

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WQ 2022-0012**

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IN THE MATTER OF  
PROCEEDINGS ON THE PETITIONS FOR RECONSIDERATION OF  
**WATER QUALITY CERTIFICATION FOR  
YUBA COUNTY WATER AGENCY  
YUBA RIVER DEVELOPMENT PROJECT  
FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 2246**

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**ORDER DENYING YUBA COUNTY WATER AGENCY'S REQUEST FOR ABEYANCE**

**BY THE BOARD:**

**1.0 INTRODUCTION**

This order denies Yuba County Water Agency's<sup>1</sup> (YCWA) request to hold in abeyance its petition for reconsideration of the State Water Resources Control Board's (State Water Board or Board) water quality certification (certification) of the Yuba River Development Project (Project), Federal Energy Regulatory Commission (FERC) Project No. 2246.

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<sup>1</sup> Doing business as Yuba Water Agency.

## 2.0 BACKGROUND<sup>2</sup>

On July 17, 2020, the State Water Board's Executive Director issued a certification for YCWA's Project. Condition 23 of the certification postponed the effective date of the certification for purposes of filing petitions for reconsideration until a prior determination by FERC that the Board had waived its certification authority was overturned by judicial or administrative action. On December 15, 2020, the Board adopted State Water Board [Order WQ 2020-0043](#), which amended Condition 23 to indicate that the certification is final for the purposes of reconsideration and to enable proceedings on reconsideration. On January 14, 2021, the State Water Board received timely petitions for reconsideration of the Project certification from: (1) YCWA;<sup>3</sup> (2) the California Department of Fish and Wildlife (CDFW); and (3) the California Sportfishing Protection Alliance, Friends of the River, Sierra Club Mother Lode Chapter, Trout Unlimited, and South Yuba River Citizens League (collectively, CSPA et al.). As described in Order WQ 2020-0043, petitions for reconsideration of the certification triggered an ex parte communication bar for the issues raised on reconsideration.

In accordance with title 23 of the California Code of Regulations, section 3867.1, the State Water Board noticed the opportunity to respond to the petitions for reconsideration in June 2021 and filed the record for the certification with the Board in July 2021. YCWA and CSPA et al. submitted comments on the other petitions, and additional stakeholders also filed comments. On September 17, 2021, Board staff held a technical

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<sup>2</sup> This limited order focuses on the reasons for denying YCWA's request to put into abeyance its petition for reconsideration of the State Water Board's water quality certification for the Yuba River Development Project. It contains only brief discussion of the broader procedural context of this certification and the petitions for reconsideration of this certification. For additional background, please refer to the [certification](#), and to State Water Board Order WQ 2020-0043, available online at: [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/docs/ferc2246/yrdp\\_certification1.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/ferc2246/yrdp_certification1.pdf), and [www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/water\\_quality/2020/wq0200\\_0043.pdf](https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2020/wq0200_0043.pdf), respectively.

<sup>3</sup> YCWA's January 2021 filing was an amendment and supplement to a petition for reconsideration filed prematurely by YCWA on August 14, 2020.

workshop to provide petitioners with an opportunity to present and discuss their thoughts on certification conditions raised in the petitions for reconsideration.

On January 11, 2022, the State Water Board received a request from YCWA to hold proceedings on its petition for reconsideration in abeyance until YCWA re-activates the petition process, with the goal of promoting communications regarding a potential implementation alternative for ongoing amendments to the water quality control plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan).<sup>4</sup>

On January 14, 2022, Board staff requested input from all petitioners regarding placing YCWA's and other petitions for reconsideration in abeyance. On January 18, 2022, YCWA stated that it would not object to the petitions of CDFW and CSPA et al. being held in abeyance. On January 21, 2021, CSPA et al. responded, opposing YCWA's request and not consenting to holding proceedings on their or any of the petitions for reconsideration in abeyance. CSPA et al. contends that holding the proceedings in abeyance would prejudice it in the reconsideration proceedings, prejudice it and the State Water Board in the challenge to FERC's waiver findings before the Ninth Circuit and grant an unwarranted accommodation to YCWA. CSPA et al. also state that if YCWA's petition for reconsideration is held in abeyance, all petitions should be held in abeyance to avoid prejudice to other petitioners. On February 3, 2022, CDFW expressed a neutral position regarding placing the petitions for reconsideration in abeyance and stated that if the Board holds YCWA's petition in abeyance, it should hold the other two petitions in abeyance as well. CDFW also notes that it would like to retain the ability to restart proceedings at its discretion, should the petitions be put in abeyance.

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<sup>4</sup> The State Water Board is updating the Bay-Delta Plan through two separate proceedings: (1) the Lower San Joaquin River/Southern Delta update (completed in 2018), focused on flow objectives on the Lower San Joaquin River and its salmonid-bearing tributaries and update of the southern Delta salinity objectives for the protection of agriculture; and (2) the Sacramento/Delta update, focused on flow-related objectives on the Sacramento River and its tributaries, Delta eastside tributaries, Delta outflows, and interior Delta flows.

### **3.0 APPLICABLE LAW**

An aggrieved person may petition the State Water Board for reconsideration of an action or failure to act by the Executive Director. (Cal. Code Regs., tit. 23, § 3867, subd. (a)(1).)

California Code of Regulations, title 23, section 3869, subdivision (c) provides that the State Water Board may hold a petition for reconsideration in abeyance “if agreed upon in writing by the petitioner and the applicant (if not the petitioner).”

### **4.0 DISCUSSION**

YCWA requests to hold reconsideration proceedings on the Project certification in abeyance in order to facilitate settlement discussions on certification issues that are currently prohibited by the ex parte communication bar, and characterizes settlement of certification disputes as “necessary for YCWA to conclude a Bay-Delta Voluntary Agreement.” YCWA’s request states that granting the abeyance would align resolution of the issues raised in certification with the Board’s projected timeline for initiating environmental review of a Voluntary Agreement framework in the first half of 2022.

The State Water Board is exercising its discretion to deny the request for reconsideration for several reasons. First, there is a lack of agreement among the petitioners regarding whether to hold the petitions in abeyance. As a practical matter, when multiple petitions address the same issues, it is not possible to hold one petition in abeyance and proceed on another. Second, while the Board strongly supports negotiated solutions to complex water quality and supply questions regarding the Bay-Delta through a Voluntary Agreement framework, an abeyance is not necessary to promote such a solution. Finally, putting the petitions for reconsideration in abeyance at this point in the proceedings risks loss of significant resources expended in processing the petitions, and does not provide a comparable benefit in immediate resources saved.

#### **4.1. Lack of Unanimous Petitioner Agreement Prevents Approval of YCWA's Abeyance Request**

California Code of Regulations, title 23, section 3869, subdivision (c) provides that the State Water Board may hold a petition for reconsideration in abeyance "if agreed upon in writing by the petitioner and the applicant (if not the petitioner)."

The State Water Board has received three petitions for reconsideration of the certification: one from YCWA, one from CDFW, and one from CSPA et al. YCWA has requested its petition be put in abeyance; however CSPA et al. have not agreed to their petition being put into abeyance. Thus, one of the conditions for holding reconsideration proceedings in abeyance—agreement in writing by the petitioner—is not met for the CSPA et al. petition. (See Cal. Code Regs., tit. 23, § 3869, subd. (c).) CDFW is neutral on whether the petitions are put into abeyance.

As a practical matter, it is not possible to both proceed with CSPA et al.'s petition and to put YCWA's petition in abeyance, as the two petitions have significant overlap. Of the five certification conditions to which CSPA et al. requested major changes, three of these conditions were also raised in YCWA's petition for reconsideration: Condition 1(D) - Evaluation of Flows, Condition 12 - Lower Yuba Habitat Restoration, and Condition 20 - Fish Passage. Both petitions also discuss the Board's ability to issue a certification when the Board had denied a request for certification without prejudice and YCWA had not submitted a new request. Because of this overlap, the Board would be unable to both determine and refrain from determining the joint issues.

Additionally, it is worth noting that even if it were possible to hold only YCWA's petition for reconsideration in abeyance, the *ex parte* communication bar would remain in effect as to the issues raised in CSPA et al.'s petition. This would seem to defeat the purpose of granting YCWA's abeyance request.

Both CSPA and CDFW's responses to YCWA's request for an abeyance state that the Board should move the petitions for reconsideration together.

#### **4.2. An Abeyance is not Required to Enable Conclusion of a Voluntary Agreement Framework for Evaluation in the Bay-Delta Plan Proceedings**

The State Water Board recognizes that negotiated agreements among different water users and interest groups to provide for instream flows, restoration efforts, diversions for various beneficial uses, and other water management and use strategies can be a powerful tool for watershed- or sub-watershed improvement. Specifically, the State Water Board supports the potential of the “Voluntary Agreement” effort led by the California Natural Resources Agency and the California Environmental Protection Agency to reach negotiated agreements among water users, regulatory agencies, and other stakeholders regarding flow and non-flow measures to improve the Delta fisheries and related objectives in the revisions of the amended Bay-Delta Plan. These negotiated agreements would form a potential alternative for consideration in the Bay-Delta proceedings, with the goal of streamlined implementation of updated water quality standards. The Voluntary Agreement initiative is ongoing, and YCWA has been involved in discussions regarding such a potential agreement for years, both prior to issuance of the certification and after submitting a petition for reconsideration on it.

YCWA’s abeyance request suggests that resolving the issues on reconsideration is a necessary predicate to finalizing a Voluntary Agreement proposal sufficient for analysis in the Bay-Delta Plan proceedings, and that the terms of the Voluntary Agreement are potentially constrained by the terms of the certification: neither of these is the case.

YCWA and other parties can continue to discuss potential flow and non-flow commitments without specifying whether such actions would be implemented by – or otherwise be consistent or inconsistent with the terms of – the certification, should FERC’s waiver order regarding the Project certification be overturned. YCWA can apply for any necessary amendments to certification conditions that conflict with implementation of an approved voluntary agreement, in the event that both the certification and the agreement become effective, and can do so prior to the manifestation of any actual conflict. Thus, resolution of certification conditions is not required prior to finalizing a voluntary agreement proposal, and the agreement does not

need to be constrained by the existing certification terms. Any such amendments would be the subject of a future proceeding on the certification, rather than the present one.

Finalization of voluntary agreement would involve submittal of a proposal by YCWA and other parties for evaluation by the Board in a public process. Such submittal would not commit the Board to adopting all or any part of the framework as a path to meeting the requirements of the Bay-Delta Plan. Nor would it commit the Board to any particular outcome in the proceedings on reconsideration. (See *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 840-41 [finding communications related to water quality planning were not improper and such communications and a Board member's commitment to a consensus process did not bias a later adjudicative proceeding where there was no commitment to a particular outcome in the later proceeding].)

Negotiations among the parties to a proposed voluntary agreement may continue to their conclusion so long as the participants continue to avoid discussion with the Board of the appropriate contents of the certification or the related issues addressed in the petitions for reconsideration. It is commonplace for administrative agencies to engage in various capacities with the same stakeholders (E.g., *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 220; *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 841-43.)

The focus of the voluntary agreement framework is presenting one alternative for implementing future amendments to the Bay-Delta Plan: the voluntary agreement is anticipated to be for a much shorter duration than the 30-50 year license. The certification proceeding, on the other hand, addresses the Project's appropriate compliance with water quality requirements in place currently and throughout the FERC license period for the Project. Given the differences in scope, duration, and purpose between the two proceedings, the need to avoid discussion that implicates the petitions for reconsideration – while potentially inconvenient – does not constitute an insurmountable barrier to finalizing a voluntary agreement. The Board may appropriately engage in developing potentially viable alternatives for consideration in its

basin planning obligations without impairing its ability to also consider time-sensitive issues related to the Project certification.

Participation in the negotiations by the Office of Chief Counsel and attorneys for YCWA can continue help ensure that the discussion appropriately avoids issues of controversy in the Project's FERC relicensing proceeding. Further, continuing to avoid direct communication with Board members regarding voluntary agreement matters as to the Yuba River provides another layer of procedural protection to ensure that voluntary agreement negotiations do not venture into improper ex parte communications. Should a conversation stray into areas covered by the ex parte communications bar, disclosure provides a final layer of protection for the parties to the petition for reconsideration proceeding.

#### **4.3 Delaying Reconsideration at This Juncture and Under these Terms Provides Few Resource Benefits for the Board or the Petitioners**

As issued in June 2020, the certification included in Condition 23 a provision that delayed reconsideration proceedings unless and until FERC's waiver determination regarding Project certification was overturned. As discussed in State Water Board Order WQ 2020-0043, this condition was intended to avoid potential waste of resources in refining conditions on reconsideration if the Project certification conditions themselves were not effective. When YCWA nevertheless filed a petition for reconsideration, the State Water Board amended Condition 23 to allow for reconsideration. Order WQ 2020-0043 discussed a request for abeyance as a path towards settlement of issues without an ex parte communication bar.

Since January 2021, the State Water Board and the petitioners have allocated significant resources to addressing the petitions for reconsideration. The petitioners and interested parties have developed and submitted, and State Water Board staff have reviewed, the petitions and comments, including hundreds of pages of attachments. Board staff have filed an indexed record of approximately 2,900 documents. Staff and the parties prepared for and held an all-day technical workshop for all parties to further



elaborate, answer questions, and discuss the issues raised in the petitions, on September 17, 2021.

Given the degree of effort invested in the reconsideration process, there is a risk that – should settlement efforts not prove fruitful – delay at this point would result in a loss of momentum for the Board. As staff turn their attention and focus to other projects, there is an inevitable loss of fluency in the issues that have been put aside. CSPA et al. has raised similar concerns regarding their efforts in their response to YCWA’s request for abeyance.

The potential loss of staff knowledge is particularly acute under the proposed terms of the abeyance requests. YCWA’s request to lift the abeyance at will, and CDFW’s similar request should the abeyance be lifted as to its petition, would impair the Board’s ability to appropriately commit staff currently engaged in evaluating the petitions for reconsideration to other projects, since the length of their availability is unknown, and risks not having staff reasonably available to return to the certification petitions.

Additionally, the issues raised in YCWA’s petition for reconsideration are being actively addressed in state court proceedings which YCWA elected to file prior to a decision on the petition for reconsideration.<sup>5</sup> A hearing on preliminary motions is scheduled for May 24, 2022. Thus, even if all petitioners agreed to an abeyance, the Board would need to continue to spend resources addressing at least the procedural issues raised in YCWA’s preliminary motions.

Thus, the potential is high for losing the benefit of staff resources already expended, and the potential for staff resources savings is limited.

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<sup>5</sup> Where, as here, a petition for reconsideration is required to exhaust administrative remedies prior to suit, a petitioner may file in court when the period for acting on petitions for reconsideration has ended. However, the statute of limitations for filing a petition in court does not begin to run for filing until after the Board issues a decision or order on reconsideration issues. Wat. Code, § 13330, subd. (a).

## 5.0 CONCLUSION

In light of the above, the State Water Board denies Yuba County Water Agency's request to hold in abeyance its proceedings on petition for reconsideration of the water quality certification of the Yuba River Development Project, FERC Project No 2246.

This order in no way affects or prejudices the State Water Board's determinations on any other procedural or substantive issue regarding reconsideration of the certification for the Project.

### ORDER

**IT IS HEREBY ORDERED THAT** Yuba County Water Agency's request for abeyance in proceedings on its petition for reconsideration of the water quality certification for the Yuba River Development Project is denied.

### CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 1, 2022.

AYE: Chair E. Joaquin Esquivel  
Vice Chair Dorene D'Adamo  
Board Member Sean Maguire  
Board Member Laurel Firestone  
Board Member Nichole Morgan

NAY: None

ABSENT: None

ABSTAIN: None

 for  
Jeanine Townsend  
Clerk to the Board