010) (Delta Flow Criteria Report). Available at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf

¹³ FWN carefully explained the evolution of the flow recommendation starting from a percent of unimpaired flow. See FWN, Comments and Recommendations Ready for Environmental Analysis for the Yuba River Development Project (Aug. 25, 2017) (FWN REA Comments), FERC eLibrary no. 20170825-5257. For description of the development of the CDFW-USFWS-FWN flow recommendation, see *esp.* pp. 15-29. The movement away from a percent of unimpaired flow as a compliance requirement was based in part on recognition of the limited release capacity of the outlet works at Englebright Reservoir. It was also based on analysis that showed the need to balance uses during that dry-year sequences, creating a real drought plan instead of a promise to make one later.

¹⁴ FWN DEIS Comments, p. 20 notes: "FWN has reviewed the modeling based on which YCWA suggests that it would be short of water for irrigation in 1970, 1997, 2004 and 2007. It is likely that years with that hydrology YCWA would meet delivery demand by taking additional water out of storage, or that irrigators would meet demand by pumping groundwater from a basin that YCWA represents to be stable."

¹⁵ FWN, Comments and Recommendations on the Draft Environmental Impact Statement for the Yuba River Development Project (Jul. 30, 2018) (FWN DEIS Comments), FERC eLibrary no. 20180730-5138, p. 17: "It has always been the intention of the Network that the February-June flows proposed for the Yuba River in relicensing should largely be the same as the flows required to meet the objectives in the update of the Bay-Delta Plan."

¹⁶ This is crudely consistent with the State Water Resources Control Board, *Framework for the Sacramento/Delta Update to the Bay-Delta Plan* (Jul. 6, 2018). Hereinafter cited as "Framework." Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf

¹⁷ Framework, *esp.* pp. 27-28: "The proposed program of implementation will include... provisions for addressing drought..."

¹⁸ See YWA filing, "Statement of Reasons Why The Action or Failure to Act Was Inappropriate or Improper (Cal. Code Regs., Title 23, § 3867, Subd. (D)(4)) In Support of Yuba County Water Agency's Petition for

B. YWA’s Arguments Disavowing All Responsibility for Physical Habitat Conditions in the Lower Yuba River Stream Channel Are without Merit.

Condition 12 of the Certification requires YWA to submit a plan to the State Water Board about potential stream channel improvements downstream of Englebright Dam. YWA’s “Statement of Reasons” and supporting appendices the reprises the argument that YWA has no responsibility at all for any such stream channel improvements other than placement of large wood, and that the construction and operation of the YRDP has been wholly and completely beneficial for the lower Yuba River.

The Statement of Reasons reminds the State Water Board of the “principles of California law that require environmental measures to be ‘roughly proportional’ to a project’s impacts.”¹⁹ Yet YWA argues that operation of the YRDP for the past 50 years has had no negative impacts to the stream channel of the lower Yuba River and that operation of the YRDP for the next 50 years will equally have no negative impacts.

This is the line of argument YWA made in the FERC licensing. Since FERC generally limits mitigation requirements to direct impacts of project operations, and limits its consideration of project operations to hydropower operations as opposed to water supply and power operations, FERC incorrectly accepted YWA’s arguments in relicensing. In an explicit demonstration of forum shopping, YWA cites that decision in its Statement of Reasons.²⁰

The Statement of Reasons brushes aside the fact that there are differing conclusions regarding “proportional” responsibility. The document relies on the faulty assumption that the only possible conclusion regarding assignment of responsibility for the condition of lower Yuba River channel is YWA’s conclusion. Assuming that conclusion as fact, the Statement of Reasons then sets forth another speculative string of arguments, in this case legal, about all the laws that the State Water Board would violate should it assign YWA a (by assumed definition) disproportional degree of mitigation responsibility.²¹ It would violate the California Constitution. It would violate the United States Constitution and be a “taking” as defined therein. It would “commandeer the assets” of YWA.²²

As the pages of speculation turn, they increasingly morph into assumed fact. The Certification would require YWA to spend “enormous sums” on “physical-habitat projects.”²³ The Certification would require YWA to contribute all required flow from the Yuba River for the Bay-Delta Plan without requiring upstream water users to contribute; still more speculation piled on without foundation, with no regard to water right priorities, assuming facts still undecided. By the end of the subsection, the narrative has painted the entire Certification as no

Reconsideration of July 17, 2020 Water Quality Certification for Federal Permit or License” (Statement of Reasons), p. 52.

¹⁹ *Id.*, p. 43. *See also* p. 70.

²⁰ *Id.*, pp. 52-53, citing to FERC’s Final EIS. FERC staff recommended placement of large wood primarily because FERC staff could point to the direct effect that the YRDP’s New Bullards Bar Reservoir captures large amounts of large wood.

²¹ *See* Statement of Reasons, pp. 70-74.

²² *Id.*, p. 73.

²³ *Id.*

more than a series of requirements that YWA “address problems resulting from others' activities,” “raising serious constitutional issues.”

All Condition 12 actually says is that YWA has to submit a *plan*. Condition 12 does not require YWA to implement any of these speculative actions.

C. YWA’s Arguments Disavowing All Responsibility for Fish Passage Past Englebright Dam Are without Merit.

Condition 20 of the Certification requires YWA to prepare a report outlining options for fish passage for salmon and steelhead to the upper Yuba River watershed and to make a recommendation about a contribution that YWA might make to it. Based on past and current behavior, including the current Appendix A to YWA’s filing, it is reasonable to expect that any action of YWA required under open-ended Condition 20 would simply give rise to further denial by YWA of all responsibility for fish passage for Englebright Dam.

Similar to YWA’s argument on physical habitat downstream, YWA completely disavows all responsibility for fish passage past Englebright Dam because other entities are more or entirely responsible. Englebright Dam is owned and maintained by the Army Corps of Engineers but used and operated by YWA. YWA is the only entity that gains a substantial economic benefit from Englebright Dam. This benefit derives from YWA’s use of Englebright Reservoir as an afterbay for it peaking and load-following operations at New Colgate Powerhouse.

The responsibility for fish passage past Englebright Dam has been a disputed issue since the initiation of relicensing in 2011. YWA’s filing adds nothing new to the discussion.

V. The State Water Board Should Use the Pendency of a Ruling on Waiver to Strengthen both the Conditions and the Rationale Statements in the Certification.

The State Water Board should make use of its time during the pendency of a court decision on waiver of certification for the YRDP to carefully review, in depth and in detail, the record for the FERC relicensing of the YRDP and for the Certification. Board staff should make key decisions about the hard choices discussed in this comment letter and develop legal and technical rationales for those decisions. There also need to be clear expectations, deliverables and timelines to accompany the decisions.

A. The State Water Board Should Revise Condition 1 to Require Appropriate Flows for the Lower Yuba River.

The State Water Board should use the pendency of a decision on waiver of certification to dig into the record and correct the central deficiency of the Certification by developing a flow regime consistent with all of its authorities that appropriately balances the uses of the Yuba River. The State Water Board’s deference in Certification to the flow regime YWA proposed in its Amended Final License Application is particularly perplexing because the Yuba is one of the very few watersheds where there is actually a surplus of water in almost every year.

FERC's Environmental Impact Statement (EIS) already analyzed the effects of the CDFW-USFWS-FWN flow recommendation on the environment and such other uses as water supply and power generation. FERC staff did not accept these recommendations for a variety of reasons that in our view are unfounded.²⁴ But in the Final EIS and in filings by proponents in the record, there is quantification and rationale enumerated that the State Water Board should consider, consistent with its authorities.

For certification, the State Water Board's mandate under Clean Water Act is to assure compliance with water quality standards, including beneficial uses. The State Water Board is not bound by FERC's truncated view of project effects, by FERC's geographic scope, or by FERC's reticence to reduce water available to licensees for water supply.

For example: FERC's Final EIS declines to require many recommended physical habitat mitigations in the lower Yuba River stream channel downstream of Englebright Dam because of compound sources of degradation and because "the Federal Power Act does not require that all project effects on aquatic resources be mitigated."²⁵ Note that, in contrast, CEQA requires mitigation for significant impacts of a Proposed Project.²⁶ Declining to require either augmented flows or physical channel modification other than limited riparian planting as a license condition, the Final EIS explains: "Since the recommended habitat improvement measures cannot change the fundamental reshaping of the geomorphic and riparian conditions in lower Yuba River that occurred as a result of these historical influences, any improvements would be transitory at best."²⁷ The Final EIS also offers the rationale: "The additional releases would also come at a significant cost in terms of reduced project operational flexibility, water supply, and power generation."²⁸ Regarding channel modification, the Final EIS mentions construction impacts without addressing the specifics of the prospective improvements of measures proposed by resource agencies and FWN.²⁹

In addition, the State Water Board should evaluate the relative merit of YWA's arguments about loss of water transfer revenues. In relicensing, as cited and repeated in its Statement of Reasons, YWA argued against the CDFW-USFWS-FWN flow recommendation because, under YWA's modeling assumptions, YWA would have lost \$40 million in transfer revenues in 2014.³⁰ The State Water Board should balance YWA's alleged property right to such a windfall in a year when Delta water quality standards were weakened, many public trust resources were decimated, and most water agencies in the State were compelled to manage substantial water supply shortages. The State Water Board should further evaluate the merit of YWA's rationale that some of the most junior water diverters (San Luis and Delta-Mendota Water Authority) in California rely on transfers from YWA as a rationale for shorting water to public trust resources.³¹

²⁴ For discussion, *see* FWN DEIS Comments, pp. 16-21.

²⁵ *See* Final EIS, pp. B-22 and B-23.

²⁶ CAL. PUB. RES. CODE §§ 21002, 21002.1.

²⁷ *See* Final EIS, p. 3-212.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Statement of Reasons, p. 60.

³¹ *Id.*, p. 58.

In aggregate, the State Water Board must address these and similar issues that are presented in the Final EIS, paying particular attention to FERC staff's recommendations for balancing resources.

In our view, the CDFW-USFWS-FWN flow recommendation for the lower Yuba River strikes the minimum appropriate balance of flow requirements that the State Water Board must adopt in order to protect the public trust resources of the lower Yuba River and waters downstream.

B. The State Water Board must revise Condition 12 to define and require appropriate physical habitat improvements for the lower Yuba River.

Condition 12 of the Certification requires YWA to submit a plan to the State Water Board about potential stream channel improvements downstream of Englebright Dam. Condition 12 states nothing about what level of effort the State Water Board expects such a plan to require YWA to do.

The State Water Board should reconsider the Certification on its own motion and analyze options for appropriate physical habitat improvements in the lower Yuba River. We recommend that a revised Condition 12 require the channel improvements recommended in relicensing by USFWS in its Federal Power Act (FPA) § 10(j) recommendations (Condition 3) and FWN in its FPA § 10(a) recommendations, and used the rationale statements from each of those entities to support its decision.³² It is important to note that USFWS and FWN in no way sought to assign all responsibility for the condition of the lower Yuba River stream channel to YWA. They presented a different interpretation of proportional responsibility.³³

³² CDFW recommended less channel restoration in the futile effort to initiate a paper compromise with the licensee.

³³ See Department of the Interior, Comments, Recommendations, Terms and Conditions, And Prescriptions – Notice Ready for Environmental Analysis for the Yuba River Development Project, Federal Energy Regulatory Commission Project No. P-2246-065; Yuba, Nevada, and Sierra Counties, California (Aug. 25, 2017) (USFWS 10(j) conditions), eLibrary no. 20170825-5196, *esp.* pp. 52-62; FWN REA Comments, pp. 35-52; FWN DEIS Comments, pp. 3-15.

Part of USFWS and FWN's rationale also stemmed from recognition that the flow release capability of YWA from Englebright Dam was limited, and that modifying the channel to allow floodplain inundation at a lower flow volume was a more cost-effective mitigation for reduction of such mitigation than inducing spill at Englebright Reservoir. Non-flow mitigation became in part mitigation for the project's reduced frequency of floodplain inundation. Following YWA and FERC in relicensing, the Untimely Petition ignores this aspect of non-flow mitigation and the efforts to meet YWA's interests. In contrast, the Untimely Petition's strawman flow requirement assumes that YWA would need to induce spill at Englebright Reservoir in order to comply with the Bay-Delta Plan. See Untimely Petition, Appendix B (Flows), Modeling Approach Memorandum pp. 13-14. It is not at all clear that the State Water Board's Framework would require this, but in support of its narrative YWA adopted the modeling assumption that was the most costly and difficult.

C. The State Water Board Must Revise Condition 20 to Begin to Define a Path Forward on Reintroduction of Anadromous Fish Upstream of Englebright Dam and to Assign YWA’s Proportional Responsibility for it.

Condition 20 as written states nothing about the appropriate next steps for reintroduction of fish upstream of Englebright Dam. It also states nothing that defines the level of effort the State Water Board expects from YWA regarding such reintroduction. YWA’s disavowal of all responsibility is predictable.

It is futile for the Certification to require YWA to prepare yet another report regarding fish passage options to the upper Yuba River watershed.³⁴ If one looks past the advocacy of Appendix A to YWA’s filing, that appendix and its bibliography provide an idea of the extent that dozens of entities have over the past two decades investigated fish passage to the upper Yuba River watershed. More study in the abstract just won’t help. What is needed is action that will move the needle. A reasonable next step is a relatively low-cost pilot reintroduction of spring-run Chinook salmon to the upper Yuba River.

The State Water Board has not advanced, and does not appear prepared to defend, a clear legal argument or enforceable requirement that YWA should on its own take on fish passage the upper Yuba River. In that event, a requirement for YWA to make an initial investment in a pilot reintroduction appears to be a reasonable measure. By the time waiver is of certification is resolved³⁵, a nascent plan currently led by CDFW and NMFS may have enough definition to allow a requirement for YWA to meaningfully contribute. Given the objective of keeping such a pilot cost-effective, a requirement of YWA to contribute an initial \$5 million to such an effort appears reasonable, as a starting proportionate share. We advance this number understanding that the longer-term responsibility and the ultimate decisions on fish passage are contingent on the outcome of a pilot reintroduction and likely contentious argument. We reluctantly conclude that some deferral is required on this issue.

VI. The State Water Board Must Defend its Authority from YWA’s Scorched Earth Attack.

The Certification for the YRDP appears geared toward not offending anyone. The apparent effort to preserve options to negotiate a non-regulatory solution to both the Conditions of Certification and the Bay-Delta Plan has the effect, in the first instance, of preserving the options for YWA to beat the daylights out of the State Water Board. YWA has been glad to oblige.

³⁴ In addition to the Yuba Salmon Forum studies partly cited in the Certification, there are numerous studies have already been conducted that analyze fish passage to the upper Yuba River. These include documents from the Upper Yuba River Studies Program in the late 1990’s, U.S. Army Corps of Engineers (USACE). 2014. Yuba River Ecosystem Restoration Reconnaissance Report; National Marine Fisheries Service (NMFS). 2014. Yuba River Fish Passage Improvement Investigation, p.1-2; documents from the Yuba Salmon Partnership (2019).

³⁵ The State Water Board filed a petition for review of FERC’s Order on Waiver with the Ninth Circuit, U.S. Court of Appeal on September 17, 2020 (State Water Board Petition for Review). CSPA, the South Yuba River Citizens League, Friends of the River, and the Sierra Club and its Mother Lode Chapter filed a petition for review of FERC’s Order on Waiver with the Ninth Circuit, U.S. Court of Appeal on September 18, 2020 (SYRCL et al. Petition for Review).

From the moment it chose to seek waiver of the water quality certification for the YRDP, YWA has unabashedly played to win. It didn't simply do what it needed to do to carry the day. It deliberately sought to obliterate the State Water Board. In its letter requesting waiver, YWA:

- Brushed aside its failure to conduct the CEQA review that was precondition to Certification, saying its own failure to perform didn't matter.
- Complained that CEQA would largely be duplicative of NEPA, and would cost \$300,000.
- Argued that denial of a certification without prejudice violated the Clean Water Act, although FERC had not supported that interpretation and has not supported it since.
- Argued that its decision to withdraw and resubmit its application for certification in 2018 was “*pro forma*.”
- Invoked guidance from the Environmental Protection Agency (EPA), not yet final at the time, that proposed to limit the scope and procedure for issuance by the states of water quality certifications.

In a July 7, 2020 “Answer” to the rehearing requests of the State Water Board, YWA increased its level of rhetoric, constructing an elaborate theory that the State Water Board’s delay in issuing a certification for the YRDP was part of a “Valley-wide scheme” aimed at preserving the Board’s authority in the Bay-Delta Plan.³⁶ YWA advanced this conspiracy theory even while quoting the State Water Board’s statements that Bay Delta-Plan objectives would be “implemented primarily using water rights authority.”³⁷

Finally, YWA’s August 14 filing attacks not only the specifics of the Certification but its scope and legal propriety. In support, the filing cites to the EPA’s Final Rule on Section 401 issued on July 13, 2020,³⁸ against which the State of California and multiple other states filed suit against the EPA claiming numerous violations the Clean Water Act and the Administrative Procedures Act. YWA’s Statement of Reasons argues that the Certification “[e]xceeds the [s]cope [a]llowed by Clean Water Act Section 401 and the SWRCB’s [o]wn [r]egulations.”³⁹ YWA argues:

- Some of its terms are improper because they concern physical habitat and not water quality.
- That consistent with EPA’s unlawful Final Rule, the reach of Section 401 is limited to point-source discharges. This directly opposes *SD Warren* (2006).
- “401 conditions that regulate ‘the activity as a whole,’ rather than the discharge itself, are beyond the scope of section 401.” This directly opposes *Jefferson PUD No. 1* (1994).

³⁶ YWA, Motion of Yuba County Water Agency for Leave to File Answer and Answer to California State Water Resources Control Board’s Request for Rehearing (Jul 7, 2020), eLibrary no. 20200707-5134, pp. 3 ff. (YWA’s July 7, 2020 Answer to SWRCB) FERC disallowed this pleading because it does not allow answers to rehearing requests.

³⁷ *Id.*, p. 12

³⁸ Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (Jul. 13, 2020).

³⁹ Statement of Reasons, *esp.* p. 86 ff.

- “Conditions that regulate water quantity do not address whether the project discharge complies with ‘water quality requirements.’” Thus, YWA seeks to disallow Certification Conditions relating to flow.
- Many additional Conditions related to beneficial uses (such as recreation) are outside the scope of 401
- Any reservation of authority by the State Water Board or requirements that the Board approve plans or actions is outside the scope of 401.

In sum, YWA’s attack on the Clean Water Act and the State’s authority under it was an escalating series of choices. The fact that YWA has company in the hydropower industry in this assault on foundational environmental law does not excuse it; it makes it worse. Nothing compelled YWA to extend and deepen its argument at each step. It chose to.

The State Water Board must defend its authorities from attack by YWA and others. It has already opposed YWA’s attack on its Section 401 authority in court.⁴⁰ In addition, it must revise the water quality certification for the YRDP with defensible and enforceable conditions, while aggressively exercising its Section 401 authority as affirmed in *SD Warren and Jefferson PUD No. 1*.

At the same time, the State Water Board must affirmatively produce an update to the Bay-Delta Plan that is defensible and complete. This requires the Board to dig into the demands, uses, hydrology and operation of each watershed that is tributary to the Bay-Delta. It must set forth clear and enforceable rules for each watershed in detail. It must set operating rules for the Delta that turn inflow into outflow. It must also set rules for upstream diversions and reservoir storage; in this last regard, the Yuba watershed is a great place to start.

The CDFW-USFWS-FWN flow recommendation for the lower Yuba River is one example of how the State Water Board could apply the broad outline of its 2018 “Framework” for the update of the Bay-Delta Plan. It is not the only way. But its acknowledgment of watershed-specific issues provides a valuable contrast to the State Water Board’s broad-brush approach to the update of the Bay-Delta Plan over the past decade.

VII. The State Water Board Should Close the Book on a Voluntary Agreement for the Yuba River and Complete a Revised Certification and the Update of the Bay-Delta Plan.

The State Water Board must respond in kind to YWA’s choices to attack the State Water Board’s authority. The State Water Board should therefore cease any procedural deference or accommodation of YWA beyond that required by law. That will require the State Water Board to make a major change in direction.

The State Water Board needs to disallow further consideration of a proposed “Voluntary Agreement” for the Yuba River. The Certification not only subordinates itself to a potential but not yet completed such agreement explicitly in Condition 30, but more importantly postpones

⁴⁰ State Water Board Petition for Review, *op. cit.*

difficult decisions regarding flow in Condition 1 so that the State Water Board may ultimately accept such an agreement. Though the State Water Board diluted its own Certification document with equivocation in order to accommodate YWA, YWA has rewarded the State Water Board with a scorched earth attack on the State Water Board's certification authority. No good deed goes unpunished.

And to what end? In its most recent incarnation, the Yuba Voluntary Agreement⁴¹ would simply provide a reliable buyer for increased YWA water sales, with the additional transfer water furnished by pulling the same water out of storage that YWA claimed in relicensing would cause water shortages to local irrigators. Other than firming up water sale revenues, the proposed Yuba Voluntary Agreement would keep the Yuba Accord flow requirements for the lower Yuba River with the additional contribution by YWA of 9000 acre-feet of water in many water years. Since the Yuba Accord is YWA's proposed mitigation for FERC's geographic scope that is limited to the Yuba River alone, the proposed Yuba Voluntary Agreement would assign a maximum of 9,000 acre-feet per year of responsibility to YWA for a contribution specifically to Delta inflow and outflow. If one assumes an unimpaired inflow to the Delta of 10 million acre-feet a year, the requirement for YWA specifically for Delta inflow would amount to .0009 (nine ten-thousandths) of the annual total unimpaired flow.

The State Water Board and the Attorney General's office have, at least, petitioned for review of FERC's findings that the State Water Board waived its Section 401 authority to condition both the Yuba-Bear Hydroelectric Project and the YRDP.⁴² The State Attorney General's office has also stepped up and filed suit to overturn the EPA Final Rule on Section 401. The State Water Board needs to impress on the California Natural Resources Agency, California Environmental Protection Agency and the Governor's cabinet the seriousness of YWA's no-holds-barred attack on State authority. State agencies across the board need to get on the same page as the Attorney General's office and stop returning punches with patty cakes.

Attitude adjustment is a precondition, but it is not the solution. In order to complete a revised Certification that is worthy of the effort, State Water Board staff has to finish and turn in its homework. It must master the record for the YRDP relicensing and develop defensible and enforceable flow and other Conditions and associated rationales in a revised Certification. The State Water Board should plan to issue a revised Certification consistent with success in overturning the unlawful EPA Final Rule as well as waiver.

⁴¹ See California Department of Natural Resources, Planning Agreement Proposing Project Description and Procedures for the Finalization of the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan (March 1, 2019), pdf page 50 ff. Available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi9h7aOusvsAhVDHM0KHYS6BFUQFjADegQIBxAC&url=http%3A%2F%2Fresources.ca.gov%2FCNRALegacyFiles%2Fdocs%2Fvoluntary-agreements%2F2019%2FComplete%20March%201%20VA%20Submission%20to%20SWRCB.pdf&usg=AOvVaw0rC0Q57KKI1XBghB8861ba>. See also: Yuba Water Agency, Voluntary Agreement Fact Sheet. Available at: <https://www.yubawater.org/272/Voluntary-Settlement-Agreements>

⁴² The State Water Board petitioned the Ninth Circuit, U.S. Court of Appeals for review of FERC's Order on Waiver for the Yuba-Bear Project on August 14, 2020.

The State Water Board also needs to unpack its processes. The State Water Board does not need to resolve the Bay-Delta Plan in order to issue a Certification. Although FWN advanced it in good faith as a solution to both processes, a decision to require the CDFW-FWS-FWN flow recommendation in certification would be a floor, not a ceiling for the Bay-Delta Plan. Equally, the State Water Board should not take YWA's bait that suggests that a Condition in the Certification that requires consistency with the Bay-Delta Plan also requires CEQA for the entire Bay-Delta Plan. Nor should the State Water Board feel compelled to defend the entire Bay-Delta Plan in certification.

Separate from revising the Certification, the State Water Board must affirmatively produce an update to the Bay-Delta Plan that is defensible and complete. This requires the Board to dig into the demands, uses, hydrology and operation of each watershed that is tributary to the Bay-Delta. It must set forth clear and enforceable rules for each watershed in detail. It must set operating rules for the Delta that turn inflow into outflow. It must also set rules for upstream diversions and reservoir storage;

As suggested above, State Water Board Bay-Delta staff should carefully consider the flow recommendation developed in relicensing by staff from CDFW, USFWS and FWN for the Yuba River. That recommendation and the rationales that support it contain, both in substance and methodology, valuable lessons about watershed-specific decisions, balancing resources and approaches to dry year sequences that the State Water Board needs to master, whatever its final decision may eventually be.

VIII. Conclusion

The State Water Board should dismiss without prejudice YWA's untimely petition, or in the alternative treat it as a comment letter, and should reject it substantively.

The State Water Board should accept these comments of CSPA et al. and implement the recommendations contained herein.

Respectfully submitted this 17th day of November, 2020.



A handwritten signature in black ink that reads "Chris Shutes".

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