

**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 County Water Agency
Yuba River Development Project (FERC No. 2246)**

**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
RECONSIDERATION OF JULY 17, 2020 WATER QUALITY
CERTIFICATION FOR FEDERAL PERMIT OR LICENSE**

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TABLE OF CONTENTS

- I. There Was No Legal Authority for the Delegated Certification's Issuance or for Its Many Terms Granting Staff the Authority to Modify Its Requirements 3
 - A. YCWA Has No Pending Application for a Water Quality Certification, so the Delegated Certification's Issuance Was Not Authorized by Federal or State Law 4
 - B. The Regulations That Delegate "All Actions" Associated With Water Quality Certifications to the Executive Director Are Not Authorized By Statute, So the Delegated Certification Is Invalid 7
 - C. The Delegated Certification's Many Terms That Would Grant Staff Ongoing Authority to Modify the Certification's Requirements Constitute Further Illegal Delegations.....12
 - D. The Delegated Certification's Issuance Violated CEQA Because It Was Not Authorized by the Recent Amendment to Water Code Section 13160.....18

- II. The Process by Which the Delegated Certification Was Developed and Issued Violated Statutory Fair-Hearing Requirements, the State's Administrative Procedure Act, Open Meeting Laws and Constitutional Due Process Principles20
 - A. The Issuance of the Delegated Certification Denied YCWA the Basic Fair Hearing Required By Law.....21
 - B. The Issuance of the Delegated Certification Violated the Administrative Adjudication Bill of Rights24
 - C. The Issuance of the Delegated Certification Violated YCWA's Due Process Rights as an Agency Created Specifically by the Legislature to Address the Water Problems of the People of Yuba County.....28
 - D. The Delegated Certification's Issuance Violated the Water Code's Requirement That a Quorum of the SWRCB Is Necessary for SWRCB Action and Therefore Violated Open Meeting Laws30

- III. Significant Technical Information That the Delegated Certification Did Not Consider or Dismissed Without Explanation Demonstrates That the Certification Violates Fundamental Constitutional, Water Quality and Administrative Laws and Principles.....32
 - A. Based on the SWRCB Staff's 2018 Bay-Delta Framework, the Delegated Certification's Condition 1(D) Could Result in Severe Impacts to Water Temperatures to Support Yuba River Salmonids, Hydroelectric Generation and Agricultural Water Supplies36

B.	The Delegated Certification's Condition 20 Concerning Fish Passage Fails to Consider Extensive Existing Information Showing Passage Would Involve Enormous Expense, Generate Highly Uncertain Benefits, and Address Only the Non-YRDP Impacts of Hydraulic Mining and Federal Facilities	41
C.	The Delegated Certification's Condition 12 Concerning Lower Yuba River Habitat Restoration Compels YCWA to Attempt to Mitigate For Historic Hydraulic Mining and Ignores the Habitat Benefits the YRDP Has Provided	45
D.	The Delegated Certification's Condition 6 on Lohman Ridge Tunnel Closures Ignores FERC's Technical Analysis and Would Impose a \$22 Million Obligation on YCWA for Little Demonstrable Environmental Benefit	49
E.	The Delegated Certification's Condition 7 on New Colgate Power Tunnel's Intakes Ignores FERC's Technical Analysis Showing It Would Not Benefit Fish, But Would Cost YCWA \$55 Million During the Term of the License....	50
F.	The Delegated Certification Does Not Analyze Its Terms' Likely Significant Indirect Impacts on Yuba County's Disadvantaged Communities and Economy.....	51
G.	The Delegated Certification Does Not Analyze Its Terms' Likely Significant Indirect Impacts on Yuba County Groundwater Basins, Which Could Become Overdrafted as a Result of the Certification.....	54
H.	The Delegated Certification Does Not Analyze Its Terms' Likely Significant Impact on Transfers by YCWA, Which Have Advanced State Policy by Providing Important Water Supplies to Other Regions	57
IV.	The Delegated Certification Exceeds the Scope Allowed by Clean Water Act Section 401 and the SWRCB's Own Regulations	60
A.	The Delegated Certification Exceeds the Scope of Authority Under Clean Water Act Section 401 by Seeking to Incorporate Water Quality Standards That Have Not Yet Been Adopted.....	60
B.	The Delegated Certification Is Not Authorized by Clean Water Act Section 401 or the SWRCB's Own Regulations Because Its Conditions Extend Far Beyond the YRDP's Activities	61
1.	The Delegated Certification Would Require YCWA to Spend Huge Amounts of Money and Suffer the Impairment of Its Mission to Serve Yuba County's People to Instead Address Conditions That Were Caused by Others and That Predate the YRDP.....	64
2.	Clean Water Act Section 401 and Appropriate Provisions of State Law Do Not Authorize the SWRCB to Hold YCWA Responsible for Impacts the YRDP Did Not Cause.....	70

C. The Delegated Certification Exceeds the Allowable Scope of a Water Quality Certification Because Several of Its Key Terms Concern Solely Physical Habitat, Rather Than Water Quality74

D. The Delegated Certification Does Not Protect Beneficial Uses Consistent With, or Reflect Appropriate Requirements of, State Law and Therefore Is Not Authorized by Clean Water Act Section 401.....78

E. The Delegated Certification Is Not Authorized by Clean Water Act Section 401 Because It Seeks to Establish the SWRCB as Having Concurrent Jurisdiction Over The YRDP With FERC83

F. The Delegated Certification Violates the EPA's 2020 Final Rule by Seeking to Regulate Effects Beyond the YRDP's Discharges and Asserting Ongoing SWRCB Authority86

V. Conclusion90

**STATEMENT OF REASONS WHY THE ACTION OR FAILURE TO ACT
WAS INAPPROPRIATE OR IMPROPER
(Cal. Code Regs., title 23, § 3867, subd. (d)(4))**

I. Introduction

Yuba County Water Agency ("YCWA") is currently undergoing the relicensing of the Yuba River Development Project ("YRDP") in proceedings before the Federal Energy Regulatory Commission ("FERC"). YCWA has not had an application for a Clean Water Act section 401 water quality certification pending before the State Water Resources Control Board since July 31, 2019, when the board's Executive Director denied the last application without prejudice. Nonetheless, on July 17, 2020, under asserted delegated authority based on the board's current regulations, a Water Quality Certification for Federal Permit or License (the "Delegated Certification") was issued to YCWA. Prior to the issuance of the Delegated Certification, there had been no public notice that the State Water Resources Control Board (the "SWRCB") was considering issuing anything related to the YRDP relicensing, and the SWRCB conducted no public process in which YCWA or anyone else could have addressed the issues identified in the Delegated Certification.

In the limited amount of time YCWA has had to analyze all of those issues since the Delegated Certification was issued, YCWA's many technical analyses (submitted with its Petition for Reconsideration and this Statement) have indicated that the certification's terms could cause an approximately \$500 million economic impact just to YCWA through a combination of increased costs and lost revenues. This estimate of the Delegated Certification's impact does not even include the impacts to Yuba County's agricultural industry – the county's main industry – that would occur with severely reduced surface-water supplies from YCWA. The estimate also does not include the potentially hundreds of millions of dollars in costs that it would authorize the SWRCB's Executive Director to impose on YCWA in order to move salmon and other fish above the federal government's Englebright Dam, which has been the impassable barrier for the Yuba River's fish since the federal government built it in 1941 to address the massive impact of 1800s hydraulic mining on the river and its watershed. All of these effects would be suffered not only by YCWA, but also by the many disadvantaged communities in Yuba County that are supported by YCWA in its role as the agency specially created by the Legislature to address the county's water problems, and one of the few sources of revenue available to support the

local share of flood-control and other public-safety projects that address the risks that historically have constrained the County's economy.

YCWA's estimate of the impacts of the Delegated Certification is based on detailed technical analyses that, among other things, project the certification's effects based on the assumption that the SWRCB's staff would exercise their sub-delegated authority as reserved in the certification. SWRCB staff could use this ongoing regulatory supervision to compel YCWA to comply with the streamflow recommendations of the California Department of Fish and Wildlife ("CDFW") discussed in the certification, as well as with the new "Sacramento/Delta Inflow" – commonly known as the "55%-of-unimpaired-flow" – and "Cold Water Habitat" water quality objectives that the SWRCB's staff proposed in their July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan. YCWA's analysis indicates that implementation of these potential CDFW and SWRCB standards could significantly reduce the value of YCWA's hydroelectric generation, cut surface-water supplies available for Yuba County farmers by 49% in critical years and at least substantially interfere with YCWA's capacity to transfer water to areas of needs, especially in drier years. While the costs imposed by the Delegated Certification could prove severe, the fishery benefits it hopes to attain may be illusory: YCWA's analysis indicates that the Delegated Certification, by significantly reducing reservoir storage, might *adversely* impact the fish that it seeks to protect by depleting the available cold water, increasing water temperatures and reducing physical habitat in the most sensitive conditions for those species.

The legal reasons why the SWRCB should grant reconsideration and vacate the Delegated Certification are both numerous and solid. First and foremost, the SWRCB had no basis to issue the Delegated Certification when YCWA did not have an application for a water quality certification pending. Doing so violated both Clean Water Act section 401 and the SWRCB's own regulations. Second, the basis for the Executive Director's action, the SWRCB regulations that seek to delegate from the board to the Executive Director authority to take "all actions" on water quality certifications and applications, is invalid because it delegates from the SWRCB members themselves their special judgment and discretion as public officials appointed by the Governor. Simply put, the law does not permit boards to delegate their authority and responsibility to make decisions this momentous. Third, the Delegated Certification's issuance without any sort of public

process violated basic fair-hearing, administrative-procedure, open-meeting and constitutional due process requirements.

In addition to its procedural defects, the Delegated Certification also contains numerous substantive flaws. The Delegated Certification cites sparse technical analysis and disregards, without comment or explanation, extensive contrary technical analysis by FERC and the U.S. Army Corps of Engineers ("Corps of Engineers"). Instead, the certification relies on CDFW's proposals – already considered and rejected by FERC – as a basis for the SWRCB staff to exercise sub-delegated authority in the future to impose new fish-passage and streamflow requirements on YCWA based on many studies, but little guaranteed process. The Delegated Certification also lacks any analysis of its effect on the full range of beneficial uses of the Yuba River's water and therefore violates both Article X, section 2 of the California Constitution and the Porter-Cologne Water Quality Control Act itself. Finally, the Delegated Certification's terms extend well beyond the scope of a water quality certification authorized by the Clean Water Act's section 401 and violate the U.S. EPA's applicable regulations.

For all of these reasons, and based on the legal arguments below and all the supporting information and materials submitted with this Statement, YCWA respectfully requests that the SWRCB grant reconsideration of the Delegated Certification and promptly vacate it.

II. There Was No Legal Authority for the Delegated Certification's Issuance or for Its Many Terms Granting Staff the Authority to Modify Its Requirements

The SWRCB should grant reconsideration of the Delegated Certification, and vacate the Delegated Certification and its many conditions, because its issuance was not supported by the relevant legal authorities. First, when the Delegated Certification was issued, YCWA had no application for a water quality certification pending, which is a necessary prerequisite for the SWRCB to issue a certification under Section 401 of the Clean Water Act and the SWRCB's own regulations. Second, by delegating to the Executive Director authority to take "all actions" concerning water quality certifications that can involve – as is the case here – whole communities' economies and water supplies, management of major rivers over many decades and hundreds of millions of dollars in costs, the relevant regulation improperly delegate the public trust SWRCB members to exercise their special

judgment and discretion as appointees of the Governor. The Delegated Certification then compounds this problem by including more than 30 subdelegations to SWRCB staff to make – without SWRCB members' involvement and with little to no process – highly consequential decisions through the 50-year term of a new license for the YRDP. For all these reasons, no legal authority supports the Delegated Certification. The SWRCB should grant this petition for reconsideration and vacate the Delegated Certification.

A. YCWA Has No Pending Application for a Water Quality Certification, so the Delegated Certification's Issuance Was Not Authorized by Federal or State Law

The Delegated Certification, on page 9, states the status of YCWA's application for a water quality certification in a manner that YCWA does not dispute:

YCWA filed an application for water quality certification (certification) with the State Water Board under section 401 of the Clean Water Act for the Project on August 24, 2017. (YCWA 2017c.) State Water Board staff provided public notice of the application pursuant to California Code of Regulations, title 23, section 3858, by posting information describing the Project on the State Water Board's website on September 21, 2017. On July 31, 2019, the State Water Board denied YCWA's most recent application for certification without prejudice

(Delegated Certification, p. 9).

Thus, the Delegated Certification itself acknowledges that its issuance was not authorized by the federal Clean Water Act, the Water Code or the SWRCB's regulations. *The applicable legal authorities require that a water quality certification be based on an application for one.* YCWA had, and has, no application pending. On July 31, 2019, the Executive Director denied without prejudice YCWA's last application. In a July 13, 2020 letter to the Executive Director, YCWA confirmed that it had no application pending. (Attachment L 3.) Consequently, there was no legal authority for the Delegated Certification's issuance.

Clean Water Act section 401, subdivision (a)(1), states, in relevant part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . *Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in*

connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application

(33 U.S.C. § 1341, subd. (a)(1) (emphasis added).) Water Code section 13160, in turn, simply authorizes the SWRCB to issue water quality certifications under the Clean Water Act.

The SWRCB's regulations to implement Water Code section 13160, however, are all based on the consideration of an "application." They authorize the Executive Director to "take all actions connected with *applications* for certification, including issuance and denial of certification." (Cal. Code Regs., title 23, § 3838, subd. (a)(emphasis added).) They require that "[a]n *application* for water quality certification shall be filed with the state board executive director . . . whenever a potential discharge from a proposed activity . . . (B) is involved or associated with . . . a hydroelectric facility, and the proposed activity requires a FERC license or amendment to a FERC license." (Cal. Code Regs., title 23, § 3855, subd. (b)(1) (emphasis added).)

The regulations further state that "[a] complete *application* shall include all of the following information and items" and then state a list of required items. (Cal. Code Regs., title 23, § 3856 (emphasis added).) They also require that the Executive Director give "public notice of an *application* at least twenty-one (21) days before taking certification action on the *application*" (Cal. Code Regs., title 23, § 3858, subd. (a) (emphasis added).) Additionally, they allow for the possibility of a hearing by the SWRCB on an application: "The state board . . . may hold a public hearing with respect to any *application* for certification." (Cal. Code Regs., title 23, § 3858, subd. (b) (emphasis added).) Finally, they provide for SWRCB or Executive Director action on an "application:"

After review of the application, all relevant data, and any recommendations of a regional board, other state and federal agencies, and any interested person, the state board, [or] the executive director, when acting as the state board's designee . . . shall issue certification or deny certification for any discharge resulting from a pertinent activity before the federal period for certification expires.

(Cal. Code Regs., title 23, § 3859, subd. (a) (emphasis added).)

YCWA has had no application for a water quality certification pending before the SWRCB since July 31, 2019, when the Executive Director denied YCWA's previous application without prejudice. (Attachment L 2.) The fact that YCWA continues to have an application for a license pending before FERC does not support the Delegated Certification's issuance because both Clean Water Act section 401 and the SWRCB's regulations make it clear that an application for the underlying federal license is different from an application to the SWRCB for a water quality certification. (33 U.S.C. § 1341, subd. (a)(1)); Cal. Code Regs., title 23, § 3856.) Section 401, subdivision (a), requires "an applicant for a Federal license" to provide a certification from the State and directs the State to establish procedures for public notice "of all applications for certification by it." Section 3856, subdivision (d)(1) of the SWRCB's regulations requires the filing of "the application(s) for federal license(s)/permit(s)" as part of an application for a water quality certification from the SWRCB. Both section 401 and the SWRCB's regulations explicitly distinguish between an application for a water quality certification and the application for the underlying federal license.

"It is a settled principle in California law that [w]hen statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it." (*In re Lance* (1985) 37 Cal.3d 873, 886 (quotations omitted).) This rule applies equally in interpreting regulations. (*Hoitt v. Dep't of Rehabilitation* (2012) 207 Cal.App.4th 513, 523.) The applicable laws – especially Clean Water Act section 401 and the SWRCB's regulations – are clear and unambiguous that the SWRCB only may issue a water quality certification based on an application to SWRCB and cannot extend to the related, but separate, application for a Federal license or permit. As a result of the Executive Director's July 31, 2019 dismissal of YCWA's prior application without prejudice, YCWA has had no application for a water quality certification pending since then. There accordingly was no legal authority for the Delegated Certification's issuance. The SWRCB therefore should grant reconsideration and vacate the Delegated Certification.¹

¹ YCWA understands that, since the Delegated Certification's issuance on July 17, 2020, the Executive Director also has issued a water quality certification to Merced Irrigation District without that district having an application pending. The apparent *de facto* amendment of the SWRCB's regulations via the issuance of the Delegated Certification and the similar certification issued to Merced without an application pending constitutes an illegal "underground regulation" that violates Government Code section 11340.5, subdivision (a).

B. The Regulations That Delegate "All Actions" Associated With Water Quality Certifications to the Executive Director Are Not Authorized By Statute, So the Delegated Certification Is Invalid

The Executive Director issued the Delegated Certification based on section 3838, subdivision (a), of the SWRCB's regulations, which states: "*The executive director, or his/her designee, is authorized to take all actions connected with applications for certification, including issuance and denial of certification.*" (Cal Code Regs., title 23, § 3838, subd. (a) (emphasis added).) Here, the Delegated Certification involves the full scope of this delegation: it encompasses a 50-year term and includes conditions under which SWRCB staff could order YCWA to, among other things, comply with streamflow standards in amendments to the Bay-Delta Water Quality Control Plan ("Bay-Delta Plan") that have not yet been adopted and implement fish passage over or around the 273-foot-high Englebright Dam owned by the U.S. Army Corps of Engineers ("Army Corps") in addition to YCWA's own 645-foot-high New Bullards Bar Dam. (Delegated Certification, pp. 5-6, 12, 15-18, 22, 32, 53, 57; see Attachment A (Englebright height); see also FERC's Final Environmental Impact Statement for Hydropower License – Yuba River Development Project – Project No. 2246-065 – California (FEIS) (FERC 2019) (New Bullards Dam height).)

The California Supreme Court, however, has declared that those who hold public offices to exercise their judgment are clothed with a public trust that cannot be delegated:

As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization . . . [¶] On the other hand, public agencies may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action.

(*California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist.* (1970) 3 Cal. 3d 139, 144.) Ministerial tasks are those that do not involve discretion or the exercise of judgment. (See *Glendale City Employees' Assn. v. City of Glendale* (1975) 15 Cal.3d 328, 344.)

This principle that the exercise of judgment or discretion is a public trust that cannot be delegated applies especially to the SWRCB *as a board*. Water Code section 174 describes the trust invested in the SWRCB's members as follows:

- (a) The Legislature hereby finds and declares that in order to provide for the orderly and efficient administration of the water resources of the state, it is necessary to establish a control board that shall exercise the adjudicatory and regulatory functions of the state in the field of water resources.
- (b) It is also the intention of the Legislature to combine the water rights, water quality, and drinking water functions of the state government to provide for coordinated consideration of water rights, water quality, and safe and reliable drinking water.

Water Code section 175 reflects this trust by requiring that members of the SWRCB have specific qualifications and be confirmed by the state Senate. Water Code section 183 states that "the board" possesses "the powers conferred upon heads of departments of the state" and "may hold any hearings and conduct any investigations in any part of the state necessary to carry out the powers vested in it." Water Code section 181, in turn, states "[t]hree members of the board shall constitute a quorum for the purpose of transacting *any* business of the board." (Emphasis added.) These sections reaffirm that the SWRCB, as a whole, is the entity entrusted by the state to make decisions about water resources.

Water Code section 13160 does not depart from this focus on the "state board" as the entity to make decisions concerning such certifications:

- (a) The state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.) and any other existing or subsequently enacted federal water quality control law.
- (b)(1) The state board is authorized to give any certificate or statement required by any federal agency pursuant to the Federal Water Pollution Control Act or any other federal water quality control law.

Deviating from the plain language above, the current regulations provide complete delegation of the SWRCB's discretion, judgment, and authority to issue water quality certifications to the Executive Director. To support this extraordinarily broad delegation, those regulations reference only two Water Code sections other than section 13160, sections 7 and 1059.

Sections 1059 and 7 do not permit the SWRCB's members to delegate away the public trust associated with their office. Section 1059 only authorizes the delegation of certification of copies of documents and records, and therefore does not authorize the broad delegation of authority to staff. The board and the department, as to matters under each of their respective jurisdictions,

may designate one or more of their employees who shall have authority to certify under their respective seals all copies of orders, applications, permits, licenses, certificates, and other records under this division, and to attest all records, transcripts, evidence, and other original documents which it is necessary so to authenticate.

Water Code section 7 is similarly unavailing. It states:

Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.

Significantly, this statute authorizes the delegation of authority by a "public officer." A public officer is an individual; a board is not a public officer. This distinction exists in not only statute, but in the California Constitution. Article VII, section 4 identifies those associated with the state who are exempt from the civil service, listing several types of "officers" and also "members of boards and commissions." The distinction between officers and boards is further reflected in Government Code section 1001, which defines the state's "civil executive officers" to include "persons serving on boards or commissions created under the laws of the state" An officer is an individual, but a board is the group of individuals acting in concert. Water Code section 7 does not even address the possible delegation by the SWRCB of the authority it holds as a board acting through its quorum.

The Water Code sections concerning actions by individual SWRCB members and the role of SWRCB staff further emphasize the fact that Water Code section 7 cannot authorize the delegation of "all actions connected with applications for certification" to the Executive Director. For example, Water Code section 183 authorizes any SWRCB member "upon authorization of the board" to conduct a hearing or investigation, but requires that "any final action of the board shall be taken by a majority of all the members of the board, at a meeting duly called and held." In contrast, the SWRCB's current regulations concerning water quality certifications state that the SWRCB "may hold a public hearing with respect to any application for certification" (Cal. Code Regs., title 23, § 3858, subd. (b)), but then authorize the Executive Director to act without a hearing and without a board vote – a power Water Code section 183 denies to SWRCB members themselves.

The Water Code also makes clear that the SWRCB's employees serve to advise the SWRCB, not to make decisions involving what the California Supreme Court called "the exercise of judgment or discretion . . . in the nature of public trusts." (*California School*

Employees Assn., 3 Cal. 3d at p. 144.) Water Code section 186, subdivision (b), explicitly states:

For the *purpose of administration*, the board shall organize itself, with the approval of the Governor, in the manner it deems necessary properly to segregate and conduct the work of the board. The work of the board shall be divided into at least two divisions, known as the Division of Water Rights and the Division of Water Quality. *The board shall appoint a deputy director or division chief for each division, who shall supervise the work of the division and act as technical adviser to the board* on functions under his or her jurisdiction.

(Emphasis added.)

The Water Code does not expressly authorize the Executive Director's position, so the above description of the roles of the Deputy Directors for Water Rights and for Water Quality are the best indication of what role SWRCB staff is to play relative to the SWRCB members themselves. Such senior employees are "technical advisers to the board," not decisionmakers swathed with the SWRCB's full authority.

Only one Water Code section even suggests that the SWRCB could delegate *any* authority to the Executive Director to act on water quality certifications for hydroelectric projects. Water Code section 13321, subdivision (a)(2)(A), sets a time limit of 45 days for the SWRCB to act on a request for a stay of a water quality certification "issued under Section 13160 authority delegated to an officer or employee of the state board" for FERC-licensed hydroelectric projects. This statute does not actually authorize any delegations and, as noted above, Water Code section 13160 does not do so either. Moreover, while it might be possible for the SWRCB to delegate to the Executive Director certifications involving ministerial issues, certifications involving all operations of a major hydroelectric project over the entire decades-long life of a new FERC license are a different matter.

The California Constitution requires that all of the statutes authorizing any delegations to SWRCB staff be interpreted narrowly to avoid decisions being made outside of the public's view. Article I, section 3(b) states:

- (b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
- (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it

furtheres the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

Section 3, subdivision (b)(2)'s requirement that statutes be narrowly construed precludes any interpretation of the statutes discussed above that would allow the SWRCB to delegate the authority to take "all actions" concerning a water quality certification for a major hydroelectric project like the YRDP to the Executive Director. Such certifications can last for decades, impact water supplies for many communities, change rivers' management and compel project operators to spend hundreds of millions of dollars. Section 3, subdivision (b)(2), of the California Constitution requires that decisions like these be made in public by the SWRCB itself unless there is explicit statutory authorization for a delegation, which does not exist here.

Absent express statutory authority for the delegation of policy decisions to agency employees, an officer cannot delegate duties that involve judgment or discretion.² This default rule further emphasizes the lack of legal support for the SWRCB regulations' sweeping delegation to the Executive Director of "all actions connected with applications for certification." In a 2007 Opinion, the California Attorney General considered the question of delegation in the context of the Native American Heritage Commission and concluded that the Commission could not properly delegate matters that are entrusted to its judgment or discretion:

Examples of permissible delegations include most personnel decisions, supervision of the agency's staff, and general day-to-day administration of the agency's operations. [¶] *On the other hand, matters that call for an exercise of the board's or commission's special discretion or judgment may not lawfully be delegated to an executive officer or other body because such authority is exclusively reserved, as a public trust, for the public agency to which that authority has been conferred by law. If this were not so, the board or commission would itself have little purpose.*

² "[S]ince 1901 the opinions of this office have uniformly concluded that when an officer is given duties which involve judgment or discretion, absent specific statutory authorization, such duties may not be delegated. (See 54 Ops.Cal.Atty.Gen. 154, 156 (1971); 56 Ops.Cal.Atty.Gen. 399 (1973); Ops.Cal.Atty.Gen. N.S. 1521 (1939); Ops.Cal.Atty.Gen. N.S. 279 (1937); Ops.Cal.Atty.Gen No. 576 (1901); Compare 63 Ops.Cal.Atty.Gen. 240 (1980); 5 Ops.Cal.Atty.Gen. 40 (1945).)" (68 Ops. Cal. Atty. Gen. 65, 70 (1985), fn. 8 (emphasis in original).)

In our view, Commission functions such as (1) determining whether sacred Native American sites, remains, or artifacts are suffering or are threatened with severe damage; (2) determining appropriate mitigation measures; and (3) deciding whether and when to bring a legal action are not "routine," "preliminary," or "ministerial in nature," but rather call for exercise of the Commission's special judgment and discretion.

Hence, we believe that the final administrative decisions as to each of these matters must be made by the Commission, in keeping with the public trust conferred upon it, and may not be delegated to any other body or other officer.

(90 Ops. Cal. Atty. Gen. 89, 95-96 (2007) (emphasis added).)

The Attorney General further emphasized the point that a delegation authorizing staff to take action would negate any requirement that the commission's quorum vote in favor of an action: "The quorum rule for convening meetings is intended to ensure that a board's or commission's determinations reflect the considered judgment of at least a significant and representative number of the board's or commission's members." (90 Ops. Cal. Atty. Gen. 89, 97 (2007).)

The same logic applies here. The Legislature created the SWRCB in 1967 so that there would be one state agency to exercise "special judgment and discretion" in considering and deciding water-right and water quality matters together. (See *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 695-696.) Water quality certifications for hydroelectric projects epitomize the combination of those issues, being subject to the federal Clean Water Act and Porter-Cologne Water Quality Control Act and processed by the SWRCB's Division of Water Rights. Delegating complete authority to issue such certifications to the Executive Director contradicts the reasons why the SWRCB was created. Its regulations delegating complete authority over those certifications to the Executive Director therefore are not authorized by law and the Delegated Certification is invalid. The SWRCB should grant reconsideration and vacate the Delegated Certification.

C. The Delegated Certification's Many Terms That Would Grant Staff Ongoing Authority to Modify the Certification's Requirements Constitute Further Illegal Delegations

The Delegated Certification contains at least 33 terms under which the staff – usually the Deputy Director for the Division of Water Rights, but occasionally the Executive Director – has further authority to modify the Delegated Certification's requirements under various conditions. (See Delegated Certification, Conditions 1(A); 1(B); 1(D) [two different

Deputy Director decisions]; 4(A); 4(B); 4(C); 4(D); 4(E); 4(F); 5(A); 5(B); 5(C); 7; 8; 9; 10; 11; 12 [two different Deputy Director decisions]; 13; 14; 15; 16; 17; 18; 19; 20 [separate Deputy Director and Executive Director decisions]; 21 [three different Deputy Director decisions]; 26.) One of these terms, Condition 26, effectively is a reservation of jurisdiction over any plan YCWA develops under any term of the Delegated Certification:

Notwithstanding any more specific provision of this certification, any plan developed as a condition of this certification requires review and consideration of approval by the Deputy Director. The State Water Board's approval authority, including authority delegated to the Deputy Director or others, includes the authority to withhold approval or to require modification of a proposal, plan, or report prior to approval.

(Delegated Certification, p. 56, Condition 26.)

The Delegated Certification's further delegations to staff include authorizing the Deputy Director to *annually* approve a matter as seemingly unrelated to water quality as monitoring for bald eagles:

By December 31 of each year following implementation of TR2 [a proposed FERC license condition], the Licensee shall submit a Bald Eagle Monitoring Report to the Deputy Director for review and consideration of approval . . . [¶] The Deputy Director reserves the right to modify or approve modifications to the requirements referenced in this condition."

(Delegated Certification, p. 41, Condition 4(E).)

In contrast, the Delegated Certification's further delegations to staff also include at least two momentous decisions. First, the Certification provides staff with blanket authority to implement whatever terms the SWRCB may adopt as part of its ongoing update of the Bay-Delta Water Quality Control Plan ("Bay-Delta Plan"). In contrast, the Delegated Certification's further delegations to staff also include at least two momentous decisions.

First, the Certification provides staff with blanket authority to implement whatever terms the SWRCB may adopt as part of its ongoing update of the Bay-Delta Plan. This blanket authority implicates YCWA's due process rights and procedural violations of the APA as discussed in greater detail in Section II below. Further, these future violations are not corrected by Condition 29 of the Delegated Certification, which states, in part, that: "[t]he State Water Board shall provide notice and an opportunity to be heard in exercising its authority to add to or modify the conditions of this certification." The ambiguity of this

language alone demonstrates that there is no assurance that this "notice" and "opportunity" would apply to each and every decision that would be made by staff. It is also unclear what this "notice" and "opportunity" to be heard means or whether it would otherwise comply with due process requirements. As written, the "notice" and "opportunity to be heard" may very well follow in the footsteps of the process adopted in issuing the Delegated Certification in that it may only provide verbal notice one day ahead of each decision and an "opportunity" to respond verbally or in writing in an unspecified amount of time. Clearly YCWA's rights are not protected by Condition 29.

Second, it allows staff to order YCWA to implement a fish-passage program that would involve YCWA being required to somehow enable salmon, steelhead and other fish to migrate past not only the Army Corps' Englebright Dam – the impassable barrier to fish in the Yuba River watershed – but also YCWA's New Bullards Bar Dam on the North Yuba River. Notably, because of the pre-existing Englebright Dam, New Bullards Bar Dam has never blocked the passage of salmon, steelhead or other anadromous fish. As discussed in more detail below (Section III), these staff decisions could severely impact YCWA's water supplies and hydroelectric generation and cost YCWA hundreds of millions of dollars.

Specifically, Condition 1(D) concerns the Bay-Delta Plan and states, in part:

After considering monitoring results from Condition 4 and other information associated with conditions in this certification, and/or following adoption of any future amendments to the *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Bay-Delta Plan) (State Water Board 2018) addressing flows in the Sacramento River and its tributaries (including those currently being developed under the Sacramento/Delta Update to the Bay-Delta Plan), the Deputy Director may require the Licensee to initiate consultation on flows with CDFW, USFWS, NMFS, State Water Board staff, and, if applicable, the USFS. Such consultation would determine whether the required flows are reasonably protective of water quality and beneficial uses in the Yuba River and Project-related tributaries and/or whether they meet the requirements of the Bay-Delta Plan . . .

If the above consultation and evaluation of MIFs [minimum instream flows] does not occur within 10 years of license issuance, the Licensee shall initiate consultation with CDFW, USFWS, NMFS, State Water Board staff, and, if applicable, the USFS . . .

[After YCWA submits a resulting proposal] The Deputy Director may approve the Licensee's proposal or require other changes to the extent necessary to

ensure reasonable protection of the beneficial uses . . . The Licensee shall implement the new flows and/or other management actions as soon as reasonably practicable after receiving the Deputy Director's decision and any other required approvals

(Delegated Certification, p. 32, Condition 1(D).)

Further, Condition 20 concerns fish passage and states, in relevant part:

No later than six months following license issuance, the Licensee shall initiate consultation with NMFS, USFS, USFWS, CDFW, USACE, and State Water Board staff on studies regarding fish passage . . . At a minimum these studies shall include:

- An assessment of a reasonable range of passage alternatives. This shall include evaluating alternatives for adult and juvenile volitional fish passage, as well as adult and juvenile trap and haul to locations above Englebright Dam and/or New Bullards Bar Reservoir . . .

No later than three years following license issuance, the Licensee shall complete the studies and submit an informational report to the Deputy Director for review, including related information, and a proposal regarding anadromous fish passage past Project facilities. The Licensee shall develop the report in consultation with NMFS, USFS, USFWS, CDFW, USACE³, and State Water Board staff. The Deputy Director may require modifications to the report. The Licensee shall file the Deputy Director reviewed informational report with FERC.

The Executive Director may require implementation of the proposal in the report, or other alternative, following notice and an opportunity to be heard.

(Delegated Certification, p. 53, Condition 20.)

These further delegations of authority to staff are illegal for a number of reasons. As discussed above in Section I.B., because the SWRCB members exercise their "special discretion and judgment" as public officials vested with a public trust obligation, the SWRCB cannot delegate decisions involving such matters to its staff without statutory authorization. Lacking that statutory authorization, the Executive Director cannot *further sub-delegate* such matters to her staff throughout the anticipated 50-year term of YCWA's new FERC license. (See Delegated Certification, p. 6 (potential 50-year term).) This point is particularly true of the Deputy Director, whom Water Code section 186, subdivision (b),

³ USACE is another acronym used to designate the Army Corps.

explicitly designates as "a technical adviser to the board," not a decisionmaker in lieu of the SWRCB itself.⁴

Moreover, the Delegated Certification's 30-plus terms under which the staff would delegate broad and ongoing authority to itself to continue to modify the terms violate basic principles of California law concerning how governmental authority may be delegated. For such a delegation to be valid, the governing body must have exercised its judgment and discretion in setting rules that the person exercising the delegated authority then applies; the governing board must not have abdicated its decision-making function. (See *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1094-1095; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 374-377 (city could not have delegated full land use authority over airport land to joint powers authority); *San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 900-901, 904 (improper delegation to arbitrator).) A grant of delegated authority also must be associated with "safeguards adequate to prevent its abuse." (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 376.) These safeguards do not exist here.

Most fundamentally, essentially none of the more than 30 self-delegations to staff contain any procedural safeguards for YCWA at all. For example, Condition 1(D), under which the Deputy Director potentially could order YCWA to comply with the Deputy Director's interpretation of whatever amendments to the Bay-Delta Plan the SWRCB eventually adopts, states only that the "Deputy Director may approve the Licensee's proposal or require other changes to the extent necessary to ensure reasonable protection of beneficial uses." (Delegated Certification, p. 32.)⁵ There is no requirement of a hearing or even a guaranteed opportunity for YCWA to be heard before the Deputy Director modifies the YRDP's minimum streamflow requirements.

⁴ The Water Code does authorize delegations to the SWRCB's staff of certain well-defined actions. (See, e.g., Water Code §§ 1347 (minor contested applications of less than 3 cfs of direct diversion or 200 acre-feet of annual storage); 1425, subd. (d) (temporary urgency permits); 1435, subd. (d) (temporary urgency change orders).)

⁵ It is noteworthy that the standard of "reasonable protection of beneficial uses" is the standard that the SWRCB itself must apply in adopting water quality objectives like those in the Bay-Delta Plan. (See Water Code § 13241.) It also is noteworthy that one of the actions Regional Boards are prohibited from delegating to their Executive Officers is "the issuance, modification, or revocation of any . . . water quality objectives." (Water Code § 13223, subd. (a).)

Perhaps recognizing the enormous costs associated with fish passage above Englebright and New Bullards Bar Dams, the Delegated Certification's Condition 20 would give YCWA somewhat more process before the Executive Director could compel YCWA to implement one or more fish passage projects. Condition 20 states, in relevant part:

No later than three years following license issuance, the Licensee shall . . . submit an informational report to the Deputy Director for review, including related information, and a proposal regarding anadromous fish passage past Project facilities . . . The Deputy Director may require modifications to the report . . . [¶] The Executive Director may require implementation of the proposal in the report, or other alternative, following notice and an opportunity to be heard.

(Delegated Certification, p. 53, Condition 20.)

This condition does not require that the Executive Director even give YCWA an actual hearing before compelling YCWA to implement fish-passage projects potentially costing hundreds of millions of dollars. An "opportunity to be heard" by a staff member is not a safeguard sufficient to support the Delegated Certification's self-delegation of authority, especially when the staff's decision could obligate YCWA to spend huge sums of money. The Court of Appeal recently held that the SWRCB could adopt emergency and temporary unreasonable use regulations through *open and public proceedings* to protect "belly-scraping flows" to support listed spring-run salmon during a severe drought. (*Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, 1004.) Allowing the staff to impose enormous and long-running obligations on YCWA without an open and public proceeding involving the SWRCB members, acting in their positions as holders of a public trust, does not come close to meeting the minimum safeguards provided for the temporary and more limited regulations in *Stanford Vina*.

Adequate safeguards sometimes can be implied from the statutory scheme's purpose. (*Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630, 656-657.) However, the scope of the Delegated Certification's conditions, and its terms that would compel YCWA to seek orders from FERC to amend its license to implement SWRCB staff's commands, indicate that the underlying substantive statutes would not be a sufficient safeguard either. Porter-Cologne defines "quality of the water" as "chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use." (Water Code § 13050, subd. (g).) The Delegated Certification, however,

demonstrates that it is not possible to derive any safeguards on delegations to staff from that explicit statutory definition. For example, the Delegated Certification's conditions include further self-delegations of authority about bald eagle monitoring, the management of "large woody material," management of aquatic invasive species, "lowering of floodplain surfaces," "planting of riparian vegetation" and management of recreational facilities. (Delegated Certification, pp. 41-42, 47-50, Conditions 4(E), 8, 11-12, 14.) Judging by the breadth of such conditions, there appear to be few topics associated with the operation of a hydroelectric project that might not be considered to relate to "water quality" under the authority delegated under Porter-Cologne and the SWRCB's applicable regulations.

The approximately 33 different terms under which the Executive Director, the Deputy Director, and potentially other staff would have continuing authority to modify the requirements the Delegated Certification would impose on YCWA would constitute an inappropriate and illegal delegation of the SWRCB members' public trust obligations to exercise their special judgment and discretion *as a board*. The Delegated Certification contains essentially no safeguards to protect YCWA in the future exercise of those 33 terms. The Delegated Certification therefore does not comply with applicable law. The SWRCB should grant reconsideration and vacate the Delegated Certification.

D. The Delegated Certification's Issuance Violated CEQA Because It Was Not Authorized by the Recent Amendment to Water Code Section 13160

Like all state and local agencies, the SWRCB generally is required to analyze its actions under CEQA before approving them. (See Public Resources Code §§ 21002, 21002.1, 21080(a), 21081.) The Delegated Certification specifically acknowledges the SWRCB's CEQA obligations. (Delegated Certification, pp. 14-15 ("The issuance of this certification does not obviate . . . the State Water Board's obligations under CEQA").) No CEQA document has analyzed the effects of implementing the Delegated Certification. The Delegated Certification states that CEQA coverage was not necessary because of "the potential for certification to be waived if the State Water Board waits to issue certification until completion of CEQA." (Delegated Certification, p. 14.) As support for this statement, the Delegated Certification relies on: (1) the fact that FERC had issued "an order on May 31, 2020, approving YCWA's request to find that the State Water Board has waived certification;" and (2) recent amendments to Water Code section 13160 that authorize the

SWRCB to issue water quality certifications without CEQA coverage in some circumstances. (Delegated Certification, p. 14.)

The facts of this case do not excuse the SWRCB's failure to comply with CEQA. The recent statutory amendments did not authorize the issuance of the Delegated Certification without CEQA coverage because its issuance will make no difference to the question of whether the SWRCB has waived its certification authority. As recently amended, Water Code section 13160, subdivision (b)(2), states:

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.

Hence, the operative statutory condition under which the SWRCB may issue a certificate prior to CEQA review is "if the state board determines that waiting . . . poses a substantial risk of waiver."

Here, there is no risk of waiver because, by the time the Delegated Certification was issued, FERC already had issued its waiver determination. The Delegated Certification states as much when it notes, on page 14: (a) on May 21, 2020, FERC issued an order finding that the SWRCB had waived its authority; and (b) "[t]he State Water Board disagrees with FERC's decision and has requested rehearing."

In its June 20, 2020 request for rehearing to FERC, the SWRCB staff included a draft of the Delegated Certification as an attachment. (Attachment L 5.) On July 21, 2020, FERC issued an order denying the SWRCB's request for rehearing. (Attachment L 6.) Under the Federal Power Act, the SWRCB now has 60 days from July 21 to file a petition for judicial review of FERC's waiver order, if the SWRCB chooses to do so. (See 16 U.S.C. § 825*l*, subd. (b).)

If the SWRCB were to file a petition for judicial review of FERC's waiver order, the Delegated Certification would be irrelevant to that review. FERC found that the SWRCB had waived its certification authority based on facts occurring in 2018. (Attachment L 4.) The Delegated Certification, issued hastily in July 2020, cannot change what the SWRCB did, or did not do, in 2018. A court may hold that the acts of SWRCB in 2018 resulted in a

waiver by the SWRCB, which would render the Delegated Certification moot.

Alternatively, a court may hold that those past acts did not effect a waiver, in which case the SWRCB's certification authority would be restored, and YCWA would need to file a *new* application for a certification under Clean Water Act section 401, Water Code section 13160 and whatever the SWRCB's applicable regulations may be at that time. The Delegated Certification can make no difference in any of these scenarios. It therefore is not possible, in the words of the recently-amended Water Code section 13160, subdivision (b)(2), that the SWRCB "waiting until completion of [CEQA] environmental review to issue the certificate" would "pose[] a substantial risk of waiver of the state board's certification authority."

It is undisputed that the SWRCB has not undertaken any CEQA review. The recent amendments to Water Code section 13160 do not apply to this situation.⁶ The Delegated Certification's issuance therefore violated CEQA. To remedy this fatal defect, the SWRCB should grant reconsideration and vacate the Delegated Certification.

III. The Process by Which the Delegated Certification Was Developed and Issued Violated Statutory Fair-Hearing Requirements, the State's Administrative Procedure Act, Open Meeting Laws and Constitutional Due Process Principles

The Delegated Certification was issued on July 17, 2020 without any prior notice, any public proceeding, or any opportunity for YCWA or anyone else to address any of the information on which the Delegated Certification was based. This process violated YCWA's right to a fair hearing under the Water Code and the Code of Civil Procedure, the state Administrative Procedure Act's (APA) Administrative Adjudication Bill of Rights, basic laws that require that the public's business be done openly and transparently, and constitutional due process requirements. These violations are particularly egregious given the command of the California Constitution, which requires that all of these laws be

⁶ Whether the Delegated Certification could support any valid CEQA review is highly questionable. As discussed above in Section II.C, the Delegated Certification contains over 30 open-ended terms under which the SWRCB's staff could effectively modify – without action by the SWRCB itself – the certification's terms, including on such momentous issues as what the Yuba River's minimum streamflow requirements would be and whether YCWA would be compelled to implement fish passage above the federal Englebright Dam. These terms are so open-ended that it is difficult to tell how a CEQA document that attempted to analyze them based just on their explicit text could comply with the fundamental principle that "[a]n accurate, stable and finite project description is the sine qua non" of valid CEQA analysis. (See *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 938 (quotation and citation omitted).)

interpreted broadly to ensure that the public's business is done in public. (Cal. Const., Art. I, § 3, subd. (b)(2).)

A. The Issuance of the Delegated Certification Denied YCWA the Basic Fair Hearing Required By Law

Judicial review of a water quality certification occurs under Code of Civil Procedure section 1094.5 because such a certification is issued under Porter-Cologne. (Water Code § 13330, subds. (a), (e).) Under Code of Civil Procedure section 1094.5, subdivision (b), a court will review whether the SWRCB provided YCWA a "fair trial." To meet this standard, administrative proceedings must provide at least basic safeguards of fairness like adequate notice of a potential agency action and a reasonably clear statement of the action under consideration (see, e.g., *Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891, 897-900), and an opportunity to understand and rebut adverse information, including the agency decisionmaker's application of his or her own expertise. (See *Franz v. Bd. of Medical Quality Assurance* (1982) 31 Cal.3d 124, 138-140.) These standards generally are captured in the state APA's Administrative Adjudication Bill of Rights, but also apply as common law under Water Code section 13330 and Code of Civil Procedure section 1094.5. (See *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91 (state APA standards helpful to define fair-hearing requirements even where APA does not strictly apply); Government Code §§ 11425.10-11425.60 (Administrative Adjudication Bill of Rights).)

The Delegated Certification was issued through a process that provided YCWA *none* of the basic safeguards of a fair hearing required by Water Code section 13330 and Code of Civil Procedure section 1094.5. YCWA received no reasonable, or even written, notice that the Executive Director was considering issuing the Delegated Certification, having only been told orally *the day before* that the Executive Director would be issuing that document. (Attachment L 1, ¶¶ 5-6).

This certainly was unexpected news because YCWA did not even have an application for a water quality certification pending. (See Section I.A, above.) There was no public comment period in which YCWA could have addressed the problems with the Delegated Certification. As discussed below (see Section III), in many cases, the Delegated Certification contains terms proposed by, among others, CDFW and the federal Department of the Interior (DOI) that FERC had rejected based on detailed technical analyses. In

adopting those terms, the Delegated Certification apparently rejected FERC's authority and technical analyses without YCWA having any opportunity to rebut whatever asserted SWRCB expertise was being applied. All of these problems demonstrate that the issuance of the Delegated Certification did not comply with the basic standards for a fair hearing under Code of Civil Procedure section 1094.5, as incorporated through Water Code section 13330.

The process apparently used in formulating and issuing the Delegated Certification resembles the University of Southern California's (USC) student disciplinary process that the Court of Appeal has held to be a violation of Code of Civil Procedure section 1094.5's fair hearing requirements in multiple recent decisions. USC's disciplinary process involved written notice to the accused student of the "alleged violation and the basis for the charge;" an investigator meeting separately with the relevant people; an opportunity for those people to both present additional information and review documentary evidence, including the investigator's summaries of interviews with witnesses; no opportunity for the accused student to ask witnesses questions; the investigator making "findings of fact" and then imposing discipline in consultation with other university staff. (See *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1040-1041.)

In four separate decisions, the Court of Appeal has held that these procedures violated the fair hearing rights of accused students, largely because they had no opportunity to ask questions to test the credibility of the case against them. (*Doe v. Allee, supra*, 30 Cal.App.5th 1036; see also *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 239-248; *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212, 1232-1240; *Boormeester v. Carry* (2020) 49 Cal.App.5th 682, 698-699, 703-707.)⁷ In *Doe v. Allee*, the Court of Appeal explained how the lack of a fair hearing flowed from USC's system that allowed the investigator to serve so many functions:

The flaws in Dr. Allee's investigation, which formed the basis for her factual findings, illustrate well the significant dangers created by USC's system . . .

⁷ The Court of Appeal has issued similar recent decisions concerning disciplinary procedures at other private and public universities. (See, e.g., *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055; *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44 (*UC Santa Barbara*); *Doe v. Westmont College* (2019) 34 Cal.App.5th 622.) In the *UC Santa Barbara* decision, the Court of Appeal held that, among other things, denial of the opportunity to present evidence violated fair-hearing requirements and stated, "It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy." (*UC Santa Barbara, supra*, 28 Cal.App.5th, at pp. 59-61.)

[¶] Dr. Allee had unfettered discretion to chart the course and scope of her investigation and determine [witnesses'] credibility, and exercised that discretion in questionable ways. In his first meeting with Dr. Allee, Doe [the accused student] articulated his theory that Roe [the accuser] had a strong motive to fabricate [the allegation]. Dr. Allee seems to have rejected that theory almost immediately, despite investigative leads . . . that, if pursued, would lend support to Doe's theory, and weaken Roe's credibility. This was symptomatic of a larger problem with Dr. Allee's investigation. She did not follow up with presumably identifiable and available witnesses . . . who might have filled in holes in the investigation, thus providing a fuller picture from which to make the all-important credibility determination . . .

Deficiencies such as these are virtually unavoidable in USC's system, which places in a single individual the overlapping and inconsistent roles of investigator, prosecutor, fact finder and sentencer. While providing a hearing at which the witnesses appear and are cross-examined before a neutral fact finder cannot ensure that such flaws do not occur, such a procedure at least provides an accused student with a fair and meaningful opportunity to confront the adverse witnesses in an attempt to expose weaknesses in the evidence.

(Doe v. Allee, supra, 30 Cal.App.5th, at pp. 1069-1071 (emphasis added).)

If anything, the process leading to the Delegated Certification afforded YCWA much less process than the USC system rejected by the Court of Appeal in *Doe v. Allee*. Like the investigator in that case, the Executive Director had "unfettered discretion to chart the course and scope of her investigation" because the SWRCB's current regulations delegate to the Executive Director the authority to "to take all actions connected with applications for certifications, including issuance and denial of certification." (Cal. Code Regs., title 23, § 3838, subd. (a).) Under this broad delegation, YCWA effectively received no prior notice that the Delegated Certification's issuance was being considered and YCWA had no opportunity to rebut whatever information was considered in formulating that certification.⁸ As in *Doe v. Allee*, relevant conclusions were reached without considering relevant evidence, as indicated by the fact that the Delegated Certification does not explain why certain proposals by CDFW and DOI were adopted with few, if any, modifications –

⁸ Even now it is unclear what information was considered in formulating the Delegated Certification. It contains a list of items that apparently might be in its administrative record, but those items include vague descriptions like "Project-related controllable water quality factors" and "Other information in the record." (Delegated Certification, pp. 15-16.)

even after FERC rejected the same proposals based on detailed technical analyses. (See Section III below.)

This apparent incorporation of previously rejected technical information without providing YCWA any opportunity to dispute and rebut whatever the underlying logic may have been was an independent violation of YCWA's right to a fair hearing. In applying Code of Civil Procedure section 1094.5, the California Supreme Court has held, "[D]ue process requires, when in an adjudication any agency intends to rely on members' expertise to resolve legislative-fact issues, that it notify the parties and provide an opportunity for rebuttal." (*Franz, supra*, 31 Cal.3d, at p. 140.) Under this rule, YCWA's right to a fair hearing was violated due to the absence of *any* process by which YCWA could have disputed and rebutted the apparent application of asserted SWRCB staff expertise in overturning – without explanation – technical conclusions reached by FERC in rejecting proposals by CDFW and DOI that the Delegated Certification accepts.

Under Water Code section 13330 and Code of Civil Procedure section 1094.5, the SWRCB is required to give YCWA a fair hearing before issuing a water quality certification. The process by which the Delegated Certification was developed and issued complied with none of the elements that constitute a fair hearing. The SWRCB therefore should grant reconsideration and vacate the Delegated Certification.

B. The Issuance of the Delegated Certification Violated the Administrative Adjudication Bill of Rights

The issuance of a water quality certification is an "adjudicative proceeding" under the SWRCB's regulations. (See Cal. Code Regs., title 23, § 648, subd. (a).) This apparently is why the SWRCB's *ex parte* prohibition applies to certification proceedings. The April 25, 2013 "Ex Parte Communications Questions and Answers Document" issued by the SWRCB's Chief Counsel to members of the SWRCB and of the Regional Water Quality Control Board states the following, on page 4:

Adjudicative actions are those actions where the water boards make a decision after determining specific facts and applying laws and regulations to those facts. Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water board reaches a decision that determines the rights and duties of a particular person or persons . . .

Below is a partial list of common water board actions that often follow adjudicative proceedings: . . .

- Water quality certification orders (401 certification)

A proceeding before the SWRCB or a Regional Board does not necessarily have to involve witnesses and live testimony to be an "adjudicative proceeding." In a 2019 Court of Appeal decision, the Los Angeles Regional Board successfully defended the validity of a Porter-Cologne cleanup-and-abatement proceeding that was conducted through document exchanges, with the court holding it to be an "informal hearing" under the APA. (*Barclay Hollander Corp. v. Calif. Regional Water Quality Control Bd. et al.* (2019) 38 Cal.App.5th 479, 504-506.)⁹

The SWRCB's regulations for adjudicative proceedings state that, with certain exceptions, Chapter 4.5 of the APA applies to those proceedings. (Cal. Code Regs., title 23, § 648, subds. (b)-(c).) Those regulations also make it clear that they incorporate the APA's requirements for adjudicative proceedings held under Porter-Cologne, which governs water quality certifications. (Cal. Code Regs., title 23, § 641; see also Water Code § 13160.)¹⁰ Nothing in the SWRCB's regulations for water quality certifications indicates that their issuance is exempt from the APA as incorporated by the SWRCB's other regulations. The SWRCB has chosen, through its regulations, to be bound by many APA terms and must comply with them.

The APA chapters that apply here include not only the prohibitions on *ex parte* communications (Government Code §§ 11430.10-11430.80), but also the Administrative Adjudication Bill of Rights (Government Code §§ 11425.10-11425.60). That Bill of Rights

⁹ In *Barclay Hollander*, the Court of Appeal held that the affected party had waived its objection to the Regional Board conducting an informal proceeding, rather than a formal hearing, by failing to object to the informal proceeding for over a year after it began. (38 Cal.App.5th, *supra*, at pp. 505-506.) Here, in contrast, YCWA objects to the SWRCB's issuance of the Delegated Certification, or any water quality certification issued by the SWRCB for the relicensing of the YRDP, without a formal hearing. This petition represents YCWA's first opportunity to object to the SWRCB's ongoing process concerning such a certification. The Executive Director had denied YCWA's prior application for a certification in a July 31, 2019 letter, and gave YCWA no notice that she would be issuing the Delegated Certification other than during an informal electronic meeting on July 16, 2020, the day before she issued it. (Attachment L 1, ¶ 6.) YCWA had no opportunity to object to the SWRCB using informal procedures to consider and issue a water quality certification prior to the Executive Director's actual issuance of the Delegated Certification. YCWA therefore had no obligation to object to an informal proceeding before now. (See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1209-1212.)

¹⁰ Regulation section 641 states, "The regulations contained in this chapter are adopted for the purpose of implementing and carrying out provisions of . . . Division 7 . . . of the Water Code." Porter-Cologne is Division 7 of the Water Code.

includes numerous relevant requirements, including Government Code section 11425.10, which states:

- (a) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements:
 - (1) The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence . . .
 - (2) The agency shall make available to the person to which the agency action is directed a copy of the governing procedure . . .
 - (3) The hearing shall be open to public observation as provided in Section 11425.20 . . .
 - (4) The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30 . . .
- (b) The requirements of this section apply to the governing procedure by which an agency conducts an adjudicative proceeding without further action by the agency, and prevail over a conflicting or inconsistent provision of the governing procedure, subject to Section 11415.20. The governing procedure by which an agency conducts an adjudicative proceeding may include provisions equivalent to, or more protective of the rights of the person to which the agency action is directed than, the requirements of this section.

Similarly, Government Code section 11425.30 states, in relevant part:

- (a) A person may not serve as presiding officer in an adjudicative proceeding in any of the following circumstances:
 - (1) The person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage . . .
- (c) The provisions of this section governing separation of functions as to the presiding officer also govern separation of functions as to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

The issuance of the Delegated Certification violated all of these basic requirements of the state's Administrative Adjudication Bill of Rights. YCWA was not provided "a copy of the governing procedure," assuming there was any such procedure. Whatever proceeding occurred was not subject to any sort of "public observation," even to the extent that written comments could have been made available for YCWA's review. The Executive Director

apparently exercised all of the functions of "investigator," "advocate," and "presiding officer." This violation is particularly striking because Government Code section 11425.30, subdivision (c), specifically prohibits the combination of those functions in "the agency head or other person or body to which the power to hear or decide in the proceeding is delegated." Even if the delegation of the issuance of water quality certifications to the Executive Director under the SWRCB's regulations were valid – which it is not, for the reasons discussed above (see Section I.B) – the Executive Director's exercise of any such delegated authority would have to comply with the above APA prohibition on the combination of functions, and it did not do so.

As a result, probably the most significant violation of the Administrative Adjudication Bill of Rights that occurred with the issuance of the Delegated Certification was that YCWA was denied any opportunity at all to respond to whatever information may have been considered in developing that certification.¹¹ Government Code section 11425.10, subdivision (a)(1), requires that "[t]he agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence." The Delegated Certification makes it clear that the Executive Director had some opportunity to comply with this requirement relative to YCWA, yet simply failed to do so. The certification states, on page 10:

On July 7, 2020, State Water Board staff requested comments from the Central Valley Regional Water Quality Control Board (Central Valley Regional Water Board) on the draft certification. (See Cal. Code Regs. Tit. 23, § 53855 [sic], subd. (b)(2)(B).) On July 16, 2020, comments were received from the Central Valley Regional Water Board on the draft certification. The comments have been incorporated into the final certification.

Apparently, there was the time and opportunity to give the Central Valley Regional Board at least nine days to comment on a draft certification before issuing the Delegated Certification. In contrast, YCWA – and the public – received no effective notice that a certification was forthcoming. While nine days would not have been an adequate time to prepare comments on a draft certification with the sort of potential impacts that the Delegated Certification could have (see Section III below), YCWA was not even afforded that minimal opportunity.

¹¹ It still is not clear what information the Executive Director considered in issuing the Delegated Certification. (See fn 8, above (citing Delegated Certification, pp. 15-16).)

C. The Issuance of the Delegated Certification Violated YCWA's Due Process Rights as an Agency Created Specifically by the Legislature to Address the Water Problems of the People of Yuba County

The seminal U.S. Supreme Court decision concerning the determination of whether a government agency's procedures provide constitutionally adequate due process – *Mathews v. Elridge* (1976) 424 U.S. 319 – states principles that must be followed in all cases. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (*Mathews, supra*, 424 U.S., at p. 333.) "The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." (*Mathews, supra*, 424 U.S., at p. 348.) The applicable procedures must ensure that those at risk are "given a meaningful opportunity to present their case." (*Mathews, supra*, 424 U.S., at p. 349.) Under *Mathews*, the question is whether the "procedural scheme itself [is] adequate to ensure a meaningful hearing." (*Cal. Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 350.) A procedural scheme that provides no opportunity for a "meaningful hearing" violates constitutional due process requirements. (*Id.* at p. 349.)

The water quality certification process under the SWRCB's regulations that produced the Delegated Certification provided YCWA no opportunity to be heard at a meaningful time in a meaningful manner. The regulations do not require any sort of hearing (Cal. Code Regs., title 23, § 3858), and there was no hearing. The Executive Director is delegated authority to take "all actions" on applications for certifications with only 21 days' notice of the application. (Cal Code Regs., title 23, §§ 3838, subd. (a); 3858, subd. (a).) The regulations require no public proceeding in which anyone could even have commented, and there was no public process. Even the minimal required notice did not occur here because, as discussed above (see Section I.A), YCWA did not actually have any application pending. Accordingly, there was no "opportunity to be heard at a meaningful time and in a meaningful manner." As explained in Section III and its supporting materials, the Delegated Certification and its onerous conditions will injure YCWA and its citizens. The Delegated Certification's issuance therefore violated constitutional due process requirements.

Because YCWA is the agency the Legislature created specifically to address Yuba County's water problems for the public good of the county, YCWA's due process rights were

violated by the Delegated Certification's issuance. In 1959, the Legislature created YCWA by special act, finding in section 26:

The Legislature hereby finds that water problems in the County of Yuba require countywide water conservation, flood control and development of water resources; that all land within the county will be benefited thereby; that the solution of these problems lies within and is peculiar to the area to be included in the Yuba County Water Agency; that the county for many years has made investigations and engineering surveys of the county's water resources by private, public and United States engineers; that county water districts, municipalities, irrigation districts and reclamation districts now exist within portions of the county, have acquired property and works, developed a limited water supply, and have incurred indebtedness, but have been and are unable alone to economically develop an adequate water supply and control the floods of said county, and for such reason it is necessary to have a political entity at least coextensive with the geographical limits of the entire county. It is therefore hereby declared that a general law cannot be made applicable to said county, and that the enactment of this special law is necessary for the conservation, development, control and use of said water for the public good and for the protection of life and property therein.

(Cal. Stats. 1959, p. 2798; see also West's Water Code Appendix, § 84-26 (1959 finding remains in place).)

Because YCWA is invested with authority to act as the unique representative of the people of Yuba County in addressing what the Legislature identified as the county's "water problems," YCWA may not be denied due process when the SWRCB addresses YCWA's water rights and facilities. As the Delegated Certification acknowledges, YCWA holds numerous water-right permits and licenses, many of which specifically authorize hydroelectric generation. (Delegated Certification, pp. 7-8.) Under the Federal Power Act, YCWA must be compensated if FERC issues a new license to another entity. (16 U.S.C. §§ 807, subd. (a); 808, subd. (a)(1).) These are property interests sufficient to trigger for due process protection. (See *Casitas Mun. Water Dist. v. United States* (Fed.Cir. 2008) 543 F.3d 1276, 1288-1296 (government-mandated diversion of water subject to water right can be a physical taking).)

YCWA therefore may assert constitutional due process rights here for two main reasons. First, it is asserting the interests of the county's people in managing the water of their local river to be less of a source of destructive floods and more of a water supply, for the purpose of serving not only local demands, but also generating revenue to support the

county's communities, including its disadvantaged communities. (See *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 675-677; *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 630; see also Appendices A – G (concerning impacts of Delegated Certification).) Second, it is the primary entity that can assert those interests because YCWA alone holds the FERC license for the YRDP and is seeking its renewal, which is a necessary condition for the SWRCB to issue a water quality certification. (See *Sanchez, supra*, 145 Cal.App.4th, at pp. 675-677; see also 33 U.S.C. § 1341 (water quality certification to support application for federal license); Cal. Code Regs., title 23, § 3856, subd. (d)(1) (application for water quality certification must contain the application for the relevant federal license).) As the agent created by the Legislature to serve the people of Yuba County by addressing the county's "water problems," YCWA may assert the requirements of constitutional due process on behalf of its citizens. The Delegated Certification's issuance violated those requirements.

D. The Delegated Certification's Issuance Violated the Water Code's Requirement That a Quorum of the SWRCB Is Necessary for SWRCB Action and Therefore Violated Open Meeting Laws

As discussed above in Section II.B, the regulations delegating the issuance of water quality certifications to the Executive Director are illegal because, among other things, they purport to allow a final action of the SWRCB to occur without its quorum voting in favor of that action. To the extent that any authority to act could be delegated under those regulations, however, the Executive Director's specific issuance of the Delegated Certification here violated Water Code section 181's basic quorum requirement. That statute states, in relevant part, "Three members of the board shall constitute a quorum for the purpose of transacting any business of the board." Notwithstanding this basic requirement for action by the SWRCB, the Delegated Certification indicates that it can become a final action of the SWRCB without any vote by the SWRCB members themselves. (Delegated Certification, p. 55, Condition 23.)

The issue presented is not just a matter of the SWRCB's organization and efficiency. The requirement that the SWRCB act only upon a vote of its quorum keys into the basic requirements of governmental transparency stated in the Bagley-Keene Open Meeting Act (Government Code §§ 11120-11132). Bagley-Keene states the following policies:

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

This article shall be known and may be cited as the Bagley-Keene Open Meeting Act.

(Government Code § 11120.)

To implement these policies, Bagley-Keene prohibits "a majority of the members of a state body" from deliberating on an action "outside of a meeting authorized by this chapter." (Government Code § 11122.5, subd. (b)(1).) The SWRCB of course is a "state body" to which Bagley-Keene applies. (Government Code § 11121, subd. (a).)

The formulation and issuance of the Delegated Certification without any public notice or proceedings violated the requirements and policies of governmental transparency stated in Bagley-Keene, as implicated by Water Code section 181's quorum requirement for the SWRCB. Because the issuance of the Delegated Certification did not comply with these requirements, it failed to satisfy Bagley-Keene's basic policy that "the proceedings of public agencies be conducted openly so that the public may remain informed." The Delegated Certification therefore is invalid. The SWRCB should grant reconsideration and vacate the Delegated Certification.¹²

¹² The absence of any adequate process – or any process, in many cases – associated with the potential exercise of the over 30 terms in the Delegated Certification that would allow the SWRCB staff to modify that certification's effect would result in each of those terms independently violating all of the procedural requirements discussed in Sections II.A – II.D. (See Sections II.B – II.C above (sub-delegations to SWRCB staff).)

IV. Significant Technical Information That the Delegated Certification Did Not Consider or Dismissed Without Explanation Demonstrates That the Certification Violates Fundamental Constitutional, Water Quality and Administrative Laws and Principles

The SWRCB's regulation concerning a petition for reconsideration of a water quality certification states that the petition must be supported by "a full and complete statement of reasons why the action or failure to act was inappropriate or improper." (Cal. Code Regs., title 23, § 3867, subd. (d)(4).) This entire Statement in Support of Petition for Reconsideration is a statement of the many reasons why the issuance of the Delegated Certification was inappropriate and improper. More specifically, there is significant technical information that demonstrates that the certification's most critical terms do not consider relevant information; contradict, without explanation, findings by FERC that were actually based on technical analyses; and will not protect beneficial uses of water in the Yuba River. This information was not available when the Delegated Certification was issued due to the absence of any prior public proceedings.

The failure to consider or analyze applicable technical information causes the Delegated Certification to be inappropriate and improper in many ways. For example, the certification does not address or analyze the extensive pre-existing information about potential options for implementing fish passage above Englebright Dam and New Bullards Bar Dam that showed that *all* of those options would involve hundreds of millions of dollars in costs and expense for speculative benefits for salmon and steelhead. The Delegated Certification does not contain, and fails to cite, any technical analysis of its terms' potential impacts on not only agricultural water supplies and hydroelectric generation, but also on the cold-water habitat beneficial uses that seem to be the certification's dominant focus. (See Delegated Certification, p. 11 (listing beneficial uses of Yuba River).) The Delegated Certification's failure to consider water-supply impacts also causes it to neglect to analyze its potential impacts on Yuba County's disadvantaged communities – in which more than half of the County's people live – and on the implementation of the Sustainable Groundwater Management Act in the two groundwater basins within the county. (See Water Code §§ 10720-10737.8 (SGMA).)¹³

¹³ SGMA contains, among other state policies, the following: "It is the intent of the Legislature to preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater." (Water Code § 10720.1, subd. (b).)

These failures do not merely implicate the SWRCB's reconsideration standards as stated in its regulations. Rather, these failures are of both constitutional and statutory importance as well. The people amended Article X, section 2 into the California Constitution in 1928. It states, in part, that, "because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable" In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the California Supreme Court explained Article X, section 2's effect: "*This amendment . . . establishes state water policy. All uses of water, including public trust uses, must now conform to the standard of reasonable use.*" (33 Cal.3d, at p. 443 (emphasis added).) Article X, section 2 requires that state decisionmakers assess the water costs of their decisions for competing uses of water and seek to minimize those costs. (*City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 341 (courts); *Environ. Defense Fund v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 200 (judicial and SWRCB concurrent jurisdiction under Art. X, § 2).)

Porter-Cologne contains similar statutory mandates. Water Code section 13000 states, in relevant part:

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, *considering all demands being made and to be made on those waters*, and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

(Emphasis added).

Water Code section 13001 implements this policy, stating, "The state board and the regional boards in exercising any power granted in this division shall conform to and implement the policies in this chapter [Water Code §§ 13000-13001]" Further, Water Code section 13160, which grants the SWRCB the authority to issue water quality certifications, is part of Porter-Cologne and therefore is subject to the policy stated in Water Code section 13000 and Water Code section 13001's mandate that the SWRCB abide by that policy "in exercising any power granted" by Porter-Cologne.

The Delegated Certification contains no assessment of its terms' effects on "all demands being made" of the waters of the Yuba River. That alone is enough to show that the Delegated Certification is inappropriate and improper because it is inconsistent with Article X, section 2 and Porter-Cologne's requirements for the analysis of potentially

competing water uses. The Delegated Certification compounds this problem by implicitly defining "water quality" so broadly that the certification encompasses the potential for SWRCB's staff to compel YCWA to spend hundreds of millions of dollars to address the effects of congressionally-authorized and federal-owned Englebright and Daguerre Point Dams and to alter the actual bed of the river itself.

Finally, the Delegated Certification fails the most basic test for an administrative decision that is subject to judicial review under Code of Civil Procedure section 1094.5. According to the California Supreme Court's decision in *Topanga Assn. for a Scenic Community vs. County of Los Angeles* (1974) 11 Cal.3d 506, 515, Code of Civil Procedure section 1094.5 establishes:

[A] requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. If the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandamus the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route.

(*Topanga, supra* 11 Cal. at 515.) *Topanga's* logic applies to regulatory actions under Porter-Cologne that are reviewed under Code of Civil Procedure section 1094.5.

(*Asociation de Gente Unida for el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1268.)

The Delegated Certification fails to meet *Topanga's* requirements for many reasons. It fails to explain how its terms comply with Article X, section 2's and Porter-Cologne's fundamental policies. Many of its terms – particularly those concerning Yuba River streamflows, fish passage and lower Yuba River habitat – are so vague and subject to the exercise of future SWRCB staff discretion that it is not possible for the certification to have bridged "the analytic gap between the raw evidence and ultimate decision or order." This is especially true in light of the robust technical information that the Delegated Certification either did not address or dismissed without any explicit analysis.

State agencies' decisions concerning water quality certifications issued under section 401 of the Clean Water Act also can be reviewed under the federal Administrative

Procedure Act (Federal APA). (See *Greater Yellowstone Coalition v. Lewis* (9th Cir. 2010) 628 F.3d 1143, 1148, 1152-1153; *National Fuel Gas Supply Corp. v. N.Y. State Dep't of Envtl. Conservation* (2nd Cir 2019) 761 Fed.Appx. 68, 71-72 (state agency ruling on application for water quality certification vacated for failure to address FERC's findings).)¹⁴ Under the Federal APA, a court may "hold unlawful and set aside agency action, findings, and conclusions" if they are found to be, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right;" "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" or "without observance of procedure required by law." (5 U.S.C. § 706(2)(A)-(D).) Review of an agency action under the Federal APA to determine whether that action was arbitrary or capricious involves, among other things, a determination whether "the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency" (*Greater Yellowstone, supra*, 628 F.3d, at p. 1148.)

For the same reasons that the Delegated Certification fails to comply with *Topanga's* requirements under Code of Civil Procedure section 1094.5, that certification fails under the Federal APA. The Delegated Certification failed to consider "relevant factors" as required by Article X, section 2 and Porter-Cologne; failed to explain why "relevant data" that was readily available from FERC's proceedings was disregarded; and failed to explain "a rational connection" between "the facts found and the choice made," to the extent choices were made in light of the Delegated Certification's significant sub-delegations of future decisions to SWRCB staff.¹⁵

The technical information summarized below and submitted with YCWA's petition for reconsideration demonstrates that the Delegated Certification not only fails to comply with basic rules for administrative decision-making, but also does not comport with constitutional and statutory policies enacted by the people and the Legislature, respectively.

¹⁴ A copy of this decision is provided as Attachment L 7, per Federal Rules of Appellate Procedure, rule 32.1.

¹⁵ For the reasons discussed above in Sections II - III, the Delegated Certification also is invalid under the Federal APA because the procedures by which it was issued were "in excess of statutory jurisdiction, authority, or limitations" and were "contrary to constitutional right," "short of statutory right" and "without observance of procedure required by law." (See 5 U.S.C. § 706(2), subds. (B)-(D).)

A. Based on the SWRCB Staff's 2018 Bay-Delta Framework, the Delegated Certification's Condition 1(D) Could Result in Severe Impacts to Water Temperatures to Support Yuba River Salmonids, Hydroelectric Generation and Agricultural Water Supplies

The Delegated Certification sets certain minimum lower Yuba River streamflows that appear to be based on the Yuba Accord flows that the SWRCB approved in Corrected Order WR 2008-0014, with some "minor alterations." (Delegated Certification, pp. 17, 26-32.) The Delegated Certification, however, goes on to state that "there is uncertainty" related to lower Yuba River flows and states the following rationale for *possible* changes to lower Yuba River streamflow requirements:

[T]here is uncertainty as to the impact of YCWA's proposed changes to the Yuba Accord flows, and additional modifications may be needed to better address the Project's impacts to the Yuba River and aquatic resources over the term of the license (such as those proposed by CDFW in its 10(j) conditions). There are indications that YCWA's flow proposal for the lower Yuba River below Englebright Dam may not adequately provide for:

- Holding temperatures for spring-run Chinook salmon in Schedule 6 years;
- Floodplain inundation during the winter and spring juvenile salmonid growth period;
- Juvenile salmonid habitat in the early growth period, which may trigger early or premature outmigration of juvenile salmonids; and
- Spill reductions for natural riparian regeneration following spring flows.

There is evidence that additional alterations to lower Yuba River flows and flows below New Bullards Bar may be needed to better address the Project's impacts on aquatic resources, water quality objectives, and beneficial uses. A more detailed description of potential insufficiencies with YCWA's flow proposal is included in CDFW's 10j, Section 3.4.8 *Rationale for Flow and Aquatic Resources Conditions – Minimum Instream Flows in the Lower Yuba River* (CDFW 2017, Recommended Conditions 2.5 and 2.6), and 3.4.6 *Rationale for Flow and Aquatic Resources Conditions – Minimum Instream Flows in the North Yuba River Downstream of New Bullards Bar Dam*.

(Delegated Certification, pp. 17-18.)

Based on this discussion, the Delegated Certification then requires YCWA to consult with various federal and state resources agencies no later than "following the adoption of

any future amendments to the *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Bay-Delta Plan)" and within 10 years of FERC's issuance of a new license for the YRDP. (Delegated Certification, p. 32 (Condition 1(D).) YCWA then would be required to submit a proposal for potential changes to the lower Yuba River streamflow requirements, with the SWRCB's Deputy Director for Water Rights then having the following sub-delegated authority:

The Deputy Director may approve the Licensee's proposal or require other changes to the extent necessary to ensure reasonable protection of the beneficial uses. If changes to the flows are required, within 10 days of the Deputy Director's approval of the Licensee's proposal or changes thereto, the Licensee shall file a request with FERC to amend the flow requirements and/or other management actions in the license. The Licensee shall implement the new flows and/or other management actions as soon as reasonably practicable after receiving the Deputy Director's decision and any other required approvals.

(Delegated Certification, p. 32 (Condition 1(D).)

Other terms of the Delegated Certification impose similarly broad obligations on YCWA to comply with whatever amendments to the Bay-Delta Water Quality Control Plan ("Bay-Delta Plan") the SWRCB eventually may adopt. For example, Conditions 31 and 32 state:

CONDITION 31. In addition to the specific conditions in this certification, the Project shall be operated in a manner consistent with all applicable requirements of the Bay-Delta Plan and SR/SJR Basin Plan.

CONDITION 32. In addition to the specific conditions in this certification, the Project shall be operated in a manner consistent with all water quality standards and implementation plans adopted or approved pursuant to the Porter-Cologne Water Quality Control Act or section 303 of the Clean Water Act. The Licensee must take all reasonable measures to protect the beneficial uses of the Yuba River and its tributaries.

(Delegated Certification, p. 57; see also *id.* at p. 26 (Condition 26 (Deputy Director authority includes authority "to require modification of a proposal, plan, or report prior to approval").)

The certification contains no analysis of the potential impacts on YCWA's water supplies, hydroelectric generation, revenues based on that generation, indirect impacts on local groundwater conditions and disadvantaged communities or even on the river conditions for lower Yuba River anadromous salmonids that appear to be the certification's

primary focus. Instead, the certification simply delegates future decision-making authority to the Deputy Director. As noted above, because the Delegated Certification fails to contain or incorporate any analysis of the potential effects of its terms concerning streamflows, it is inconsistent with multiple applicable laws.

In order to evaluate the potential effects of the certification's terms under which the Deputy Director could impose higher streamflow requirements on YCWA and the YRDP – primarily Condition 1(D) – YCWA's engineer Stephen Grinnell and its consulting firm HDR modeled a potential application of those terms. Based on the Delegated Certification's reliance on CDFW's "10(j)" recommendations, its statements that flow modifications may be needed over the term of the license "such as those proposed by CDFW in its 10(j) conditions" (Delegated Certification, p. 17) and its citation of potential amendments to the Bay-Delta Plan as likely bases for future modifications to Yuba River streamflow requirements, Mr. Grinnell and HDR prepared an analysis that compares the effects of operating the YRDP under the terms proposed in the Final EIS adopted by FERC and the U.S. Army Corps of Engineers against the effects of a "Projected Condition 1(D)" scenario in which it is assumed that the Deputy Director would impose a combination of CDFW's 10(j) recommendations and the "Sacramento/Delta Inflow Objective" and "Cold Water Habitat Objective" proposed by the SWRCB staff in their *July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan*. (Attachment B5, pp. 14-16 (July 2018 framework).) The analysis by Mr. Grinnell and HDR assumed that the 55% unimpaired flow standard stated in the proposed "Sacramento/Delta Inflow Objective" would be implemented according to the 2018 framework's "default" standard in its proposed program of implementation: "The proposed program of implementation would require tributaries without voluntary agreements to provide 55% of unimpaired flow, based on a minimum 7-day running average, measured at the confluence of the tributary." (Attachment B5, p. 25.)

Based on this analysis, Mr. Grinnell and HDR determined that implementation of CDFW's 10(j) recommendations and the SWRCB's "Sacramento/Delta Inflow Objective" and "Cold Water Habitat Objective" under the Delegated Certification would have the following effects:

- *Severe Water-Supply Impacts.* YCWA's water-supply deliveries to Yuba County's farmers would be reduced by an annual average of 20% (60,044 acre-feet per year), with reductions of 36% (109,198 acre-feet per year) in dry

years and 49% (148,186 acre-feet) in critical years (Attachment B1, pp. 16-17 (Table 3.1));

- *Severe Impacts on the Value of Hydroelectric Generation.* The economic value of YCWA's hydroelectric generation would be reduced by approximately \$2.8 million annually, and \$140 million over a 50-year FERC license term – before adjustment for inflation – largely as a result of a large shift in generation from high-value summer months to low-value spring months (Attachment B1, pp. 20-21, Table 3.3, "Average Annual Generation Value (\$)"); and
- *Reduction of Carryover Storage to Minimum Pool.* September 30 carryover storage in New Bullards Bar Reservoir would be reduced by approximately 100,000 to 200,000 acre-feet in the driest 50% of conditions in the modeled period of record, with the Delegated Certification's implementation as reflected in the Projected Condition 1(D) scenario, and storage would be at or near the FERC minimum pool of 230,000 acre-feet in approximately 10% of years, even with restrictions that attempt to maintain carryover storage for water supply and a cold water pool (Attachment B1, pp. 19-20, Figure 3.2).

Perhaps most tellingly, Mr. Grinnell's and HDR's analysis indicates that implementation of the Delegated Certification as described in the Projected Condition 1(D) scenario would cause adverse impacts to habitat for anadromous salmonids in the lower Yuba River. Relative to the proposed terms contained in the Final EIS prepared by FERC and the Army Corps U.S. Army Corps of Engineers, implementation of the certification as described in the Projected Condition 1(D) scenario would *increase* lower Yuba River water temperatures in the summer and fall during the federal ESA and State CESA-listed spring-run Chinook salmon's adult immigration, adult holding and juvenile rearing lifestages, and would result in particularly harmful water temperatures during the spawning period. (Appendix B, pp. 30-46.) The water temperature increases associated with the Delegated Certification's projected implementation would be particularly pronounced during the times when the warmest water temperatures occur, exacerbating already stressful conditions. (Appendix B, pp. 33-35, Figures WTD-1 to WTD-3.)

The water temperature results that would be experienced by spring-run Chinook salmon during the adult holding, spawning and over-summer rearing lifestages are particularly telling. As the Delegated Certification states (p. 22), "Central Valley spring-

run Chinook salmon are listed as threatened under the federal ESA and the California ESA." Notwithstanding this listing status, the certification's implementation – as described in the modeling results for the Projected Condition 1(D) scenario – would result in Yuba River water temperatures exceeding: (1) the upper tolerable water temperature threshold for spring-run Chinook salmon spawning 35% more of the time than the Final EIS Base case, when water temperatures are warmest and most stressful; and (2) the upper optimal water temperature threshold for spring-run Chinook salmon adult holding and over-summer juvenile rearing 21% more of the time, also when water temperatures are warmest and most stressful. (Appendix B, pp. 38-39, Figures WTS-1 and WTS-2.)¹⁶

Impacts on physical habitat in the lower Yuba River for Chinook salmon also would occur with the Delegated Certification's implementation, as reflected in the Projected Condition 1(D) scenario. (Appendix B, pp. 47-50.) Most prominently, physical habitat – depicted in the standard metric of "weighted usable area" or "WUA" – would be reduced during the lowest-flow conditions for listed spring-run Chinook salmon. The analysis shows that spring-run Chinook salmon spawning habitat would be reduced about 15% of the time, when habitat is most limiting, in the Projected Condition 1(D) scenario relative to the Final EIS Base case. (Appendix B, pp. 57-58, Figure HAB-1.) This result is particularly telling in light of the Court of Appeal's recent *Stanford Vina* decision, which upheld the SWRCB's use of a highly expedited emergency rulemaking to impose minimum-flow standards during the recent drought in order to protect listed spring-run Chinook salmon. (*Stanford Vina Ranch Irr. Co. v. State of Cal.* (2020) 50 Cal.App.5th 976, 986-987, 989-992.) While the SWRCB used expedited procedures to protect bare minimum streamflows for spring-run Chinook salmon in *Stanford Vina*, an analysis of the projected implementation of the Delegated Condition indicates that it actually could *cause* similarly damaging conditions for listed spring-run Chinook salmon in the lower Yuba River.

While the Delegated Certification clearly states that the Deputy Director may exercise sub-delegated authority to increase the minimum lower Yuba River streamflow

¹⁶ The Delegated Certification states that cold water in YCWA's New Bullards Bar Reservoir could be preserved to some degree for later temperature management through variable operation of the dam's intakes. (Delegated Certification, pp. 21, 44-45 (Condition 7).) As discussed in Appendix E (pp. 7-11), however, existing analysis demonstrates that such an operation would have little effect on temperatures in the lower Yuba River. The Delegated Certification does not discuss this analysis in its rationale for its related Condition 7. (Delegated Certification, p. 21.)

requirements based on considerations presented in CDFW's 10(j) recommendations and on potential amendments to the Bay-Delta Plan, the certification contains no analysis of the effects of such changes to its terms. In order to evaluate the potential effects, YCWA's consultants modeled a projected scenario based on the effects of implementing a combination of CDFW's 10(j) recommendations and new Bay-Delta Plan water quality objectives proposed by the SWRCB's staff in their July 2018 Sacramento/Delta framework. YCWA's analysis indicates that, if the Deputy Director were to impose such requirements as he or she would be authorized under the sub-delegations stated in multiple terms of the Delegated Certification, the results would be severe water-supply impacts, significant reductions in the value of YCWA's hydroelectric generation, large reductions in YCWA's carryover storage and adverse impacts on water temperatures and physical habitat for anadromous salmonids in the lower Yuba River. The Delegated Certification's lack of detailed technical analysis to support the sort of increased streamflow requirements that it would authorize the Deputy Director to impose, unilaterally, on YCWA without even guaranteeing a prior hearing presents a very serious, unassessed risk to all beneficial uses of the Yuba River's water. Therefore, it cannot stand. The SWRCB should grant reconsideration and vacate the Delegated Certification.

B. The Delegated Certification's Condition 20 Concerning Fish Passage Fails to Consider Extensive Existing Information Showing Passage Would Involve Enormous Expense, Generate Highly Uncertain Benefits, and Address Only the Non-YRDP Impacts of Hydraulic Mining and Federal Facilities

The Delegated Certification's Condition 20 states, in relevant part:

No later than six months following license issuance, the Licensee shall initiate consultation with NMFS, USFS, USFWS, CDFW, USACE, and State Water Board staff on studies regarding fish passage. At a minimum these studies shall include:

- An assessment of a reasonable range of passage alternatives. This shall include evaluating alternatives for adult and juvenile volitional fish passage, as well as adult and juvenile trap and haul to locations above Englebright Dam and/or New Bullards Bar Reservoir. The evaluation of alternatives shall include an assessment of the adequacy of existing studies, and/or the need for additional studies . . .

No later than three years following license issuance, the Licensee shall complete the studies and submit an informational report to the Deputy Director for review, including related information, and a proposal regarding

anadromous fish passage past Project facilities. The Licensee shall develop the report in consultation with NMFS, USFS, USFWS, CDFW, USACE, and State Water Board staff. The Deputy Director may require modifications to the report. The Licensee shall file the Deputy Director reviewed informational report with FERC.

The Executive Director may require implementation of the proposal in the report, or other alternative, following notice and an opportunity to be heard.

(Delegated Certification, p. 53.)

The language of Condition 20 might be considered ambiguous about whether it requires YCWA to propose passage above the U.S. Army Corps of Engineers' Englebright Dam. It says YCWA shall submit a "proposal regarding anadromous fish passage past Project facilities" and the federal Englebright Dam certainly is not one of YCWA's facilities. The Delegated Certification's rationale for Condition 20 recognizes this fact, but treats it as only inconvenient for an assertion of authority to require YCWA to nonetheless attempt to move fish above that federal dam:

Englebright Dam is the upper limit of anadromy on the Yuba River. Though Englebright Dam is owned by USACE, YCWA's Project operations rely on Englebright Dam to support peaking hydroelectric energy production at New Colgate and baseflow operations at Narrows 2 Powerhouse. The Project cannot operate as it has historically or proposed in its Amended FLA without use of Englebright Dam. Additionally, Project operations directly alter operations of Englebright Dam by reducing the duration and magnitude of spills from Englebright Dam and by controlling flows in the lower Yuba River. Additionally, prior to encountering Englebright Dam, anadromous fish are subject to Project impacts that affect flows in the lower Yuba River. As such, under current conditions, the Project directly impacts listed salmonids through its historic and proposed future operations. Condition 20 requires YCWA to develop a report that includes a proposal regarding fisheries reintroduction to reduce Project-related effects to listed salmonids.

(Delegated Certification, p. 24.)

There are many legal problems with the Delegated Certification's assertion of authority to require YCWA to potentially be fully responsible for ensuring passage of salmonids above the federal government's Englebright Dam. These problems are discussed in detail below in Section V. In summary, they are as follows:

- Requiring that YCWA implement fish passage over the federal dam is not within the "activity" over which the SWRCB has any certification authority under section 401 of the Clean Water Act because the long history of federal legislation, and construction

and operation of facilities on the Yuba River, to control the literal landslide of hydraulic mining debris that obliterated the river's channel and destroyed the surrounding habitat demonstrates that Englebright Dam is a federal facility built for federal purposes separate from the sorts of hydroelectric-generation and water-supply facilities and operations that comprise the YRDP;

- To be an "appropriate requirement of State law" under section 401 of the Clean Water Act, a water quality certification's terms must reflect principles of California law that require environmental measures to be "roughly proportional" to a project's impacts, while Condition 20's fish-passage terms would reach far beyond the YRDP's impacts, as demonstrated by CDFW's historical reports that show that, just before the YRDP began operating, conditions in the Yuba River were so bad that CDFW sometimes would build a physical barrier across the river's mouth to prevent salmon from migrating into it;
- Condition 20's fish-passage terms are not within the scope of an allowable water quality certification under section 401 of the Clean Water Act and the Porter-Cologne Water Quality Control Act because physical fish passage is not within the definition of water quality under either act, given that passage has nothing to do with the physical and biological integrity of water;
- Congress's carefully constructed permitting regimes under the Clean Water Act dedicate the regulation of physical habitat to the U.S Army Corps of Engineers under the act's section 404 and not to states under its section 401, which incorporates a variety of other sections of the act, but not section 404;
- Allowing the SWRCB to operate an ongoing regulatory program broad enough to encompass ordering hydroelectric project owners to ensure fish passage above federal facilities would grant the SWRCB concurrent jurisdiction with FERC to an extent that even the SWRCB itself has recognized as not legal; and
- By seeking to regulate beyond the effects of the YRDP's discharges on an ongoing basis, Condition 20 would violate the U.S. EPA's recently adopted regulations on water quality certifications.

For all of these reasons, the SWRCB should grant reconsideration of the Delegated Certification and vacate it because it cannot be sustained under either the Federal APA or Code of Civil Procedure section 1094.5.

Moreover, the Delegated Certification's rationale for Condition 20 and that condition's requirement that YCWA conduct yet more studies and consultations just so the SWRCB's Executive Director can order YCWA to do whatever he or she chooses – without even a guaranteed hearing – shows that the certification does not reflect the large volume of studies and information about potential fish passage above Englebright Dam that already exists. Not only does the rationale for Condition 20 not discuss the results of all of these studies, it also does not discuss their conclusion that providing fish passage above Englebright would cost hundreds of millions to over \$1 billion for highly uncertain benefits for fish.

All of these points are discussed in detail in Appendix A submitted with the Petition and this Statement. While the Delegated Certification states that the "[p]roceedings of the Yuba Salmon Forum" were considered in developing the certification, and while its rationale for Condition 20 generally describes the Yuba Salmon Forum (Delegated Certification, pp. 15-16, 24), nowhere does the certification analyze the large volumes of information about the viability, cost and fishery benefits – or lack thereof – that has been produced before, during and after the forum, as described in Appendix A. (Appendix A, pp. 8-14.) Nowhere does the certification discuss the available best estimate that the likely most viable fish-passage program – which would involve trucking adult salmon from the lower Yuba River to the North Yuba River above New Bullards Bar Reservoir and then somehow collecting juvenile salmon in that river and moving them to the lower Yuba River – would cost between \$624 million and \$1.03 billion. (Appendix A, pp. 11-14.) The Delegated Certification also does not analyze or even discuss existing scientific reports that indicate that the potential fishery benefits might be quite small because of limited physical habitat for spawning salmon in the areas where their reintroduction might occur. (Appendix A, pp. 14-15.)

Instead of addressing and analyzing the voluminous existing studies about all of the issues associated with ensuring fish passage above the federal government's Englebright Dam, the Delegated Certification's Condition 20 would require YCWA to conduct more studies and hold more consultations leading to the Executive Director exercising essentially unbounded discretion in deciding what to order YCWA to do. (Delegated Certification, p. 53.) The certification contains no factual analysis that is sufficient to require YCWA to undertake any effort to move fish above Englebright Dam. Unsupported by any analysis of

the relevant technical information, an untested legal theory that YCWA can be held responsible for a federal dam that was built for separate federal purposes over 20 years before the YRDP's construction does not satisfy the basic test of California administrative law. The Delegated Certification does not "bridge the analytic gap between the raw evidence and ultimate decision or order" as required by *Topanga*. (*Topanga*, 11 Cal.3d, at p. 515.) For essentially the same reasons, the certification's adoption of Condition 20 also was arbitrary and capricious under the Federal APA. The SWRCB should grant reconsideration and vacate the certification.

C. The Delegated Certification's Condition 12 Concerning Lower Yuba River Habitat Restoration Compels YCWA to Attempt to Mitigate For Historic Hydraulic Mining and Ignores the Habitat Benefits the YRDP Has Provided

The Delegated Certification's Condition 12 would require YCWA to prepare a "Lower Yuba River Habitat Restoration Plan" and states, "[t]he Restoration Plan's objective shall be the restoration and enhancement of functioning juvenile salmonid rearing habitat in the lower Yuba River through implementation of specific restoration and enhancement measures." (Delegated Certification, p. 48.) The certification then states that the plan YCWA must prepare is to contain the following, among other things:

1. Identification of restoration and enhancement actions that will be implemented by the Licensee in the lower Yuba River. Development of restoration and enhancement actions shall at a minimum include consideration of lowering of floodplain surfaces, planting of riparian vegetation, installation of LWM, and gravel augmentation;
2. Schedule for restoration and enhancement activities . . .

(Delegated Certification, p. 48.)

The certification then grants the SWRCB's Deputy Director for Water Rights sub-delegated authority to modify – without any particular process – YCWA's proposal:

The Deputy Director may require adaptive management actions be implemented based on the results of effectiveness monitoring, reporting, or other related information. The Licensee shall file the Deputy Director-approved Restoration Plan, together with any required plan modifications, with FERC. The Licensee shall implement the Restoration Plan upon receipt of Deputy Director and any other required approvals.

(Delegated Certification, p. 49.)

The certification's rationale for this broad program and sub-delegation to the Deputy Director generally discusses conditions in regulated rivers and the Yuba River, with generalized statements that "Project flows have reduced floodplain and riparian corridor inundation and connectivity" and that "LWM [large woody material] is impounded in the Project's reservoirs." (Delegated Certification, p. 22.)

Condition 12 and the Delegated Certification's rationale for it, however, both ignore the well-known history of the Yuba River, as well as FERC's prior technical analysis that rejected the same claims reflected in the certification as a basis for anything more than minor habitat work. As explained in detail in Appendix C and below in Section IV.C of this Statement, hydraulic mining in 1800s obliterated the Yuba River's original channel, generally destroying the river's riparian habitat. As Judge Lorenzo Sawyer found in his famous 1884 decision enjoining hydraulic mining:

The portion of the valley here referred to as covered with sand is that portion of the borders of the Yuba river extending across the Sacramento valley from the foot-hills to its junction with Feather river at Marysville, -- a distance of about 12 miles . . . Not only has the channel of the river through these bottoms been filled up to a depth of 25 feet and upwards, but this entire strip of bottom land has been buried with sand and *debris* many feet deep, from ridge to ridge of high land, and utterly ruined for farming and other purposes . . .

(*Woodruff v. No. Bloomfield Gravel Min. Co.* (C.C.D. Cal. 1884) 18 F. 753, 760.)

As also explained in detail in Appendix C and below in Section IV.C of this Statement, in the early 1900s, the federal government then built a series of structures in the lower Yuba River to attempt to control the debris, as well as the river's channel, culminating in the construction of the impassable federal Englebright Dam in the early 1940s. This is no relic of the past or obsolete function. Even today, as explained in Appendix A, the federal Daguerre Point and Englebright dams not only impound hydraulic debris and associated toxic materials generated in past decades, but, at least in Englebright's case, continue to receive sediments washing through the watershed.

The Delegated Certification simply ignores this well-known history of the river – all of which took place decades before YCWA built the YRDP – in favor of generalized statements about the lack of "riparian floodplain and riparian overstory" on "regulated rivers," about how "Project flows have reduced floodplain and riparian corridor inundation and connectivity" and about how the YRDP impounds "large woody material." In light of the

history of the Yuba River and the destruction of its riparian habitat by other actors decades before YCWA built the YRDP, such generalized theories cannot support the sort of open-ended restoration program that the Delegated Certification's Condition would allow the Deputy Director to impose on YCWA.

This is particularly true because Appendix C demonstrates that existing information documents not only how the YRDP has *improved* the river's riparian habitat, but also how CDFW's own historical materials show just how bad conditions for salmon and other fish were in the years immediately before YCWA built the YRDP. A few examples cited in Appendix C will suffice. A 1963 CDFW report concerning the Yuba River describes what occurred on the river in 1958 and 1959 as follows:

Lack of water posed a great threat to the salmon run on the Yuba in 1958. A combination of rain and timely releases of water averted what could have meant the loss of most of the run. As it was, 114 of the 199 salmon carcasses recovered between Daguerre Point Dam and the Baldwin Gravel Plant, the area which suffered from low water, were of unspawned fish."

For the third consecutive year a portion of the salmon spawning run on this stream was lost. The 1959 loss was a major one consisting of approximately one-third of the total run. The extensive fish loss was the result of attraction of salmon into the stream by relatively large flows with subsequent cutbacks and diversion which resulted in an almost dry streambed in the spawning area below Daguerre Point Dam.

(Appendix C, p. 7 (citing Wooster 1963 (submitted as Attachment C14).)

A 1970 CDFW preliminary report describes how, in 1960, CDFW agreed to actually prevent salmon from migrating into the Yuba River during part of the year:

On or before September 7, Department of Fish and Game will install and maintain a temporary barrier at the mouth of the Yuba River to prevent salmon from entering the stream until October 15, when adequate transportation and spawning are provided.

(Appendix C, p. 6 (citing Wooster & Wickwire 1970 (submitted as Attachment C15).)

As with the Yuba River's history generally, the Delegated Certification simply ignores this documented pre-YRDP history of conditions for salmon and other fish in the river in making the certification's generalized statements about the river's habitat and the YRDP's effect on it. This omission is particularly striking because the Wooster 1963 and Wooster & Wickwire 1970 reports were exhibits in prior SWRCB proceedings that resulted

in the SWRCB's 2003 decision, which the certification explicitly cites as a reference. (Delegated Certification, p. 60 (citing 2003 SWRCB decision).)

Finally, the Delegated Certification ignores the fact that FERC and the U.S. Army Corps of Engineers analyzed, in detail in their final EIS, the concerns on which the certification bases Condition 20 and required YCWA to implement a much less extensive habitat-restoration program than Condition 20 would allow the Deputy Director to impose on YCWA.¹⁷ Resource agencies and environmental groups proposed that FERC require YCWA to implement an extensive plan for restoring habitat for juvenile salmonids throughout the lower Yuba River, extending 21 miles downstream from Englebright Dam. (FEIS, pp. 3-207 to 3-210.) FERC and the Army Corps, however, rejected this proposal, based largely on findings in which they distinguished YCWA's lack of responsibility for the historic destruction of the river's habitat by others, and instead adopted much less extensive terms. (FEIS, pp. 3-207 to 3-214, 5-11 to 5-16.) Under the terms adopted by FERC and the Army Corps, YCWA would develop, for FERC's consideration and in consultation with the SWRCB, among others, a plan for placing large woody material in the lower Yuba River. (FEIS, pp. C-6 to C-9.) YCWA also would develop, for FERC's consideration, a plan for "planting riparian vegetation on 100 acres of floodplain in the lower Yuba River, including no fewer than four separate planting sites." (FEIS, Appendix C, pp. C-6 to C-9.)

In other words, FERC and the Army Corps reviewed the exact same issues as those covered by the Delegated Certification's Condition 20, rejected broad proposals from resource agencies similar to Condition 20 based on a recognition of how little responsibility YCWA bears for the condition of the lower Yuba River's physical habitat and tailored the FEIS's terms to YCWA's responsibility. Without even acknowledging this analysis by FERC and the Army Corps, the Delegated Certification appears to simply disagree and would authorize the Deputy Director to impose broad obligations on YCWA. This sort of approach is arbitrary and capricious under the Federal APA because the Delegated Certification's "explanation . . . runs counter to the evidence before the agency" (*Greater Yellowstone, supra*, 628 F.3d, at p. 1148), and also fails *Topanga's* basic requirement that an agency "bridge the analytic gap between the raw evidence and ultimate decision or

¹⁷ FERC's and the Army Corps' Final EIS is identified as a reference in the Delegated Certification on page 60. This Statement refers to that document as the "Final EIS" or "FEIS."

order." (11 Cal.3d, at p. 515.) Evidence in the record and the governing federal agency's analysis may not be disregarded on an issue in favor of keeping the SWRCB staff's options open for imposing extensive and burdensome obligations on YCWA.

D. The Delegated Certification's Condition 6 on Lohman Ridge Tunnel Closures Ignores FERC's Technical Analysis and Would Impose a \$22 Million Obligation on YCWA for Little Demonstrable Environmental Benefit

YCWA's Lohman Ridge tunnel conveys water diverted from the Middle Yuba River eventually to New Bullards Bar Reservoir, from which it is available to derive hydroelectric generation at YCWA's New Colgate powerhouse. (Delegated Certification, p. 5.) The New Colgate powerhouse is YCWA's largest and is a "peaking" facility that can ramp up and down from generating one megawatt to generating its full 315 megawatt capacity, and back, in fewer than 10 minutes, when necessary to contribute to meeting peak demands for electricity. (Final EIS, p. 2-12.) The Delegated Certification's Condition 6, however, would reduce water available for generation at New Colgate by requiring YCWA to keep the Lohman Ridge tunnel closed more often than the conditions discussed in FERC's and the Army Corps' Final EIS, particularly by requiring closure in dry and critically water years not contemplated by FERC and the Army Corps. (Delegated Certification, pp. 43-44; Appendix D, pp. 3-4.) The certification's rationale for Condition 6 relies on CDFW's comments concerning, among other things, the potential entrainment of "rainbow trout and potentially other native fish and frog species" through the tunnel. (Delegated Certification, p. 21.)

The problem with the certification's complete reliance on CDFW's comments, however, is that FERC and the Army Corps demonstrated in their Final EIS that CDFW's proposal for closure of the Lohman Ridge tunnel would have little environmental benefit and would cost YCWA approximately \$22 million – not adjusted for inflation – in lost hydroelectric generation revenue over a license's 50-year term. (Appendix D, pp. 4-6.) FERC and the Army Corps found that the additional tunnel closures would only prevent the entrainment of about 21 fish a year, that fish that went into the tunnel would not be subject to any turbines and that there was evidence fish diverted into the tunnel actually could swim back up it. (Appendix D, pp. 4-7.) In other words, FERC and the Army Corps found that there was essentially no environmental justification for requiring the sort of additional tunnel closures that Condition 7 would impose.

In simply choosing to agree with CDFW rather than FERC and the Army Corps without even addressing their environmental and economic analyses, the Delegated Certification would impose a \$22 million obligation on YCWA without any sort of analysis based on the evidence available. The imposition of Condition 7 in the Delegated Certification therefore was arbitrary and capricious under the Federal APA and violated basic rules of California administrative law as explained in *Topanga*.

E. The Delegated Certification's Condition 7 on New Colgate Power Tunnel's Intakes Ignores FERC's Technical Analysis Showing It Would Not Benefit Fish, But Would Cost YCWA \$55 Million During the Term of the License

The Delegated Certification's Condition 7 would require YCWA to use the upper intake in New Bullards Bar Reservoir for the New Colgate Powerhouse in the months of March, April and May no later than three years after YCWA receives a new license from FERC. (Delegated Certification, pp. 44-45.) Condition 7 further would require YCWA to consult with a technical review group every year to determine what intake to use during the remainder of the year. (*Id.*) The certification would sub-delegate authority to the Deputy Director authority to require "changes in the operations of the New Colgate Power Tunnel Intake" (*Id.*) The Delegated Certification's stated rationale for Condition 7 is that requiring YCWA to draw water from the upper level of New Bullards Bar Reservoir in the spring months is intended to support releases of cooler water in later, warmer months: "Condition 7 is designed to save cold water for later in the year (i.e., fall) by requiring use of the upper intake in the spring. This condition will help improve water temperatures in the Middle and lower Yuba River and allow for greater growth and reproduction of both stream and anadromous salmonids." (Delegated Certification, p. 21.)

The problem with this rationale is that FERC's and the Army Corps' analysis of this CDFW proposal in the Final EIS demonstrated that compelling YCWA to draw from the upper intake would do essentially nothing to make the lower Yuba River cooler and would cost YCWA approximately \$1.1 million a year every year for the potential 50-year license term. YCWA does not operate the upper intake now because, in 1993, it agreed with CDFW to only use the lower intake to draw water that was as cold as possible from New Bullards Bar Reservoir to support downstream fish. Appendix E explains FERC's and the Army Corps' analysis of both the lack of any benefit from, and the associated large cost of, compelling YCWA to use the currently non-operational upper intake three months out of

the year. (Appendix E, pp. 3-11.) The Delegated Certification simply fails to address the existing analysis by FERC and the Army Corps and instead chooses to impose on YCWA a condition that has been demonstrated to have little to no chance of improving conditions for downstream salmon, while costing YCWA approximately \$55 million – not adjusted for inflation – over a potential 50-year license term. The certification's adoption of Condition 7 therefore violated basic administrative-law requirements under *Topanga* and was arbitrary and capricious, as defined by the Federal APA.

F. The Delegated Certification Does Not Analyze Its Terms' Likely Significant Indirect Impacts on Yuba County's Disadvantaged Communities and Economy

The state considers more than half of the communities in Yuba County to be disadvantaged. (Appendix F, p. 2.) Nearly 25% of Yuba County's people – twice the state average – live below the poverty line. (*Id.*) In the communities of Linda and Olivehurst, near the Yuba and Feather Rivers, nearly 50% of the people live below the poverty line. (*Id.* at pp. 2-3.) The social and economic challenges confronting these communities are in large part tied to Yuba County's water problems, most notably the fact that the Yuba and Feather Rivers have had several devastating – and lethal – floods, the worst occurring in 1955, 1986 and 1997. (*Id.* at pp. 1, 4-5.) The legacy and risk of flooding in Yuba County has discouraged economic investment, job creation and social advancement. The resulting economic problems created by such flooding, and the continued risk of flooding, are indicated by the disparity in sales tax revenues of Yuba County and its neighbor across the Feather River, Sutter County. While Yuba County ranked next-to-last in per capita taxable sales in 2017 among areas in the Sacramento Valley and the foothills, Sutter County was much higher and even above the statewide average. (*Id.* at p. 4.) It is little wonder then that, when the Legislature created YCWA specifically to address the county's water problems, it cited the need to control floods as one reason for doing so. (*Id.* at pp. 4-5 (quoting § 26 of the 1959 Yuba County Water Agency Act (West's Water Code Appendix § 84-26).)

The revenues YCWA generates by operating the YRDP represent one of the only local sources of funding to support significant investments in public safety measures that reduce the risk of flooding to improve the lives of people throughout Yuba County, especially in disadvantaged communities. (Appendix F, pp. 1, 7.) In the last three fiscal

years alone, YCWA has contributed \$15.4 million in grants and \$36.6 million in low-interest loans to support public safety, flood risk reduction and economic development in the county. (*Id.* at p. 5.) YCWA's financial support to the community has included paying \$5.6 million annually in bond debt to cover both its share and Yuba County's share of major levee improvements along the Feather River. (*Id.*) YCWA also partners with local cities, reclamation districts and utility districts on regional solutions for water and wastewater infrastructure and services, which will help to protect the groundwater supplies on which 80% of the county's residents rely for drinking water. (*Id.* at p. 6.) To benefit the Yuba River itself, YCWA contributes \$575,000 a year to support a fisheries research and monitoring program as part of the ongoing implementation of the Lower Yuba River Accord. (*Id.* at p. 7.)

Operating the YRDP's facilities of course are one of the most important ways in which YCWA supports disadvantaged communities. New Bullards Bar Dam is the only facility in the Yuba River watershed that can provide control of flood flows. (Appendix F, p. 5.) YCWA is also planning the construction of a \$225 million secondary spillway at New Bullards Bar to further improve public safety. (*Id.* at p. 6.) The agricultural water supplies that YCWA supplies to local farmers have had the demonstrable benefit of alleviating what was once a serious overdraft of the groundwater south of the Yuba River. (See Appendix G and Section IV.G of this Statement below.) By supporting sustainable management of that aquifer, YCWA's operation of the YRDP benefits not only local farmers, but thousands of people who live in both communities and in rural areas and are dependent on groundwater.

The Delegated Certification, however, considered none of these issues or the consequences its conditions would have in Yuba County. The Petition for Reconsideration, this Statement and the accompanying materials describe the social and economic harm the Delegated Certification could cause in Yuba County. If the focus is on financial effects on YCWA as an entity alone, YCWA estimates that the certification's effect would be approximately \$500 million in lost revenues and increased costs. This nearly \$500 million total consists of: (1) approximately \$300 million in lost water-transfer revenues, (2) \$140 million in lost hydroelectric generation revenues, and (3) \$55 million in increased costs associated with the requirement under the certification's Condition 7 that YCWA draw water through the New Colgate powerhouse's upper intake. (See Appendix B, pp. 2-3, 26-30 & Attachment B1, p. 21, Table 3.3; Appendix E, p. 6 (\$1.1 million per year for 50 years);

Appendix F.) These values are in 2020 dollars, without adjustment for the inflation that will occur over the 50-year term of the license. The costs to YCWA could easily exceed \$1 billion when the potential for the SWRCB's Executive Director to order YCWA to provide fish passage above the federal Englebright Dam under the Delegated Certification's Condition 20 is considered. (Appendix F, pp. 1-2 (citing Appendix A on fish passage and Attachment B1 on lost hydroelectric revenues).)

The Delegated Certification would also harm local farmers and ranchers. Its conditions regarding flows could have a dramatic impact on Yuba County's irrigated agriculture, which is the county's primary industry in addition to the federal government's operation of Beale Air Force Base. As discussed in Attachment B1 and in Section IV above of this Statement, implementation of CDFW's streamflow proposals and the SWRCB staff's 55%-of-unimpaired-flow proposal for the Bay-Delta Water Quality Control Plan through the certification's Conditions 1(D), 31 or 32 would cause an average annual shortage in YCWA's agricultural supplies of approximately 60,000 acre-feet and shortages of approximately 109,000 acre-feet in dry years and 148,000 acre-feet in critical years. (Attachment B1, pp. 16-17, Table 3.1.) To preserve anything close to the current level of irrigated agriculture in the county, farmers would need to pump enormous amounts of groundwater, driving up utility and facilities costs, increasing energy usage and driving down groundwater levels for not only the farmers, but the 80% of Yuba County residents who rely on groundwater. To the extent that such reductions in surface-water supplies and increased groundwater pumping would be economically unsustainable, Yuba County's agricultural industry probably would contract, further depressing economic returns and prospects in the county and causing further problems for the county's disadvantaged communities.

The Delegated Certification simply does not contain or incorporate any analysis of its potential effects on those disadvantaged communities, Yuba County's economy or the ability of the community at large to continue to try to address the flood risks and other factors that have long constrained the county's prospects. The failure of the Delegated Certification to analyze its potential impacts on water uses and resources throughout Yuba County is not only inconsistent with the Legislature's creation of YCWA in 1959 to address the county's "water problems" holistically – which YCWA has done – but also is inconsistent with the SWRCB's obligations under Article X, section 2 of the California Constitution and Porter-Cologne. The issuance of the Delegated Certification therefore was arbitrary and

capricious under the Federal APA and does not satisfy the requirements of California administrative law as explained by our Supreme Court in *Topanga*. To protect Yuba County's disadvantaged communities, the SWRCB should grant reconsideration and vacate the Delegated Certification.

G. The Delegated Certification Does Not Analyze Its Terms' Likely Significant Indirect Impacts on Yuba County Groundwater Basins, Which Could Become Overdrafted as a Result of the Certification

The critical relationship between Yuba River water supplies for Yuba County agriculture and the maintenance of sustainable groundwater conditions in the county has been plain for decades. The area of the county north of the river has had river water available to it, and has used that water, for decades. (Appendix G, p. G-4.) The area of the county south of the river did not have surface water available to it until YCWA began deliveries in the 1980s and was subject to a well-understood overdraft for years before that. (Appendix G, p. G-3.) Based on the availability of water from the YRDP, and an effective conjunctive use program based on the Lower Yuba River Accord, however, the Yuba South Subbasin has recovered and its groundwater levels are at nearly historic highs. (Appendix G, p. G-3.) Based largely on YCWA's plan to continue to provide supplies from the YRDP both north and south of the river, YCWA, as a groundwater sustainability agency ("GSA") under the state's Sustainable Groundwater Management Act ("SGMA") was able to adopt a groundwater sustainability plan that covers both the Yuba North Subbasin and the Yuba South Subbasin in early 2020 – two years before the deadline for basins that are not in critical overdraft. (See Appendix G, p. 1; Water Code § 10720.7, subd. (a)(2) (2022 due date for GSPs in non-overdrafted basins).)

All of this success could vanish soon under the Delegated Certification. As discussed above in Section IV.A, YCWA analyzed the water-supply impacts of the SWRCB's Deputy Director using his or her sub-delegated authority under the certification's Condition 1(D) to compel YCWA to comply with a "Projected Condition 1(D) scenario that incorporates CDFW's recommended flows and the 55%-of-unimpaired-flow standard proposed by SWRCB staff in the *July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan*. As also discussed above in Section IV.A, the Delegated Certification relies on CDFW's flow recommendations in stating that "[t]here are indications" that YCWA's streamflow proposals "may not adequately provide for" certain conditions for lower Yuba

River fish and that "[t]here is evidence that additional alterations to lower Yuba River flows . . . may be needed to better address the Project's impacts on aquatic resources, water quality objectives, and beneficial uses." (Delegated Certification, p. 17.) The certification also explicitly would authorize the Deputy to use his or her sub-delegated authority to compel YCWA to comply with whatever amendments to the Bay-Delta Water Quality Control Plan the SWRCB eventually might make. (Delegated Certification, p. 32 (Condition 1(D)); see also *id.* at p. 57 (Conditions 31-32).)

YCWA's modeling shows that, under that Projected Condition 1(D) scenario, the resulting reductions in the supplies that YCWA could deliver to Yuba County farmers would be reduced by an annual average of approximately 60,000 acre-feet, which is about 20% of demand. (Attachment B1, p. 17, Table 3.1.) Perhaps even more significantly, however, YCWA's analysis shows that implementation of the Delegated Certification consistent with the Projected Condition 1(D) scenario would result in water-supply shortages over 100,000 acre-feet in dry years and nearly 150,000 acre-feet in critical years. (Attachment B1, p. 17, Table 3.1.) These shortages would be 36% and 49% of local farmers' demands for water from YCWA. (Attachment B1, p. 17, Table 3.1.) In order to survive such a scenario, those farmers would need to pump groundwater at levels probably never experienced previously north of the Yuba River and generally similar to the levels that drove the area south of the river into overdraft before YCWA's deliveries began in the mid-1980s.

A state action that could produce such a result is inconsistent with SGMA. SGMA states the following overarching state policies:

In enacting this part [SGMA], it is the intent of the Legislature to do all of the following:

- (a) To provide for the sustainable management of groundwater basins.
- (b) To enhance local management of groundwater consistent with rights to use or store groundwater and Section 2 of Article X of the California Constitution. It is the intent of the Legislature to preserve the security of water rights in the state to greatest extent possible consistent with the sustainable management of groundwater . . .
- (d) To provide local groundwater agencies with the authority and the technical and financial assistance necessary to sustainably manage groundwater . . .

- (g) To increase groundwater storage and remove impediments to recharge.
- (h) To manage groundwater basins through the actions of local governmental agencies to the greatest extent feasible . . .

(Water Code § 10720.1.)

Appendix G shows that the sort of surface-water shortages that implementation of the Delegated Certification to compel implementation of CDFW's streamflow recommendations and the SWRCB staff's proposed 55%-of-unimpaired-flow Bay-Delta water quality objective would almost certainly cause significant groundwater problems in Yuba County. Appendix G compares the "minimum threshold" analysis that YCWA adopted in its GSP to show the conditions under which "undesirable results" would occur with the level of surface-water supply shortages that the Delegated Certification's implementation could cause. (Appendix G, pp. G-7 to G-15.) For example, Appendix G indicates that, in the dry and critical years when the shortages would exceed 100,000 acre-feet a year and reach 36% to 49% of demand, implementation of the Delegated Certification could cause the dewatering of many domestic wells in Yuba County. (Appendix G, pp. G-7 to G-15.)

The Delegated Certification does not contain or incorporate any analysis of these potential effects of its Condition 1(D)'s sub-delegation of authority to the Deputy Director to compel YCWA to comply with CDFW's streamflow recommendations, the SWRCB staff's 55%-of-unimpaired-flow proposal for the Bay-Delta Plan or of the certification's Conditions 31 and 32, which appear to require constant compliance with any changes to any relevant basin plan and the Bay-Delta Plan. As discussed above in this Section III, this omission, in and of itself, causes the Delegated Certification to violate Article X, section 2 of the California Constitution and Porter-Cologne, as well as SGMA's state policies. The Delegated Certification's failure to address its potential effects on Yuba County's groundwater also causes the certification to violate basic administrative law requirements as stated in the Federal APA and *Topanga*. As a result, given irrigated agriculture's prominence in the county's economy, the indirect groundwater effects that the Delegated Certification fails to analyze would injure the majority of the county's people who live in disadvantaged communities, as described above.

H. The Delegated Certification Does Not Analyze Its Terms' Likely Significant Impact on Transfers by YCWA, Which Have Advanced State Policy by Providing Important Water Supplies to Other Regions

The Legislature has enacted multiple state policies that not only favor water transfers, but that also direct state agencies – including the SWRCB – to encourage and assist in transfers. Water Code section 109 states:

- (a) The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights. It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import.
- (b) The Legislature hereby directs the Department of Water Resources, the State Water Resources Control Board, and all other appropriate state agencies to encourage voluntary transfers of water . . .

In Water Code section 475, the Legislature similarly has declared:

The Legislature hereby finds and declares that voluntary water transfers between water users can result in a more efficient use of water, benefiting both the buyer and the seller.

The Legislature further finds and declares that transfers of surplus water on an intermittent basis can help alleviate water shortages, save capital outlay development costs, and conserve water and energy.

The Legislature further finds and declares that it is in the public interest to conserve all available water resources, and that this interest requires the coordinated assistance of state agencies for voluntary water transfers

YCWA has been perhaps the most active entity in California in advancing these policies by transferring water to other areas of the state in need. (See, e.g., Hanek & Stryjewski, *California's Water Market, By the Numbers: Update 2012* (Public Policy Inst. of Cal., Nov. 2012) pp. 10, 20, 24, 33, 41 (discussing transfers by YCWA) (Attachment L10.) The Department of Water Resources' annual report on State Water Project ("SWP") operations, Bulletin 132, consistently has contained a section on transfers by YCWA to State Water Contractors every year since at least Bulletin 132-13, which covered SWP operations in 2012. (See DWR Bulletin 132-13, pp. 163-165; DWR Bulletin 132-14, pp. 170-

173; DWR Bulletin 132-15, pp. 171-175; DWR Bulletin 132-16, pp. 167-171; DWR Bulletin 132-17, pp. 174-176.)¹⁸ Similarly, under a contract with DWR, San Luis & Delta-Mendota Water Authority ("SLDMWA") – a joint powers authority of Central Valley Project contractors located in San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito and Santa Clara Counties – has a contract with DWR to buy water transferred by YCWA through DWR. (See Agreement For The Supply And Conveyance Of Water By The Department Of Water Resources Of The State Of California To The San Luis & Delta Mendota Water Authority Under The Dry Year Water Purchase Program, dated December 21, 2007, pp. 2-3 (Attachment L11); see also map of members of SLDMWA with county lines (Attachment L12)(available at <https://sldmwa.org/OHTDocs/Maps/SLDMWA%20Member%20Agencies%20Map2.jpg> (accessed Aug. 13, 2020).) In the SWRCB's California WaterFix hearing, SLDMWA's Assistant Executive Director Frances Mizuno testified to the critical nature of water transfers to SLDMWA's members:

11. The SLDMWA's member agencies also depend upon transfers of surface water, to supplement the supplies delivered under their CVP contracts. Particularly in times of drought and water shortages, member agencies rely on water transfers to temporarily move water from willing sellers to help serve existing demand. Transfers often include purchases of water from water users located north of the Delta . . .
12. Transfers can form a significant portion of the supply available to the SLDMWA's member agencies, especially in dry years. In the period from 2008 through 2016, the SLDMWA arranged for the transfer of over 1,000,000 acre-feet of water to its member agencies. During this period, transfers arranged by the SLDMWA ranged from a low of 29,667 acre-feet in 2011, to a high of 201,369 acre-feet in 2015 . . .

(SWRCB Cal. WaterFix hearing exhibit SLDMWA-19 (Testimony of Frances Mizuno), p. 4 (Attachment L13) (available at

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/san_luis_mendota_wd.html (accessed Aug. 13, 2020).)¹⁹

¹⁸ Cited excerpts of these bulletins are Attachments L 14 – L 18.

¹⁹ Ms. Mizuno's testimony was marked as "proposed," but the cited SWRCB webpage indicates it was admitted into evidence on March 12, 2018.

Since 2006, the water that YCWA transfers to mainly DWR contractors and SLDMWA members has been transferred under the arrangements of the Yuba River Accord. Under the Accord, YCWA's transferrable water essentially is defined by the increment of water between a base Yuba River streamflow schedule and the streamflow schedule set by the Accord's fisheries agreement, as incorporated into YCWA's consumptive water-right permits by the SWRCB's Corrected Order WR 2008-0014.

YCWA's analysis of the impacts of reasonably foreseeable implementation of the Delegated Certification indicates that the certification would eliminate much, if not all, of YCWA's capacity to transfer water. As discussed in more detail above in Section III.B, YCWA analyzed the effects of a "Projected Condition 1(D)" scenario in which the Deputy Director would exercise sub-delegated authority to impose on YCWA the CDFW streamflow recommendations on which the certification explicitly relies and the 55%-of-unimpaired-flow standard that SWRCB staff has proposed as a new objective for the Bay-Delta Water Quality Control Plan. (Appendix B, pp. 20-22.) The impacts of this scenario on YCWA's ability to transfer water is explained in detail in Appendix B, on pages 26 through 28. As Appendix B explains, transfers generally do not occur in the wettest 25% of years, but implementation of the certification in a manner similar to Projected Condition 1(D) would severely impact YCWA's ability to transfer water in the drier 75% of years. The application of higher spring minimum streamflow requirements under Projected Condition 1(D) would eliminate or substantially reduce the transferable increment of Yuba Accord water in both the spring and summer months of about the driest 50% of years. (Appendix B, pp. 2, 26.) Implementation of the Delegated Certification similar to Projected Condition 1(D) also would significantly impact transferrable water in wetter years when transfers otherwise might be possible because it would reduce YCWA's end-of-September storage so much that transfers would not be possible. (Appendix B, pp. 2, 26-27.)

Contrary to state policy the Legislature has expressed in Water Code sections 109 and 475, the Delegated Certification does not even discuss, or apparently consider, the potential of its terms to adversely impact YCWA's ongoing transfers to areas of the state in need of additional water supplies. The impact is not just to those who buy Accord transfer water either, but also to YCWA and the Yuba County community. YCWA has derived significant revenues from water transfers that it has used to support flood-control and other projects in the county for many years. Implementing proposals like the CDFW streamflow

recommendations on which the Delegated Certification relies would severely impact those revenues. For example, in responding to CDFW's proposals before FERC, YCWA calculated that those proposals would have eliminated YCWA's ability to transfer water in the severe drought year of 2014, resulting in a loss of revenue of about \$40 million in 2014 alone. (Appendix B, p. 28.)

The omission from the Delegated Certification of any analysis of its effects on YCWA's ability to transfer water and the resulting effects on not only YCWA and the Yuba County community, but also the many agencies statewide like the SWP contractors and SLDMWA's members who have relied on YCWA's transfers in dry years causes the certification to be arbitrary and capricious under the Federal APA and to violate California administrative law requirements as expressed in *Topanga*. The SWRCB should grant reconsideration and vacate the Delegated Certification.

V. The Delegated Certification Exceeds the Scope Allowed by Clean Water Act Section 401 and the SWRCB's Own Regulations

A. The Delegated Certification Exceeds the Scope of Authority Under Clean Water Act Section 401 by Seeking to Incorporate Water Quality Standards That Have Not Yet Been Adopted

When section 401 of the Clean Water Act applies, it requires an applicant for a federal license for activities that may result in discharges to obtain from the state a certification "that any such discharge will comply with the applicable provisions of sections [1311, 1312, 1313, 1316, and 1317 of this title]." (33 U.S.C. § 1341, subd. (a)(1).) Section 401, subdivision (d), further provides that "any certification . . . shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] . . . and with any other appropriate requirement of State law set forth in such certification." (33 U.S.C. § 1341, subd. (d); *PUD No. 1*, 511 U.S., at pp. 707-08.)

Under the Clean Water Act, the states propose water quality standards, which EPA then reviews and approves. (See 33 U.S.C. § 1313, subd. (c)(3).) Only once EPA has issued its approval does the state standard become "the water quality standard for the applicable waters of that State." (33 U.S.C. § 1313, subd. (c)(3); *PUD No. 1*, 511 U.S., at p. 707.) In other words, water quality standards are not "applicable" within the meaning of Clean Water Act section 401 until they have been adopted through this process.

The Delegated Certification includes numerous conditions that could involve incorporating as-yet-unadopted updates to the Bay-Delta Water Quality Control Plan (the "Bay-Delta Plan") through future sub-delegated actions by SWRCB staff. (See Delegated Certification, pp. 32, 56-57 (Conditions 26, 28, 31-32).) The SWRCB has not yet adopted those updates for the Sacramento River basin, much less submitted them to EPA and obtained EPA's approval. As discussed above (see Section III), a reasonable projection of the impact of potential updates to the Bay-Delta Plan indicates that they could significantly reduce YCWA's hydroelectric generation and water supplies, while actually causing problems for the fish that those updates are supposed to benefit. Because such updates have not been adopted through the SWRCB and EPA as required by law, the Delegated Certification cannot contain terms that seek to reserve to the SWRCB's staff authority to implement those updates. Those terms therefore are not within the scope of the state's authority under Section 401. The SWRCB should grant reconsideration and vacate the Delegated Certification.

B. The Delegated Certification Is Not Authorized by Clean Water Act Section 401 or the SWRCB's Own Regulations Because Its Conditions Extend Far Beyond the YRDP's Activities

In *P.U.D. No. 1*, the U.S. Supreme Court held that a water quality certification for a license from FERC potentially could include streamflow requirements because, among other things, Clean Water Act section 401 allows certifications to address the "activity" at issue. (*P.U.D. No. 1, supra*, 511 U.S., at pp. 711-712.)²⁰ The SWRCB's regulations define "activity" for these purposes as follows:

"Activity," when used in reference to water quality certification, means any action, undertaking or project – including, but not limited to, construction, operation, maintenance, repair, modification, and restoration – which may result in any discharge to waters of the United States in California.

(Cal. Code Regs., title 23, § 3831, subd. (a).)

The SWRCB's regulations then indicate that the activity is defined by the relevant application for a federal permit or license:

²⁰ As discussed below in Section V.F, the U.S. Environmental Protection Agency recently adopted regulations that interpret Clean Water Act section 401 to limit water quality certifications to addressing the relevant "discharge," rather than the broader "activity." (See also Section V.B. ("discharge" versus "activity").)

A complete application shall include all of the following information and items: . . .

- (b) A full, technically accurate description, including the purpose and final goal, of the entire activity.
- (c) Complete identification of all federal licenses/permits being sought or applying to the proposed activity . . .
- (d) Complete copies of either:
 - (1) the application(s) for federal license(s)/permit(s) being sought for the activity, or,
 - (2) if no federal applications are required, any notification(s) concerning the proposed activity issued by the federal agency(ies), or
 - (3) if no federal notifications are issued, any correspondence between the applicant and the federal agency(ies) describing or discussing the proposed activity . . .
- (e) . . . If the federal licenses or permits required for the activity include a FERC license or amendment to a FERC license, a complete copy of a draft application for the FERC license or amendment of the FERC license . . .
- (h) A complete project description, including . . .
 - (8) A brief list/description, including estimated adverse impacts of any projects implemented by the applicant within the last five years or planned for implementation by the applicant within the next five years that are in any way related to the proposed activity or that may impact the same receiving water body(ies) as the proposed activity

(Cal. Code Regs., title 23, § 3856.) Accordingly, both P.U.D. No. 1 and the SWRCB's own regulations make it clear that the "activity" to be addressed in a water quality certification is the "action, undertaking or project" that is the subject of the applicant's underlying application for a federal permit or license.

In fact, given that the SWRCB adopted those regulations six years after *P.U.D. No. 1*, those regulations probably can best be interpreted as authorizing the SWRCB to only include, in a water quality certification, conditions on a project's "discharge," rather than its broader "activity." In 1994, *P.U.D. No. 1* rejected the argument that water quality certifications could only address the effects of a project's "discharge" and not the "activity"

as a whole, based in part of the then-current EPA regulations. (*P.U.D. No. 1*, 511 U.S., at pp. 711-712.) It therefore is striking that, when the SWRCB adopted its relevant regulations in 2000 with full knowledge of the import *P.U.D. No. 1* found in the distinction between "discharge" and "activity," the SWRCB decided to apply the following rule to govern a certification's terms:

[T]he state board, the executive director, when acting as the state board's designee, or executive officer . . . shall issue certification or deny certification for *any discharge resulting from a pertinent activity* before the federal period for certification expires. Conditions shall be added to any certification, if necessary, to ensure that all activities will comply with water quality standards and other appropriate requirements.

(Cal. Code Regs., title 23, § 3859, subd. (a) (emphasis added).)

The best reading of the SWRCB's regulation, then, is that it is more limited than *P.U.D. No. 1* and only authorizes terms in a water quality certification sufficient to address the "pertinent activity" resulting in a project's "discharge," not the entire "activity" involved in the relevant application for a federal permit or license.

Here, YCWA is applying for a new license for the YRDP from FERC. Notwithstanding the well-defined scope of that application and the SWRCB's regulations' focus on "discharges," the Delegated Certification's terms seek to compel YCWA to address conditions and facilities that existed decades before it built the YRDP as well as impacts caused by others. This characteristic of the Delegated Certification is most clearly visible in its Condition 20, under which the Executive Director – with little to no process – could order YCWA to implement a decades-long program costing hundreds of millions of dollars to implement fish passage above the federal government's Englebright Dam – which predated the YRDP by over 25 years. Other key terms of the Delegated Certification share the same problem of extending beyond the scope of the "activity" described in YCWA's application for a new license to FERC. For the reasons explained below, those terms are not valid, so the SWRCB should grant reconsideration and vacate the Delegated Certification.

1. The Delegated Certification Would Require YCWA to Spend Huge Amounts of Money and Suffer the Impairment of Its Mission to Serve Yuba County's People to Instead Address Conditions That Were Caused by Others and That Predate the YRDP

The Delegated Certification contains conditions that effectively would seek to compel YCWA to address all physical-habitat, streamflow and water-temperature issues that affect the lower Yuba River's fish – no matter what the origin of those issues is. The Delegation Certification's conditions also would seek to compel YCWA to be solely responsible for the Yuba River's contribution to whatever new amendments to the Bay-Delta Plan the SWRCB eventually might adopt. The certification's relevant conditions are the following:

- *Condition 20*, which the Delegated Certification explicitly states is intended to seek to compel YCWA to provide fish passage above the Army Corps' Englebright Dam, as well as potentially above YCWA's New Bullards Bar Dam, which is located upstream of Englebright – even though New Bullards Bar Dam has never blocked fish passage because YCWA built it 25 years after the federal government built Englebright Dam (see Delegated Certification, pp. 24, 53);
- *Conditions 1(D), 26, 28, 31 and 32*, which collectively would require YCWA to consult with various state and federal agencies about modifying the Delegated Certification's streamflow requirements for the lower Yuba River to implement any Bay-Delta Plan amendments, among other things, and then be subject to whatever new streamflow requirements the Deputy Director might decide to impose on YCWA, even though the Deputy Director would not be required to provide YCWA any process before doing so (Delegated Certification, pp. 16-18, 32, 56-57);
- *Condition 12*, under which the Deputy Director – again without providing YCWA any process – could compel YCWA to implement a "Restoration Plan," whose objective "shall be the restoration and enhancement of functioning juvenile salmonid rearing habitat in the lower Yuba River through implementation of specific restoration and enhancement measures that may include lowering of floodplain surfaces, planting of riparian vegetation,

installation of LWM [large woody material], and gravel augmentation" (Delegated Certification, pp. 22, 48-49); and

- *Condition 7*, which would require YCWA to draw water through New Bullards Bar Reservoir's upper intake – which has not been used since 1993 under an informal agreement between YCWA and CDFW (Attachments E3 – E4) – in order to impose on YCWA an obligation to try to maintain more of a cold water pool to support salmon and steelhead downstream of the Army Corps' impassable Englebright Dam (Delegated Certification, pp. 21, 44-45).

As discussed in more detail above in Section IV and in the technical materials that are submitted with YCWA's Petition and this Statement, the above terms could:

- compel YCWA to spend hundreds of millions of dollars on a fish-passage program with questionable benefits for salmon and steelhead to address problems caused by hydraulic mining and Englebright Dam;
- result in warmer temperatures in the lower Yuba River that would actually damage salmon and steelhead;
- impair YCWA's implementation of its mission – assigned by the Legislature – of addressing Yuba County's "water problems" by significantly reducing the hydroelectric and transfer revenues that are the only available local funding for needed flood-control projects and that enable YCWA to provide benefits to the majority of the county's residents who live in disadvantaged communities (see West's Water Code Appendix § 84-26 (Legislature's finding in Yuba County Water Agency Act)); and
- force YCWA – notwithstanding the fact that other diverters export significant amounts of water from the watershed – to take sole responsibility for maintaining streamflow and water-temperature conditions for fish in the lower Yuba River and also to implement ongoing habitat restoration to address the massive impacts on the lower river's physical habitat that resulted from hydraulic mining and the federal government's work to re-route and train the river to address the still-ongoing effects of that debris.

The Delegated Certification barely acknowledges that it is seeking to compel YCWA and the YRDP to address problems largely created by others. Its primary rationale for many of the above terms is that, in the SWRCB staff's opinion, YCWA and the YRDP can be

held liable for the effects of the federal Englebright Dam because it physically is related to the YRDP's operations:

Riparian vegetation constitutes an important resource that can provide cover for juvenile salmonids and support invertebrate prey for salmonids. Regulated rivers often lack riparian floodplain and riparian overstory due to conditions that severely limit riparian regeneration and diminish or constrain available area for tree establishment. The Project contributes to the low quality and quantity of salmonid rearing habitat available in the Yuba River. Dams used in the Project block fish passage that make upstream habitat unavailable and Project flows have reduced floodplain and riparian corridor inundation and connectivity, which decreases the availability of rearing habitat in the bank and floodplain zones and suppresses the establishment of the riparian community . . .

[¶] Englebright Dam is the upper limit of anadromy on the Yuba River. Though Englebright Dam is owned by USACE, YCWA's Project operations rely on Englebright Dam to support peaking hydroelectric energy production at New Colgate and baseflow operations at Narrows 2 Powerhouse. The Project cannot operate as it has historically or proposed in its Amended FLA without use of Englebright Dam. Additionally, Project operations directly alter operations of Englebright Dam by reducing the duration and magnitude of spills from Englebright Dam and by controlling flows in the lower Yuba River. Additionally, prior to encountering Englebright Dam, anadromous fish are subject to Project impacts that affect flows in the lower Yuba River. As such, under current conditions, the Project directly impacts listed salmonids through its historic and proposed future operations. Condition 20 requires YCWA to develop a report that includes a proposal regarding fisheries reintroduction to reduce Project-related effects to listed salmonids.

(Delegated Certification, pp. 22, 24.)

This rationale ignores the very well-known history of the Yuba River and the YRDP's place in it. Perhaps most glaringly, that rationale ignores the effect of hydraulic mining on the river. As discussed in Attachment C, the hundreds of millions of cubic yards of mining debris that were washed into the river's watershed severely impacted the river. As a result, in 1884, Judge Lorenzo Sawyer issued what is commonly known as California's first environmental law in a decision prohibiting hydraulic mining at the North Bloomfield mine in the Yuba River watershed – the site we now know as Malakoff Diggins. (*Woodruff v. No. Bloomfield Gravel Min. Co.* (C.C.D. Cal. 1884) 18 F. 753; see Cal. Dept. of Parks and Recreation, "California's First Environmental Law,"

http://www.150.parks.ca.gov/?page_id=27596 (accessed Aug. 9, 2020).) In his decision,

Judge Sawyer described the effect of the hydraulic mining on the Yuba River:

The following shows some of the results of former washings, and unmistakably indicates what must result from a continuance of the work. The Yuba, with its branches and smaller affluents. . . ran through deep, rocky canyons and gorges, over a rough rocky bottom, with frequent rapids, and water-falls of greater or less height, and there were many deep holes excavated by the action of the water at the foot of falls, rapids, and the like. The beds of all these streams, from the very dumps of the higher mines to the junction of the main Yuba with Feather river, a distance of 75 miles or more, have all been filled up many feet deep, – at some places to the depth of 150 feet, – and all the streams have regularly graded themselves, so that a railroad track might be laid upon their beds for the whole distance, – the grade, of course, being steeper in the upper parts, but equally regular.

Thus, the main branches of the Yuba and Deer creek, Shady creek, Bloody run, Grizzly canyon, Humbug canyon, and the other smaller tributaries, all exhibit this result. There are many square miles, in the aggregate, in the beds of these streams, buried many feet deep with *debris*, and these channels are choked and clogged with it, – the heavier material being deposited higher up and the lighter passing further down. Most of it will from year to year be carried further down, and ultimately find its way to the valley. The transporting capacity of the water, however, is unequal to the task of carrying off all the *debris* at once, as it is discharged into the stream. So, also, the ordinary floods, from year to year, are unable to carry off all the *debris* discharged into the streams during the year, and it consequently accumulates from year to year along the upper portions of the water-courses, within the mountains, till an extraordinary flood comes. When such a flood occurs, it transports a much larger amount at once, and precipitates it upon the valleys below. Vast amounts are now accumulated in the upper courses of the Yuba and its branches, which are liable to be precipitated in immense quantities into the valleys below by any extraordinary flood – such as that of 1862 – that may hereafter occur . . .

The portion of the valley here referred to as covered with sand is that portion of the borders of the Yuba river extending across the Sacramento valley from the foot-hills to its junction with Feather river at Marysville, – a distance of about 12 miles. Formerly, before hydraulic mining operations commenced, the Yuba river ran through this part of its course in a deep channel, with gravelly bottom from 300 to 400 feet wide, on an average, with steep banks from 15 to 20 feet high, at low water, on either side. From the top of the banks, on each side, extended a strip of bottom lands of rich, black, alluvial soil, on an average a mile and a half wide, upon which were situate some of the finest farms, orchards, and vineyards in the state . . . Not only has the

channel of the river through these bottoms been filled up to a depth of 25 feet and upwards, but this entire strip of bottom land has been buried with sand and *debris* many feet deep, from ridge to ridge of high land, and utterly ruined for farming and other purposes to which it was before devoted, and it has consequently been abandoned for such uses.

(*Woodruff*, 18 F., at pp. 758-760 (emphasis added).)

To address these disastrous effects on the Yuba River, in the early 1900s, the federal government began implementing the measures for which the Delegated Certification seeks to impose responsibility on YCWA and the YRDP. As discussed in Appendix C, these measures included installing Daguerre Point Dam, building training walls along the river to force it to find a new channel and not wander across the debris field and eventually, in 1941, building Englebright Dam at the Narrows of the Yuba River below the confluence of its forks. Congress authorized Englebright's construction in the 1935 Rivers & Harbors Act, based on the recommendations of the Army Corps of Engineers. (P.L. 74-409 (Act of August 30, 1935) (Attachment L 8). The Army Corps' report, supported by an underlying report of the California Debris Commission, makes clear that the construction of Englebright – then known as the "Upper Narrows" dam – is a project intended to control mining debris separate from any hydroelectric-generation or water-supply function. Specifically, the May 28, 1935 letter from the Army Corps to the House of Representatives' Committee on Rivers and Harbors on which the 1935 Rivers & Harbors Act's authorization of Englebright was based stated:

The Board of Engineers for Rivers and Harbors has investigated the plans for the four reservoirs chosen by the commission and, with slight modifications, finds them satisfactory. It considers that power development at the upper Narrows Dam is practicable, but that it is not a necessary feature of the project at the present time. It states that the proposed reservoirs would intercept debris from natural erosion and from old mining operations, thereby reducing the cost of maintenance dredging in navigable channels to some extent.

(House of Representatives, Rivers and Harbors Commission Document No. 50, 74th Cong. (1935) p. 2 ("House Document No. 50").)

The underlying reports of the federal board of engineers, and of the California Debris Commission, make clear that the authorization, construction and operation of Englebright would serve purposes distinct from hydroelectric generation and water supplies. After citing the Sawyer Decision, the federal board's report stated that the state

would not object to the proposed dams, including Englebright, "on the condition that they will not interfere with the State's plan for water conservation"; the report went on to state:

13. The development of power at the Upper Narrows Dam is practicable but the Board is of the opinion that a power plant is not a necessary feature of the project at the present time. Provision should be made in the design of the dam to permit the future development of power whenever it becomes desirable.
14. Reservoirs constructed for the storage of new mining debris would intercept debris from natural erosion and from old mining operations which now pass downstream into the lower river channels and bay areas.

(House Document No. 50, p. 7.)

The supporting report of the California Debris Commission described how Englebright would not serve a water-supply function:

The reservoir space contemplated for hydraulic mining debris is small in comparison with that which would be developed under the California State water plan. The necessary water storage outlined in the State plan would be obtainable whether or not debris storage is provided.

(House Document No. 50, p. 31.)

The record of proceedings before Congress in authorizing Englebright Dam, which was actually built in 1941, make it plain that Englebright was built for the purpose of controlling the problem of hydraulic mining debris that still loomed in the 1930s and 1940s, decades after the debris had destroyed the Yuba River's channel.

Futhermore, as discussed in more detail in Appendix C concerning Condition 12 and as documented in contemporaneous reports by CDFW, the historical record clearly documents that, in the years immediately prior to the YRDP's construction, conditions in the lower Yuba River generally were horrible for salmonids. Multiple year classes were lost in the 1950s and 1960s due to warm river temperatures, flow fluctuations and other problems. Conditions were so adverse that, in 1960, CDFW agreed to do the following in future years:

On or before September 7, Department of Fish and Game will install and maintain a temporary barrier at the mouth of the Yuba River to prevent salmon from entering the stream until October 15, when adequate transportation and spawning flows are provided.

(Attachment C 19, p. 52.)

As also documented in Appendix C, it is essentially undisputed that the YRDP greatly improved conditions for salmon and other fish in the lower Yuba River, mainly by providing more stable and cooler flows.

This well-known history of the Yuba River demonstrates that the Delegated Certification's conditions concerning fish passage above Englebright Dam, lower Yuba River streamflows and water temperatures, and the lower river's physical habitat seek to require YCWA and the YRDP to address conditions, and mitigate impacts, caused by others, including the federal government in its still-ongoing efforts to control the devastating impacts of hydraulic mining on the river.

2. Clean Water Act Section 401 and Appropriate Provisions of State Law Do Not Authorize the SWRCB to Hold YCWA Responsible for Impacts the YRDP Did Not Cause

As interpreted by *P.U.D. No. 1*, Clean Water Act section 401 authorizes water quality certifications that address the "activity" at issue in the relevant application for a federal permit or license. The SWRCB's relevant regulations also indicate a certification's terms will address no more than the "activity" at issue in the federal application and, in fact, are most appropriately interpreted as only authorizing conditions related to the activity's "discharge." (Cal Code Regs., title 23, §§ 3831, 3856, 3859.) Clean Water Act section 401 also of course allows for certifications to address "appropriate requirement[s] of State law." (33 U.S.C. § 1341, subd.(d).) Relevant state law, however, makes clear that a water quality certification must not impose on YCWA conditions that require it to provide more than its proportional fair share in addressing conditions existing in the Yuba River watershed. This conclusion is only solidified when one interprets those laws in light of the need to ensure that they are constitutional and do not impose burdens that could constitute uncompensated takings.²¹

Preliminarily, *P.U.D. No. 1* provides no support for a water quality certification that would apply conditions to require that, when the owner of a project is seeking a *new* federal license for an *existing* project, the project owner do more than address the project's impacts. *P.U.D. No. 1* concerned a proposed project and expressed no opinion about how the Supreme Court might rule in other circumstances where a water quality certification might

²¹ As discussed above (Section III.C), YCWA can assert constitutional claims against the state as the agency specially created by the Legislature to serve the people of Yuba County by addressing the county's water problems.

"conflict with FERC's authority" under the Federal Power Act. (*P.U.D. No. 1*, 511 U.S., at pp. 708-709, 734-735.) "[C]ases are not authority for propositions not considered." (*People v. Brown* (2012) 54 Cal.4th 314, 330.) *P.U.D. No. 1* did not consider, and therefore is not authority on, any question of whether a water quality certification can require an existing project to do more than address its impacts as a proportional fair share of the responsibility for conditions in the relevant watershed.

California laws concerned with the same environmental issues as those addressed in the Delegated Certification, however, make it clear that California law does not support imposing more responsibility on a project's owner than its fair share. The Delegated Certification's Conditions 1(D), 7, 12, 20, 28, 31 and 32 appear to be almost entirely concerned with benefiting salmonids in the Yuba River and fish within the scope of the proposed Bay-Delta Plan update. (Delegated Certification, pp. 16-18, 21-22, 24-25, 32, 44-45, 53, 56-57.) As discussed above and below (Sections II and IV), however, both Article X, section 2 of the California Constitution and Porter-Cologne's Water Code sections 13000 and 13001 require the SWRCB to consider impacts on other water uses in a manner that the Delegated Certification does not.

Even California laws that are focused primarily on protecting sensitive species show that the SWRCB's water quality certification authority should not be interpreted to include requiring project operators to do more than their fair share of mitigating their projects' impacts. The California Endangered Species Act ("CESA") contains the clearest statement of this rule. In Fish & Game Code section 2052.1, CESA states:

The Legislature further finds and declares that if any provision of this chapter requires a person to provide mitigation measures or alternatives to address a particular impact on a candidate species, threatened species, or endangered species, *the measures or alternatives required shall be roughly proportional in extent to any impact on those species that is caused by that person.* Where various measures or alternatives are available to meet this obligation, the measures or alternatives required shall maintain the person's objectives to the greatest extent possible consistent with this section. All required measures or alternatives shall be capable of successful implementation. This section governs the full extent of mitigation measures or alternatives that may be imposed on a person pursuant to this chapter. This section shall not affect the state's obligations set forth in Section 2052.

(Emphasis added.)²²

While of course the Clean Water Act and Porter-Cologne govern water quality certifications' terms, the fact that Clean Water Act section 401 allows consideration of "other appropriate requirements of state law" makes CESA's "roughly proportional" policy relevant in examining whether the Delegated Certification's terms to benefit sensitive fish are within the scope allowed by section 401. The Delegated Certification's terms at issue are explicitly intended to seek to compel YCWA to address conditions that exist because *the federal government* had built Englebright Dam in an attempt to control the enormous damage hydraulic mining did to the Yuba River and the habitat along with it. Furthermore, , those certification terms also seek to compel YCWA to take full responsibility for not only instream conditions in the lower Yuba River, but also for improving physical habitat in that river reach and for the river's full contribution to any new requirements that would be imposed in the yet-to-be-adopted Bay-Delta Plan Update. The certification terms also ignore the other diverters who take significant amounts of water from the watershed (see Attachment B1). These terms are inconsistent with the policy that CESA applies when the state seeks contributions to improving conditions for sensitive fish and therefore are not "appropriate requirements of State law" under section 401.

Other California law dictates the same conclusion. Multiple California Supreme Court decisions under the public trust doctrine indicate that an owner of property subject to the trust may use its property in any manner not inconsistent with the trust and that the state must pay compensation when it decides to demand more of that owner to benefit the trust. (*State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 232; *State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 259; *People ex rel. Webb v. California Fish Co.* (1913) 166 Cal. 576, 599 (cited in *National Audubon, supra*, 33 Cal.3d, at pp. 435, 438-439).) In applying Article X, section 2 of the California Constitution to allow the SWRCB to modify water rights in some cases, the Court of Appeal in *Racanelli* emphasized that it did so to allow the SWRCB to address the relevant projects' "deleterious effects upon water quality." (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 130 ("*Racanelli*").) Consistent with these authorities, Clean Water Act

²² The CEQA Guidelines state a similar rule for mitigation imposed under CEQA. (Cal. Code Regs., title 14, § 15126.4, subd. (a)(4)(B).)

section 401, Water Code section 13160 and the SWRCB's regulations must not be interpreted to authorize water quality certification conditions that demand more than that a project owner address its own direct and indirect impacts on the relevant water resources.

Such an interpretation also is necessary to ensure that those laws are constitutional and do not become or cause uncompensated takings of property. In reviewing statutes and regulations, the courts choose the interpretation that makes them constitutional rather than one that does not. (See *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 186.) This rule is important here because a regulation that effectively commandeers, for the regulating government's preferred purpose, the operation of water-related facilities built based on prior governmental authorizations and through local or private investments is a compensable taking where the regulation invades or denies the local or private entity's use of the relevant water resource. (*Kaiser Aetna v. United States* (1979) 444 U.S. 164, 167, 178-180, 189-91 (Army Corps' order for access to private marina built based on Army Corps' acquiescence); *Casitas Mun. Water Dist. v. United States* (Fed.Cir. 2008) 543 F.3d 1276, 1289-1296 (ESA biological opinion requiring particular routing of water through locally-funded facilities built under Reclamation repayment contract could be a physical taking); *Casitas Mun. Water Dist. v. United States* (Fed.Cir. 2013) 708 F.3d 1340, 1353-1359 (test for whether the routing of water was a taking is whether it interferes with beneficial use of water right).)

The Delegated Certification's key conditions effectively would commandeer the assets that YCWA generates by operating the YRDP under its state-issued water rights and therefore could be deemed uncompensated takings. As indicated in Appendix B and in Section IV.D of this Statement, Condition 1(D) and other conditions could result in the SWRCB effectively operating YCWA's New Bullards Bar Reservoir, particularly through the broad, process-free authority that the Deputy Director would exercise under Condition 1(D) and other conditions. (Delegated Certification, pp. 32 (Condition 1(D)), 56-57.) Conditions 12 and 20 effectively would require YCWA to spend enormous sums from its revenues from hydroelectric generation, local water sales and inter-region transfers on fish-passage and physical-habitat projects that could involve YCWA modifying its facilities and operations to address the impacts of others. Conditions 6 and 7 would compel YCWA to physically operate its facilities according to the SWRCB's mandates in order to achieve the SWRCB's preferred goals. (Delegated Certification, pp. 43-45.) Under Condition 7, YCWA's

operation of New Bullards Bar Dam's intakes would be subject to the Deputy Director's standard- and process-free discretion on an ongoing basis. (Delegated Certification, p. 45.) All of these certification terms potentially constitute physical takings of the facilities YCWA built based on the state's issuance of water-right permits and licenses. Because these terms raise such serious constitutional problems, Clean Water Act section 401, Water Code section 13160 and the SWRCB's certification regulations cannot be interpreted to authorize them under standard rules of judicial interpretation.

The Delegated Certification goes well beyond the allowable scope of a water quality certification because it explicitly seeks to require YCWA to address problems resulting from others' activities, some of them occurring over 100 years before the YRDP was built. The Delegated Certification also seeks to make YCWA fully responsible for maintaining appropriate streamflow and water-temperature conditions in the lower Yuba River, and for any new contributions to satisfy future Bay-Delta Plan amendments, notwithstanding the fact that other water users export significant amounts of the watershed's runoff to other areas. Clean Water Act section 401 and the state laws and regulations that implement it cannot be interpreted this way without raising serious constitutional issues. The Delegated Certification's key terms therefore are not authorized by law. The SWRCB should grant reconsideration and vacate the Delegated Certification.

C. The Delegated Certification Exceeds the Allowable Scope of a Water Quality Certification Because Several of Its Key Terms Concern Solely Physical Habitat, Rather Than Water Quality

Nothing in Porter-Cologne or section 401 of the Clean Water Act authorizes a water quality certification to impose measures to restore or reconstruct habitat for the benefit of fisheries in the river. Porter-Cologne and the Clean Water Act both define water quality to broadly govern their implementation. Porter-Cologne contains the following pertinent definitions in Water Code section 13050, subdivisions (g), (i) and (l):

- (g) "Quality of the water" refers to chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use . . .
- (i) "Water quality control" means the regulation of any activity or factor which may affect the quality of the water of the state and includes the prevention and correction of water pollution and nuisance . . .

(l)(1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

In holding that, consistent with then-existing EPA regulations, water quality certifications could address streamflow issues, the U.S. Supreme Court in *P.U.D. No. 1* relied on the Clean Water Act's definition of "pollutant" and the possibility that a dam's operation could affect "the physical and biological integrity of water:"

In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. 33 U.S.C. § 1362(19). *This broad conception of pollution – one which expressly evinces Congress' concern with the physical and biological integrity of water – refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality."* Moreover, § 304 of the Act expressly recognizes that water "pollution" may result from "changes in the movement, flow, or circulation of any navigable waters . . . , including changes caused by the construction of dams." 33 U.S.C. § 1314(f). This concern with the flowage effects of dams and other diversions is also embodied in the EPA regulations, which expressly require existing dams to be operated to attain designated uses. 40 CFR § 131.10(g)(4) (1992).

(*P.U.D. No. 1, supra*, 511 U.S., at p. 719-720 (emphasis added).)²³

In contrast to this focus on the "physical and biological integrity of water" under both the Clean Water Act and Porter-Cologne, the Delegated Certification – and its many sub-delegations to SWRCB staff – could require YCWA to implement a decades-long and very expensive program to modify the physical habitat of the Yuba River. The certification's key measures on these points are:

²³ *P.U.D. No. 1* relied on then-existing EPA regulations interpreting the Clean Water Act as supporting its holding concerning the possibility of water quality certifications containing streamflow requirements. (511 U.S., at p. 712.) Those EPA regulations recently changed, as discussed below in Section IV.F.

- Its Condition 20, under which the Executive Director could order YCWA to implement fish passage above the federal government's Englebright Dam and YCWA's New Bullards Bar Dam (Delegated Certification, p. 53); and
- Its Condition 12, under which the Deputy Director could order YCWA's "[d]evelopment of restoration and enhancement actions [that] shall at a minimum include consideration of lowering of floodplain surfaces, planting of riparian vegetation, installation of LVM [large woody material], and gravel augmentation," and any later modifications to such actions that "the Deputy Director may require [as] adaptive management actions" (Delegated Certification, pp. 48-49).

These measures are well beyond any measures that can be required as part of a water quality certification and its incorporation of "appropriate requirements of State law." They have nothing to do with the physical and biological integrity of water, but instead seek to compel YCWA to address fish habitat problems in the Yuba River that derive almost entirely from the extraordinary amount of hydraulic mining debris washed into the watershed – "684 million cubic yards of gravel and debris . . . more than triple the volume of earth excavated during construction of the Panama Canal"²⁴ – and the physical facilities subsequently built and still maintained by the federal government to address the continuing effects of that debris. (See Section IV.C above and Appendix C.)

The Delegated Certification's attempt to use Clean Water Act section 401 as an umbrella for mandates to restore physical habitat and address related issues in the Yuba River would also upset the act's multiple and carefully constructed permitting regimes. In holding that section 401 potentially allowed water quality certifications to address streamflows, *P.U.D. No. 1* relied on section 401's explicit incorporation of effluent and other limitations under the act's section 301, and section 301's incorporation of "water quality standards" under the act's section 303. (*P.U.D. No. 1, supra*, 511 U.S., at pp. 712-713 (discussing 33 U.S.C. §§ 1311, 1313).) Importantly, though, one section of the Clean Water Act that section 401 does *not* incorporate is section 404, under which the U.S. Corps of Engineers regulates discharges that can physically modify rivers' channels.

²⁴ Yoshiyama et al, "Historical and Present Distribution of Chinook Salmon in the Central Valley Drainage of California" (2001) p. 122 (Attachment C20).

This omission indicates that section 401 does not authorize water quality certifications to address physical habitat issues. In *Coeur Alaska v. Southeast Alaska Conservation Council* (2009) 557 U.S. 261, the U.S. Supreme Court upheld the agreement between the U.S. Environmental Protection Agency and the Army Corps of Engineers about how to divide the EPA's NPDES permitting scheme under the Clean Water Act's section 402 and the Army Corps' section 404 dredge-and-fill permitting regime. (*Coeur Alaska, supra*, 557 U.S., at pp. 268-277.) That division was based on a regulation those agencies jointly issued under which they agreed that the Army Corps would have permitting jurisdiction over discharges of material that have the effect of "changing the bottom elevation of" any portion of a water of the United States. (*Id.* at pp. 275-277 (quoting 40 C.F.R. § 232.2).) Similarly, in limiting federal agencies' authority to disregard state-issued water quality certifications, the courts have emphasized that allowing federal agencies to do so would "significantly upset Congress's carefully prescribed allocation of authority between federal and state agencies in the Clean Water Act." (*Sierra Club v. U.S. Army Corps of Engineers* (4th Cir. 2018) 909 F.3d 635, 647-648.) To preserve the allocation of authority between federal and state agencies under that act, there must be similar constraints on state authority: states may not invade the authorities the act reserves to federal agencies. To allow the SWRCB to order YCWA to implement habitat projects in a section 401 water quality certification for a FERC relicensing would effectively route around the jurisdiction reserved to the Army Corps under section 404, thereby upsetting the Clean Water Act's established structure. Section 401 cannot be stretched this far, and the SWRCB therefore has no such authority to require physical habitat improvements.

An interpretation of section 401 that prevents it from becoming a tool for mandating physical-habitat projects also would be consistent with interpretations of section 401 in other settings, as well as with CEQA. In *Oregon Natural Desert Assn. v. Dombek* (9th Cir. 1998) 172 F.3d 1092, the federal Ninth Circuit Court of Appeals held that section 401 did not require water quality certifications for the issuance of grazing permits that could result in non-point source pollution, in part because the court recognized that the Clean Water Act addressed such pollution in other ways under other sections. (*Oregon Natural Desert Assn., supra*, 172 F.3d, at pp. 1095-1099.) In *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, the California Court of Appeal held that CEQA did not require that the SWRCB or a regional water quality control board be involved as a trustee agency in relation to a CEQA

document, even though that document found the project could cause erosion. (*Gentry, supra*, 36 Cal.App.4th, at p. 1389.) The Court of Appeal stated:

Although the State Water Quality Control Board [the SWRCB] and the various regional water quality control boards have statutory jurisdiction over water quality (Wat. Code, § 13001), they have no particular authority over water erosion. Thus, we have no basis for finding that the City was required to send the proposed negative declaration to the Regional Water Quality Control Board.

(*Id.*)

The express terms of the Clean Water Act and Porter-Cologne, as well as the various permitting regimes Congress constructed under the Clean Water Act, indicate that the Delegated Certification's conditions concerning physical habitat do not concern the physical and biological integrity of water. Consequently, those conditions are not within the allowable scope of a water quality certification. The SWRCB therefore should grant reconsideration of those terms and vacate them.

D. The Delegated Certification Does Not Protect Beneficial Uses Consistent With, or Reflect Appropriate Requirements of, State Law and Therefore Is Not Authorized by Clean Water Act Section 401

Clean Water Act section 401 allows a water quality certification to contain conditions to protect designated beneficial uses of a waterbody, as well as "any other appropriate requirement of State law." (33 U.S.C. § 1341, subd. (d); see *P.U.D. No. 1, supra*, 511 U.S., at pp. 712-715.) The Delegated Certification, however, fails to demonstrate that it will protect *all* beneficial uses of the Yuba River's water and does not contain or incorporate any analysis of its conditions' effects on those many uses. The Delegated Certification in fact would damage those other uses in violation of both the California Constitution's Article X, section 2 and Porter-Cologne itself. It therefore does not actually protect beneficial uses or reflect "appropriate requirements of State Law" and is not authorized by Clean Water Act section 401.

The Delegated Certification explicitly states that the Yuba River supports many beneficial uses:

The SR/SJR [Sacramento River/San Joaquin River] Basin Plan identifies beneficial uses for surface waters in the Yuba River, including sources to Englebright Reservoir: municipal and domestic supply; irrigation; stock watering; power; contact recreation; canoeing and rafting; other noncontact recreation; cold freshwater habitat; cold spawning habitat; and wildlife

habitat. The SR/SJR Basin Plan identifies beneficial uses for surface waters in the Yuba River, from Englebright Dam to the Feather River, as: irrigation; stock watering; power; contact recreation; canoeing and rafting; other noncontact recreation; warm freshwater habitat; cold freshwater habitat; warm water migration; cold water migration; cold spawning habitat; warm spawning habitat; and wildlife habitat.

(Delegated Certification, p. 11.)

While the simple existence of these many uses of the Yuba River's water would implicate the SWRCB's obligations under the California Constitution's Article X, section 2, the fact that the Delegated Certification explicitly recognizes those obligations makes them all the more pressing. As discussed in Section IV above, in *National Audubon*, the California Supreme Court stated that Article X, section 2 "establishes state water policy" and that "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use." (*National Audubon, supra*, 33 Cal.3d, at p. 443.) Article X, section 2 requires that state decisionmakers assess the water costs of their decisions for competing uses of water and seek to minimize those costs. (*City of Lodi, supra*, 7 Cal.2d, at p. 341 (courts); *Environ. Defense Fund, supra*, 26 Cal.3d, at p. 200 (judicial and SWRCB concurrent jurisdiction under Art. X, § 2).)

Porter-Cologne – the very statutory scheme that, in Water Code section 13160, authorizes the SWRCB to issue water quality certifications – establishes similar analytical requirements. As discussed above (Section IV), in Water Code section 13001, Porter-Cologne requires that the SWRCB "in exercising any power granted in this division shall conform to and implement the policies in this chapter." That chapter includes Water Code section 13000, which states, in relevant part:

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, *considering all demands being made on those waters* and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

(Emphasis added.)

Given that Porter-Cologne applies these requirements to all decisions made under it, the issuance of a water quality certification must reflect an analysis of the effect of its terms on "all demands being made" on the relevant waters and "the total values involved." A water quality certification that does not reflect such an analysis cannot comply with

Porter-Cologne and therefore cannot reflect "appropriate requirement[s] of State law," as required by Clean Water Act section 401, subdivision (d).

As discussed in Section IV, the Delegated Certification generally fails to comply with Article X, section 2 and Porter-Cologne because it fails to consider the impact of its conditions on the many uses of Yuba River water associated with the YRDP. It does not analyze its conditions' effect on YCWA's hydroelectric generation and the resulting revenues that – consistent with the Legislature's intent in creating YCWA – support flood control and disadvantaged communities in Yuba County. The Delegated Certification also fails to analyze its terms' effects on the water supplies that YCWA can deliver to Yuba County's farmers and – contrary to SGMA – the resulting indirect effects on Yuba County's groundwater, particularly the South Yuba Basin that once was critically overdrafted. (See Section IV.G.) The Delegated Certification also fails to analyze whether its terms even would be good for the Yuba River's fish. YCWA's technical analyses indicate that the Delegated Certification's terms very well might result in warmer temperatures in the lower Yuba River and cause *adverse* impacts on steelhead and spring-run and fall-run salmon, particularly in dry years. (See Appendix B.)

The Delegated Certification's failure to analyze the effects of its many conditions, and its many terms allowing SWRCB staff to modify those conditions, implicates not just analytical requirements, but also Article X, section 2's deeper constitutional concerns. The people enacted Article X, section 2 to support water storage, specifically in response to a California Supreme Court decision that held that storage of water for hydroelectric generation violated riparian rights. (*Capistrano Taxpayers Assn. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1508-1510 (discussing *Herminghaus v. So. Cal. Edison Co.* (1926) 200 Cal. 81 and reaction to it).)²⁵ As discussed in Section IV, the Delegated Certification could severely impact YCWA's ability to store water and the hydroelectric, agricultural, and environmental water uses that depend on it – even though the Delegated Certification explicitly recognizes that these are all beneficial uses of the Yuba River's water.

²⁵ See also *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140 fn. 9 (quoting *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, and its quotation of Justice Shaw's description of the value of storage in his concurring opinion in *Miller v. Bay Cities Water Co.* (1910) 157 Cal. 256).

The vague and currently unknowable requirements of the more than 30 conditions that the Delegated Certification would allow the SWRCB staff to further modify also implicate a key policy underlying Article X, section 2. In *In re Waters of Long Valley Creek System* (1979) 25 Cal.3d 339, the California Supreme Court upheld the SWRCB's authority to limit and deprioritize unexercised riparian rights in a statutory stream adjudication under Article X, section 2, based partly on the significant uncertainty such rights would create:

Uncertainty concerning the rights of water users has pernicious effects. Initially, it inhibits long range planning and investment for the development and use of waters in a stream system . . . [¶] Uncertainty also fosters recurrent, costly and piecemeal litigation . . . [¶] Finally, uncertainty impairs the state's administration of water rights.

(*Long Valley, supra*, 25 Cal.3d, at pp. 355-356.)

All of these considerations would apply even more forcefully to the Delegated Certification's terms that would allow the SWRCB staff to further modify the certification. The uncertainty associated with these terms would inhibit not only YCWA's investments in the YRDP, but also its investments in Yuba County's communities and even potentially third parties' investments in the county and its disadvantaged communities. The SWRCB staff's potential exercise of those terms would almost certainly lead to recurrent and costly disputes that would impair administration of YCWA's underlying water rights as well as FERC's ongoing authority over the YRDP.

Because the Delegated Certification is contrary to Article X, section 2's constitutional policies and analytical requirements, as well as Porter-Cologne's requirements, the Delegated Certification is not protective of all beneficial uses and does not reflect "appropriate requirements of State law." Consequently, it is not within the scope of conditions on water quality certifications allowed by Clean Water Act section 401.

The sorts of decisions under Porter-Cologne that the SWRCB and the regional boards can make without considering, as Water Code section 13000 puts it, "all demands being made" on the relevant waters and "the total values involved" only highlight the need for consideration of those factors in the issuance of water quality certifications. The courts have held that, under some circumstances, the SWRCB and the regional boards can issue NPDES permits and waste discharge requirements, and also decline to amend water quality control plans, without conducting an analysis under Water Code sections 13000 and

13241.²⁶ (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 621-627 (NPDES permit); *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 168, 176-179 (declining to amend plan).) In those cases, however, the SWRCB and the regional boards would have *already* considered, among other things, "past, present, and probable future beneficial uses of water" and "economic considerations" in adopting the underlying water quality objectives whose purpose was to "ensure the reasonable protection of beneficial uses." (See Water Code § 13241.)

In contrast, the Delegated Certification indicates that its terms are intended to *directly* support beneficial uses of the Yuba River and other waterbodies, whether or not there are any relevant water quality objectives adopted under Water Code section 13241. (See, e.g., Delegated Certification, pp. 15-16 (staff considered "beneficial uses and associated water quality objectives"), 19 ("[A]dditionally, annual water temperature monitoring (Condition 4B) will provide information needed to determine whether cold freshwater beneficial uses are being protected"), 23 ("[A] Drought Management Plan (Condition 16) is important for successful management of water resources to protect all beneficial uses"), 50-51 (Condition 16 on drought management).) In *P.U.D. No. 1*, the U.S. Supreme Court stated that water quality certifications could directly address beneficial uses without necessarily being confined to what in California are known as water quality objectives. (*P.U.D. No. 1, supra*, 511 U.S., at pp. 714-719.) Nothing in *P.U.D. No. 1*, however, authorizes a state water quality agency issuing a certification to ignore its own state law requirements for determining how to reasonably protect beneficial uses. A state order that did so could not be an "appropriate requirement of State law" under Clean Water Act section 401, subdivision (d).

Yet this is what the Delegated Certification would do because it contains no analysis of the many factors Porter-Cologne requires to be considered when measures to "ensure reasonable protection of beneficial uses" are adopted. (See Water Code § 13241; see also Water Code §§ 13000-13001.) This problem with the Delegated Certification may be best demonstrated by its Condition 20 concerning fish passage. (Delegated Certification, p. 53.) As discussed in Section IV.A above, Condition 20 would allow SWRCB staff to impose on

²⁶ Water Code section 13241 effectively requires consideration of Water Code section 13000's policies before water quality objectives to "ensure the reasonable protection of beneficial uses" are adopted or amended.

YCWA hundreds of millions of dollars of costs to implement passage of salmon and steelhead above the federal government's Englebright Dam and YCWA's New Bullards Bar Dam with little to no process – and no vote by a quorum of the SWRCB itself – for at best questionable fishery benefits and almost certainly significant losses in hydroelectric generation. By forgoing any analysis of related economic considerations or the potential effect of such measures on other beneficial uses of water, the Delegated Certification implicitly jumps over a critical step required by Porter-Cologne when the SWRCB translates beneficial uses into entity-specific regulatory requirements. The cases that allow the SWRCB and the regional boards to not undertake such analyses in adopting other entity-specific orders under Porter-Cologne are distinguishable because they occurred where the applicable board previously had conducted the required analysis in adopting the underlying water quality objectives.

The SWRCB should grant reconsideration of the Delegated Certification, and vacate that certification, to uphold the constitutional and statutory requirements of Article X, section 2, of the state Constitution and Porter-Cologne. The Delegated Certification, by itself, fails to address the factors that California law requires to be considered in determining how to reasonably protect all applicable beneficial uses of water.

E. The Delegated Certification Is Not Authorized by Clean Water Act Section 401 Because It Seeks to Establish the SWRCB as Having Concurrent Jurisdiction Over The YRDP With FERC

As discussed above (Section II.C), over 30 terms of the Delegated Certification seek to sub-delegate to SWRCB staff the authority to modify the certification's terms at future times as they see fit. These terms improperly attempt to use the Delegated Certification to circumvent FERC's exclusive jurisdiction to set and enforce the terms of a hydropower license obtained under the Federal Power Act. For example, Condition 14 contains a "reservation of rights" to further modify the terms that seek to "expand existing recreation facilities and develop new facilities to increase and improve recreation opportunities" at any future date. (Delegated Certification, p.22) While recreational terms may be imposed by FERC, the SWRCB cannot impose such a reopener condition, as explained below.

In *California v. FERC*, the Supreme Court, relying on the established precedent in *First Iowa Hydro-Electric Cooperative v. FPC* (1946) 328 U.S. 152, found that the Federal Power Act vests FERC with exclusive jurisdiction to regulate FERC-licensed hydropower

projects. The Court expressly rejected the notion that the Federal Power Act left room for "concurrent jurisdiction" that would create "a dual system of futile duplication of two authorities over the same subject matter." (*California v. FERC* (1990) 495 U.S. 490, 502 (quoting *First Iowa*, 328 U.S., at p. 171).) Such concurrent jurisdiction would allow states to regulate "the very requirements of the project that Congress has placed in the discretion" of FERC. (*Id.* (citing *First Iowa*, 328 U.S., at pp. 165).)

Section 401 of the Clean Water Act specifically authorizes the states to certify that a project that has the potential to result in discharges will comply with relevant water quality standards adopted by the state. (33 U.S.C. § 1341, subd. (d).) However, Section 401, subdivision (a)(5), of the Clean Water Act vests the federal licensing agency – not the state – with authority to enforce the section 401 terms of a license. (33 U.S.C. § 1341, subd. (a)(5).) Thus, while FERC has the authority to impose and enforce a reopener condition (see *Wisconsin Pub. Serv. Corp. v. FERC* (4th Cir. 1994) 32 F.3d 1165, 1166), section 401 does not extend this power to the SWRCB.

FERC's exclusive authority to enforce water quality certifications under section 401 certification makes perfect sense, given that the Federal Power Act precludes a state from exercising its authority over a hydropower project in a manner that would create an impermissible regulatory scheme of "concurrent jurisdiction." If section 401 allowed the SWRCB to reserve for itself the power to effectively reopen a certification at any point during a FERC license's term, then the SWRCB could effectively establish a regulatory system in which it has concurrent jurisdiction with FERC to enforce the terms imposed on a hydropower project. Like the savings clause found in Section 27 of the FPA and interpreted in *California v. FERC* (495 U.S., at pp. 497-502), Clean Water Act section 401's reservation of rights to the states is not so broad. Indeed, the plain language of Clean Water Act section 401, subdivision (a)(5), confirms that the state has no continuing jurisdiction to enforce the terms of its certification. That power belongs exclusively to the federal licensing agency – in this context, FERC.

The California courts likewise recognize that the SWRCB does not share concurrent jurisdiction with FERC. In *Karuk Tribe of Northern California v. California Regional Water Quality Control Board* (2010) 183 Cal.App.4th 330, the California Court of Appeal confirmed that the FPA gave exclusive jurisdiction, with the exception of water rights, to FERC in order to avoid "a duplicate system of state permits and federal license," or, in

other words, concurrent regulatory jurisdiction over hydropower projects. (*Karuk Tribe, supra*, 183 Cal.App.4th, at p. 344 (citing *First Iowa*, 328 U.S., at p. 168).) "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." (*First Iowa*, 328 U.S., at pp. 180-181.) In *Karuk Tribe*, the court opined that the state's ability to impose state water quality laws on a federally licensed hydropower project is confined to instances when: (1) Congress has determined the extent to which a state can participate, and (2) "that input takes place within the context of FERC licensing procedures as specified in the FPA." (*Karuk Tribe, supra*, 183 Cal.App.4th, at p. 360.)

Karuk Tribe is particularly noteworthy because the Court of Appeal's decision reflects the SWRCB's express recognition that its previous attempts to assert concurrent jurisdiction with FERC over hydroelectric projects had been rejected – twice – by the federal courts. (*Karuk Tribe*, 183 Cal.App.4th, at pp. 352-354.) The Court of Appeal's decision explicitly cites the Attorney General's acknowledgment that the SWRCB had nearly been sanctioned by the Ninth Circuit Court of Appeals for continuing to seek concurrent jurisdiction with FERC after the U.S. Supreme Court had rejected its arguments in *California v. FERC*. (See *id.*) Moreover, in the course of the *Karuk Tribe* litigation, the North Coast Regional Water Quality Control Board had prepared, with the assistance of the SWRCB's Office of Chief Counsel, a "supplemental analysis" explaining the SWRCB's scope of authority over hydroelectric projects. (*Id.* at p. 339.) That supplemental analysis states, in relevant part:

The distinction between project operations before and after a FERC license is issued is critical because in issuing a license, FERC determines what it believes to be the appropriate balance between the environmental problems that may be caused by dam operations and the benefits of hydroelectric power generation. Thus, in *California v. FERC*, the United States Supreme Court held that the state could not issue a water right permit imposing instream flow requirements that "supplement" the requirements of the FERC license, because so doing "would disturb and conflict with the balance embodied" in the FERC licensing decision. (495 U.S. 490, 506.) In the view of the United States Supreme Court, conditions imposed in a state permit that are in addition to or supplement the requirements of the FERC license but do not preclude operation of the project are still preempted because they have the effect[] of overriding FERC's licensing determination, and thus amount to a veto.

(Supplemental Analysis to Accompany Resolution No. R1-2007-0028 in the Matter of Petition to the North Coast Regional Water Quality Control Board to: 1) Order Pacificorp to Submit a Report of Waste Discharge and/or 2) Issue Waste Discharge Requirements For Iron Gate and Copco Hydroelectric Facilities (Sept. 9, 2008) p. 6 (Attachment L 9).)

The Delegated Certification now effectively tries to do what the SWRCB has failed to do twice previously: establish the SWRCB as having concurrent jurisdiction with FERC over the ongoing operation of a hydroelectric project. In the supplemental analysis for the Pacificorp matter, the Office of Chief Counsel apparently recognized the SWRCB could not assert such authority because it would "have the effect of overriding FERC's licensing determination." That also is precisely what the Delegated Certification would do, given its over 30 different terms that would sub-delegate to the SWRCB's staff the power to modify the certification's terms throughout the term of a new FERC license for the YRDP. The Delegated Certification therefore is not within the allowable scope of a water quality certification under section 401 of the Clean Water Act.

Congress has determined the extent to which the states can participate in licensing of hydroelectric projects: under Clean Water Act section 401, the states submit their water quality certifications to FERC, and FERC incorporates the terms of those certifications into the licenses and enforces them. (33 U.S.C. § 1341.) Allowing the SWRCB to establish an ongoing regulatory program in which they would have continuing delegated authority to modify the Delegated Certification's terms at many points during the term of the YRDP's new FERC license would violate Clean Water Act section 401 and be inconsistent with the Federal Power Act's vesting of exclusive jurisdiction over hydropower projects in FERC. Hence, the SWRCB should grant reconsideration and vacate the Delegated Certification.

F. The Delegated Certification Violates the EPA's 2020 Final Rule by Seeking to Regulate Effects Beyond the YRDP's Discharges and Asserting Ongoing SWRCB Authority

On July 13, 2020, the EPA published a final rule revising its regulations implementing Clean Water Act section 401 ("Final Rule"). (*Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020).) The Final Rule is EPA's first comprehensive interpretation of section 401 and interprets the statute to have a limited scope which, in turn, limits the types of conditions that can be imposed in a water quality

certification. Under EPA's revised regulations adopted in the Final Rule, the scope of a 401 water quality certification "is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." (40 C.F.R. § 121.3.)

"Discharge" is defined as "a discharge from a point source into a water of the United States." (40 C.F.R. § 121.1, subd. (f). "Water quality requirements," in turn, are defined as "effluent limitations for new and existing sources, water quality standards, toxic pretreatment effluent standards, and state regulatory requirements for point source discharges into waters of the United States." (40 C.F.R. § 121.1, subd. (n).) Water quality requirements include both numeric water quality criteria and narrative water quality standards and other regulatory requirements that apply to point source discharges. (85 Fed. Reg. at 42,255.) Under EPA's Final Rule, 401 conditions that regulate "the activity as a whole," rather than the discharge itself, are beyond the scope of section 401. (See *id.* at 42,251.)

All of the substantive and administrative conditions included in the Delegated Certification are beyond the scope of section 401 as interpreted by the Final Rule and thus violate EPA's revised regulations. Conditions that regulate water quantity do not address whether the project discharge complies with "water quality requirements." (Delegated Certification, pp. 26-43 (Conditions 1-5 on flows, ramping rates, water year types, monitoring and adaptive management and spill reduction) 46-47 (Condition 10 on Narrows reach fish stranding), 50-51 (Conditions 15, 16 and 18 on whitewater boating flows, drought management and coordinated operations).) Rather, these requirements attempt to regulate the quantity of the discharge, which is not within the scope of Section 401 under EPA's Final Rule. (See 40 C.F.R. §§ 121.3, 121.1, subd. (f) (limiting states' authority to condition Section 401 certifications to point source impacts); 85 Fed. Reg. at 42,234 ("EPA has concluded that a certifying authority's review and action under [S]ection 401 is limited to water quality impacts to waters of the United States resulting from a potential *point source* discharge from a proposed federally licensed or permitted project") (emphasis in original).)

Conditions 6 (Closures at Lohman Ridge Diversion Tunnel), 8 (Large Woody Material), 9 (Sediment Management Plan), 12 (Lower Yuba River Habitat Restoration), 21 (Mercury Management), and 24 (No net loss of wetland or riparian habitat functions) attempt to address effects attributable to the entirety of the YRDP's operations and not its discharges. (See Delegated Certification, pp. 43-46, 48-49, 53-55; see also 85 Fed. Reg. at

42,251 ("the scope of a [S]ection 401 certification...is limited to assuring that a 'discharge' from a federally licensed or permitted activity—rather than the activity as a whole—'will comply' with 'water quality requirements'").) These conditions are unrelated to assuring that the project discharge complies with water quality requirements. Condition 20, which requires fish passage past project facilities, claims to be regulating the project as a whole, although it actually seeks to improperly impose responsibility on YCWA to provide fish passage over the Army Corps' Englebright Dam. (See Section IV.B. above; see also Final Rule, 85 Fed. Reg. 42,257 (fish passage identified as a type of condition often beyond the scope of Section 401).)

EPA's Final Rule also clarifies that conditions that require monitoring and mandate submission of reports or other documents to the state agency for review and approval likewise are not conditions on the project discharge and are beyond the scope of Clean Water Act section 401. Under the Final Rule, once a state acts on a certification request, section 401 does not provide an additional or ongoing role for the state to enforce certification conditions. (40 C.F.R. § 121.11, subd. (c); 85 Fed. Reg. at 42,275.) The federal agency issuing the license is responsible for enforcing certification conditions, and section 401 does not authorize states to independently enforce water quality certification conditions under federal law. (40 C.F.R. § 121.11, subd. (c); 85 Fed. Reg. at 42,276.) Thus, it is FERC's decision as part of its ongoing oversight and enforcement of the YRDP's new license, not the SWRCB's, whether monitoring during the license term is necessary. In obvious violation of this standard, the Delegated Certification seeks to impose numerous terms that would require YCWA to continue to monitor conditions, prepare reports, and submit them to the SWRCB. (See Delegated Certification, pp. 26-32, 39-55, 57-59 (Conditions 1 (Minimum Instream Flows), 4 (Monitoring and Adaptive Management), 6 (Closures at Lohman Ridge Diversion Tunnel), 8 (Large Woody Material), 9 (Sediment Management), 10 (Fish Stranding Prevention Plan), 12 (Lower Yuba River Habitat Restoration Plan), 13 (New Bullards Bar Reservoir Fishery), 16 (Drought Management Plan), 19 (Construction and Maintenance), 20 (Fish Passage), 21 (Mercury Management), 22 (Annual Meeting), 33 (Submit reports electronically), 35 (Changes to Project), 38 (Violations), and 44 (Project Operation and Maintenance)).

Finally, all conditions included in the Delegated Certification that are unrelated to the project discharge are inappropriate conditions of a water quality certification. For

example, all conditions that reserve the right of the SWRCB to modify the certification in the future violate EPA's Final Rule. These include: Condition 4 (Monitoring and Adaptive Management), 5 (Spill Reduction), 7 (New Colgate Power Tunnel Intake), 8 (Large Woody Material), 9 (Sediment Management), 11 (Aquatic Invasive Species Management), 13 (New Bullards Bar Reservoir Fishery), 14 (Recreation Facilities), 15 (Whitewater Boating Flows), Condition 17 (Hazardous Materials), 18 (Coordinated Operations), Condition 27 (General Reservation of Authority), 28 (General Reservation of Authority to due to Climate Change), 29 (Notice and Opportunity to be Heard in event of SWRCB Exercise Reservation of Authority), 36 (Modifications in Response to Violations), and 37 (Executive Director Reservation of Authority). (Delegated Certification, pp. 39-47, 48-52, 56-58.) EPA concluded that Section 401 does not grant states with authority to either unilaterally modify a Section 401 certification or to include reopener clauses in a certification. (85 Fed. Reg. 42,279.) Through the conditions listed above, among others, the SWRCB attempts to do precisely that, in plain violation of the EPA Rule.

Conditions with open-ended and vague requirements also are beyond the scope of Section 401 because they do not address the project discharge. Conditions 32 (Consistency with Porter-Cologne Water Quality Control Act and Section 303 standards) and 39 (Compliance with all applicable federal, state, or local laws) both violate this standard. (Delegated Certification, pp. 57-58.) While The Final Rule does not specifically prohibit open-ended and vague conditions, and a licensee may or may not have to independently comply with the conditions under other statutes depending on whether they are preempted by the Federal Power Act, these conditions do not address the project discharge. As such, they are inappropriate to incorporate into the project license.

Finally, conditions regulating nonpoint source pollution into navigable waters, such as Conditions 17 (Hazardous Materials Management Plan), 19 (Construction and Maintenance), 43 (Store Hazardous Chemicals Away from Watercourses), 45 (Compliance with NPDES General Permit on Storm Water Discharges), and 46 (Compliance with Statewide NPDES Permit on Residual Aquatic Pesticide Discharges), are beyond the scope of certification, because nonpoint source discharges are not included in the definition of "water quality requirements" under the revised regulations. (See Delegated Certification, pp. 51-52, 58-59; see also 40 C.F.R. § 121.1, subd. (n).)

For all of these reasons, the conditions included in the Delegated Certification are beyond the scope of Clean Water Act section 401, as established in the Final Rule, and violate federal law. Accordingly, the SWRCB should grant reconsideration and vacate the Delegated Certification.

VI. Conclusion

For all the numerous reasons set forth in the Petition for Reconsideration, this Statement of Reasons and the supporting materials filed by YCWA, YCWA respectfully requests that the SWRCB grant reconsideration and vacate the Delegated Certification.

Dated: August 14, 2020

Respectfully submitted,

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