



State Water Resources Control Board

December 22, 2022

Mr. John James
Director of Resource Planning
Yuba County Water Agency
1220 F Street
Marysville, CA 95901
Sent via email: jjames@yubawater.org

**Yuba River Development Project
Federal Energy Regulatory Commission Project No. 2246
Yuba, Sierra, and Nevada Counties
Yuba River, North Yuba River, Middle Yuba River, and Oregon Creek**

COMMENTS ON YUBA COUNTY WATER AGENCY'S NOTICE OF INTENT TO RELY ON FEDERAL ENERGY REGULATORY COMMISSION/UNITED STATES ARMY CORPS OF ENGINEERS FINAL ENVIRONMENTAL IMPACT STATEMENT IN COMBINATION WITH A SUPPLEMENTAL ANALYSIS TO SATISFY CALIFORNIA ENVIRONMENTAL QUALITY ACT FOR THE YUBA RIVER DEVELOPMENT PROJECT RELICENSING (SCH NO. 2022110118)

Dear Mr. James:

On November 7, 2022, Yuba County Water Agency (YCWA)¹ issued a *Notice of Intent to Rely on FERC/USACE [Federal Energy Regulatory Commission/United States Army Corps of Engineers] Final Environmental Impact Statement, in Combination with a Supplemental Analysis, to Satisfy CEQA [California Environmental Quality Act] for the Yuba River Development Project Relicensing (NOI)*.

State Water Board staff appreciate the opportunity to provide comments on the NOI, and look forward to working with YCWA and other interested parties on completion of the CEQA process for the Yuba River Development Project's (Project's) FERC relicensing. Please see Attachment A of this letter for comments on YCWA's NOI.

If you have questions regarding this letter, please contact Philip Meyer, Project Manager, by email at Philip.Meyer@waterboards.ca.gov. Written correspondence should be directed to:

¹ Doing business as Yuba Water Agency.

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

State Water Resources Control Board
Division of Water Rights – Water Quality Certification Program
Attn: Philip Meyer
P.O. Box 2000
Sacramento, CA 95812-2000

Sincerely,

Philip Meyer  Digitally signed by Philip Meyer
Date: 2022.12.22 11:49:10 -08'00'

Philip Meyer
Environmental Scientist
Water Quality Certification Program
Division of Water Rights

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice on Intent for the Yuba River Development Project Relicensing

cc (with attachment):

Kelly Wolcott, Project Coordinator
Federal Energy Regulatory Commission
Email: kelly.wolcott@ferc.gov

Randy Olsen, Sacramento District Chief of Operations
United States Army Corps of Engineers
Email: randy.p.olsen@usace.army.mil

Willie Whittlesey, General Manager
Yuba County Water Agency
Email: wwhittlesey@yubawater.org

Patrick Pulupa, Executive Officer
Central Valley Regional Water Quality Control Board
Email: patrick.pulupa@waterboards.ca.gov

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
Via e-filing to FERC Docket for P-2246

California State Clearinghouse
Office of Planning and Research
Via posting to CEQAnet for SCH Number 2022110118

**ATTACHMENT:
COMMENTS ON YUBA COUNTY WATER AGENCY'S NOVEMBER 7, 2022 NOTICE
OF INTENT FOR THE YUBA RIVER DEVELOPMENT PROJECT RELICENSING**

State Water Resources Control Board (State Water Board) staff are providing the following comments in response to Yuba County Water Agency's¹ (YCWA's) November 7, 2022 *Notice of Intent to Rely on FERC/USACE [Federal Energy Regulatory Commission/United States Army Corps of Engineers] Final Environmental Impact Statement, in Combination with a Supplemental Analysis, to Satisfy CEQA [California Environmental Quality Act] for the Yuba River Development Project Relicensing (NOI)*.

(1) **Distribution List:** YCWA's distribution list for the NOI included former staff in the State Water Board's Division of Water Rights (Division), Water Quality Certification Program. To ensure future notices related to the Yuba River Development Project (Project) are received, State Water Board staff request that YCWA add the following staff to its distribution list for the Project:

- Philip Meyer, Environmental Scientist
Email: Philip.Meyer@waterboards.ca.gov
- Adam Cohen, Senior Environmental Scientist
Email: Adam.Cohen@waterboards.ca.gov
- Stephanie Postal, Attorney
Email: Stephanie.Postal@waterboards.ca.gov
- Parker Thaler, Environmental Program Manager
Email: Parker.Thaler@waterboards.ca.gov

State Water Board staff also request YCWA remove the following staff from its list as they are no longer with the Division's Water Quality Certification Program:

- Susan Monheit
- Philip Choy
- Jeff Parks
- Kristen Gangl

In addition, State Water Board staff note that YCWA did not include the State Water Board as a reviewing agency on the *Notice of Completion & Environmental Document Transmittal* filed with the Office of Planning and Research as posted on the CEQAnet Web Portal. State Water Board staff request that YCWA list the State Water Board as a responsible and/or reviewing agency in future CEQA forms and filings.

(2) **Narrows 1 and Narrows 2 Coordinated Operations:** When the FERC 2019 *Final Environmental Impact Statement* (EIS) was published in January 2019, Pacific Gas and Electric Company (PG&E) owned and operated the Narrows 1 Powerhouse as part of the Narrows 1 Hydroelectric Project (FERC Project No. 1403) and YCWA coordinated its operations of the Narrows 2 Powerhouse with PG&E's Narrows 1 Powerhouse. FERC approved the transfer of the

¹ Doing business as Yuba Water Agency.

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

Narrows 1 Hydroelectric Project license from PG&E to YCWA on May 2, 2019. On March 31, 2020, YCWA completed its purchase of the Narrows 1 Hydroelectric Project, and as such, no longer coordinates with PG&E regarding its operations. References to coordinated operations between PG&E and YCWA are made throughout FERC's 2019 EIS (e.g., measure GEN4, a coordinated operations plan). Discussions of coordinated operations need to be updated in the forthcoming CEQA document to include and analyze YCWA's current and planned operational practices for Narrows 1 and Narrows 2 Powerhouses under the new FERC license following Project relicensing as operations may impact fish stranding in the reach between these two powerhouses.

(3) **303(d) Listings of Project Streams:** On January 19, 2022, the State Water Board adopted the [2020-2022 California Integrated Report \(Clean Water Act Section 303\(d\) List/305\(b\) Report\)](#) (2020-2022 Integrated Report), which was approved by the United States Environmental Protection Agency on May 11, 2022. The 2020-2022 Integrated Report includes additional pollutants beyond mercury for Project-affected waters that were not analyzed in FERC's 2019 EIS. Current listings include:

- North Fork Yuba River is listed for mercury;
- Oregon Creek is listed for copper and iron;
- Yuba River (confluence of North and Middle Fork to Englebright Lake) is listed for chromium and mercury;
- New Bullards Bar Reservoir is listed for mercury; and
- Yuba River from Englebright Dam to the Feather River is listed for copper and mercury.

FERC's 2019 EIS analysis of impaired waterbodies is outdated. YCWA's CEQA analysis needs to include analyses of the Project and its potential impacts related to the 2020-2022 Integrated Report and identify mitigation measures, as appropriate. Please note, reservoir management can affect the methylation of mercury and should be included in the analysis of the Project's potential mercury-related impacts.

(4) **Importance of Water Quality and Temperature Monitoring:** FERC's 2019 EIS states, on pages 3-131-132, that: "...[FERC does] not expect proposed project operation to substantially change the hydraulics or water quality in the project reservoirs or impoundments, or the water quality of their releases" and thus "there appear to be few benefits from requiring YCWA to monitor water quality of any type or bioaccumulation in aquatic organisms" and from a compliance perspective, "[t]here would be no value . . . to the water quality monitoring that would result from YCWA's proposal, the State Water Board and Forest Service's [United States Forest Service] specifications, and California DFW [Department of Fish and Wildlife] and the Forest Service's recommendations." This analysis fails to consider that while proposed Project operations may be functionally similar to current operations, future hydroclimatic conditions are expected to change.

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

Expected climate change impacts in California include reduced total precipitation, altered frequency of extreme events and increased temperatures, all of which may modify streamflow and stratification in New Bullards Bar Reservoir which in turn could impact the potential for mercury release from reservoir sediments, and other water quality parameters in the reservoir and Project-affected stream reaches. The FERC 2019 EIS similarly asserts that there would be few benefits from water temperature monitoring, despite proposed changes in Project operations and future hydroclimatic conditions. Ongoing water quality monitoring as proposed by YCWA and conditioned in the July 2020 water quality certification will provide data necessary to assess the Project's ongoing potential impact to water quality and beneficial uses and allow for adaptive management if needed.

- (5) **Responsible Agency Recommended Reasonable Alternatives:** The CEQA Guidelines define a Responsible Agency as “a public agency which proposes to carry out or approve a project, for which a lead agency is preparing or has prepared an [Environmental Impact Report (EIR)] or negative declaration. For the purposes of CEQA, the term ‘[R]esponsible [A]gency’ includes all public agencies other than the lead agency which have discretionary approval power over the project.” (Cal. Code Regs., tit. 14, § 15381.) For the Project, the State Water Board is a Responsible Agency.

As a Responsible Agency, in accordance with the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15096, subd. (b)(2)), and per YCWA's request in its NOI, the State Water Board is identifying reasonable alternatives (below) and mitigation measures (Comment 6) that need to be explored in YCWA's Supplemental Analysis for CEQA compliance. Alternatives that State Water Board staff request further analysis of in YCWA's Supplemental Analysis are as follows:

- *YCWA's Offer of Settlement:* On October 31, 2022, YCWA filed an Offer of Settlement with FERC. YCWA's Offer of Settlement pertains to several FERC license proceedings: (1) YCWA's Project; (2) Nevada Irrigation District's Yuba-Bear Hydroelectric Project (FERC Project No. 2266); and (3) the Drum-Spaulding Hydroelectric Projects (PG&E's Upper Drum-Spaulding Hydroelectric Project (FERC Project No. 2310); PG&E's Lower Drum Hydroelectric Project (FERC Project No. 14531); and PG&E's Deer Creek Hydroelectric Project² (FERC Project No. 14530)).

YCWA's Offer of Settlement proposes a set of measures to provide cooler water temperatures in the lower Yuba River to protect federal Endangered Species Act (ESA)-listed fish and their designated critical

² The Deer Creek Hydroelectric Project is in the process of being transferred from PG&E to Nevada Irrigation District.

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

habitat during September through October in dry and critically dry years. In summary, the measures include:

- YCWA would operate both the upper and lower intakes at New Bullards Bar Dam. YCWA would use the upper intake during spring (March – May), and the lower intake during the remainder of the year.
- YCWA would manage flows into and out of Englebright Reservoir in dry and critically dry years to maintain target reservoir elevations from August 25 through October 15, and implement a ramp-down between October 16 and October 31.
- Yuba-Bear Hydroelectric Project and Drum-Spauding Hydroelectric Projects would provide an additional 15,600 acre-feet of water during April and early May of dry and critically dry years.
- YCWA would use this additional water (i.e., 15,600 acre-feet) to increase flows in the lower Yuba River by 175 cubic feet per second from September 1 through October 15 during dry and critically dry years.

As explained in the comment letter the State Water Board submitted to FERC on November 21, 2022, YCWA's Offer of Settlement needs to be fully evaluated for its potential benefits and environmental effects (including unintended environmental impacts) before it should be considered as a viable solution to manage water temperatures in the lower Yuba River. Therefore, State Water Board staff request that YCWA evaluate its Offer of Settlement in its Supplemental Analysis.

- *Narrows 2 or Narrows 1 Intake Extension:* Revised Water Rights Decision 1644 requires YCWA to diligently pursue development of the Narrows 2 Powerhouse Intake Extension Project at Englebright Dam, in coordination with the California Department of Fish and Wildlife (CDFW), United States Fish and Wildlife Service, and National Marine Fisheries Service. Installation and operation of a Narrows 2 or Narrows 1 Intake Extension should be evaluated as a CEQA alternative as it is a reasonable and foreseeable action that can provide meaningful water temperature benefits that may also conserve water supply when considered in combination with or against other alternatives. To date, YCWA's analysis of a Narrows 1 or 2 Intake Extension has been cursory.

Based on the limited analysis accompanying YCWA's October 31, 2022 Offer of Settlement, State Water Board staff understand that operations of an Intake Extension at Narrows 1 or Narrows 2 could provide up to 28 days of cooler water temperatures in the lower Yuba River. State Water Board staff recognize that 28 days of cooler water temperatures during dry and critically dry periods would

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

be a significant improvement compared to existing conditions and as such, should be analyzed in YCWA's Supplemental Analysis.

Additionally, State Water Board staff understand from YCWA's analysis that following exhaustion of the cold-water pool at Englebright Reservoir, releases from Englebright Reservoir into the lower Yuba River would be warmer than existing conditions. To address this potential concern, State Water Board staff recommend YCWA consider a Narrows 1 or Narrows 2 Intake Extension along with other actions such as use of both intakes at New Bullards Bar, management of Englebright Reservoir levels, and adaptive management releases from upstream projects in years where 28 days of cooler water is insufficient to manage water temperatures in the lower Yuba River. Evaluation of an Intake Extension alone, rather than in combination with other actions such as those described above, may fail to capture the potential benefits of a Narrows 1 or Narrows 2 Intake Extension.

Also, it is unclear if YCWA's Settlement Offer would provide temperature benefits for a duration equal to or greater than the potential 28 days associated with an Intake Extension. A comparison between an Intake Extension and YCWA's Offer of Settlement should be conducted as part of YCWA's Supplemental Analysis for CEQA compliance.

- *Water Quality Certification Conditions:* On July 17, 2020, the Executive Director of the State Water Board issued a water quality certification for the FERC Project relicensing. State Water Board staff request that the conditions of the certification be analyzed as a Project alternative. Please see Comment 10 for additional clarification on developing CEQA analysis on certification flow-related conditions.

Please note, that for YCWA to fully analyze the above reasonable and foreseeable alternatives, it should analyze the alternatives for all resource areas identified in Appendix G of the CEQA Guidelines³ and not limit its analysis to the supplemental resource areas listed in its NOI.

³ The CEQA Guidelines commence at California Code of Regulations, title 14, section 15000.

(6) Responsible Agency Recommended Mitigation Measures: As a Responsible Agency, in accordance with the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15096, subd. (b)(2)), and per YCWA's request in its NOI, State Water Board staff provide the following mitigation measures:

- *FERC Staff Recommendations:* At a minimum, YCWA's Supplemental Analysis should consider the FERC Staff Recommendations listed in Section 5.1 of the FERC 2019 EIS, and any supplements thereto, as potential mitigation measures.
- *10(j) and 4(e) Measures:* The Supplemental Analysis should also consider as potential mitigation measures, any Federal Power Act (FPA) section 4(e) requirements or 10(j) recommendations filed by the United States Fish and Wildlife Service, Forest Service, CDFW, other agencies, nongovernmental organizations, and other parties.

(7) CEQA Requires Identification of Significant Impacts and Analysis of Project Impacts Prior to Incorporating Mitigation Measures: CEQA requires an EIR or EIR equivalent be prepared when a project may have a significant effect on the environment (Pub. Resources Code, §§ 21100, subd. (a), 21151, subd. (a)) or when the project may result in certain specific impacts (Pub. Resources Code, § 21083, subd. (b); Cal. Code Regs., tit. 14, § 15065, subd. (a)). An EIR must include a detailed statement of all the proposed project's significant effects on the environment as well as mitigation measures proposed to minimize each of those significant effects. (Pub. Resources Code, § 21100, subd. (b); Cal. Code Regs., tit. 14, § 15126; *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 653.) However, mitigation measures are not part of a project, and an EIR must fully identify and analyze project impacts prior to proposing or relying on a mitigation measure. (*Lotus, supra*, at pp. 655-656.) In *Lotus*, the California Court of Appeal explained that initial analysis about the extent or significance of impacts is necessary to determine whether mitigation measures are required, if the proposed mitigation measures are sufficient, or if other more effective mitigation measures should be considered. (*Id.* at p. 656.)

Thus, while State Water Board staff request that YCWA's Supplemental Analysis consider the recommendations in Comment 6 as mitigation measures, staff note compliance with CEQA requires that the Supplemental Analysis first evaluate the significance of the Project's impacts on the environment.

(8) FERC's Supplemental Environmental Impact Statement Not Yet Published and Analyses in National Environmental Policy Act Document Do Not Satisfy CEQA Requirements: The CEQA Guidelines provide:

When a project will require compliance with both CEQA and NEPA [National Environmental Policy Act], state or local agencies should use the EIS or Findings of No Significant Impact rather than preparing an EIR or Negative Declaration if the following two

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

conditions occur: (1) An EIS or finding of no significant impact will be prepared before an EIR or negative declaration would otherwise be completed for the project; and (2) The EIS or finding of no significant impact complies with the provisions of these guidelines.

(Cal. Code Regs., tit. 14, § 15221, subd. (a).)

State Water Board staff are concerned by YCWA's stated intention to rely on an intermediary NEPA document; its assumption that "the final FERC license will include the modifications and recommendations [in the 2019 EIS], as well as [the Forest Service's] FPA section 4(e) conditions;"⁴ and YCWA's intent to prepare a Supplemental Analysis for CEQA compliance "based on circumstances existing at the time of its release." For example, page 23 of the NOI states that YCWA "would continue to operate and maintain the [Project] in the same manner as it operates and maintains the [Project] now, with changes due to the conditions in the new license, which are described in the [2019 EIS]." However, as stated in a letter issued from FERC to YCWA on March 8, 2021, and acknowledged on page two of the NOI, FERC intends to prepare a Supplemental EIS.

According to YCWA's NOI, the FERC 2019 EIS together with YCWA's Supplemental Analysis would constitute the final CEQA document upon which YCWA would base its Project relicensing decisions, such as "whether to accept the particular license and its terms and conditions" and whether to seek reconsideration by FERC. However, these decisions cannot occur until FERC prepares a supplemental EIS, a document that will inform and potentially result in revisions to FERC's preferred licensing alternative for the Project. Further, the CEQA Guidelines contemplate a CEQA Lead Agency relying on an EIS only when it is the final NEPA document. For example, the CEQA Guidelines require that when a supplement to an EIR is prepared, an agency decision to approve or carry out the project (such as by a Lead Agency or Responsible Agency) must consider both the previous EIR and any supplemental EIR. (Cal. Code Regs., tit. 14, § 15163, subd. (e); see also *City of San Jose v. Great Oaks Water Co.* (1987) 192 CA3 1005, 1016.) Here, where FERC has stated its intent to supplement the document that will presumably form the majority of the CEQA document, this provision also applies to the supplemental EIS. Therefore, YCWA's relicensing decisions must consider not only FERC's 2019 EIS, but also its supplemental EIS.

It is not clear whether YCWA plans to wait for the final NEPA document (i.e., whether the final NEPA document will be prepared before YCWA's Supplemental Analysis will be completed). Accordingly, State Water Board staff are concerned about the timing of YCWA's Supplemental Analysis. Because the FERC 2019 EIS does not comply with CEQA (discussed in greater detail below),

⁴ For example, the Forest Service filed revised FPA section 4(e) conditions on December 2, 2022.

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

if YCWA prepared its Supplemental Analysis for CEQA compliance prior to the supplemental EIS, it would likely need to prepare and circulate an additional Supplemental Analysis to satisfy the requirements of CEQA. Moreover, as the California Supreme Court recently noted, when an agency of the state (such as YCWA) uses a CEQA document to inform its relicensing decisions, but the FERC license includes terms and conditions not analyzed in the CEQA document, additional CEQA review is required. (*County of Butte v. Department of Water Resources* (2022) 13 Cal.5th 612, 635.) Here, FERC has stated its intent to prepare a supplemental EIS and noted the possibility of revising its preferred staff alternative. As environmental impacts often depend on the details of how a Project will be operated, a change in details may require additional or revised analyses. State Water Board staff request that YCWA take these considerations into account and time its Supplemental Analysis appropriately to ensure it fully complies with CEQA. In addition, page four of the NOI states that "YCWA will reassess the scope and details of the Proposed Project" based on subsequent actions or decisions by FERC. However, CEQA contemplates that a Lead Agency will make scoping decisions in consultation with Responsible and Trustee Agencies (see Pub. Resources Code, § 21080.4, subd. (a); Cal. Code Regs., tit. 14, § 15082, subd. (b); Cal. Code Regs., tit. 14, § 15096, subd. (b).). Therefore, if subsequent FERC actions or decisions significantly alter YCWA's Proposed Project, it would be appropriate for YCWA to engage in additional consultation regarding the scope and content of its Supplemental Analysis. If YCWA chooses to rely on FERC's 2019 EIS, State Water Board staff recommend that YCWA wait until FERC's supplemental EIS is finalized and assess whether additional consultations are needed. YCWA should clearly identify the anticipated timeline and dependencies (e.g., FERC supplemental EIS) for its Supplemental Analysis CEQA process.

Additionally, the CEQA Guidelines state, "Because NEPA does not require separate discussion of mitigation measures or growth inducing impacts, these points of analysis will need to be added, supplemented, or identified before the EIS can be used as an EIR." (Cal. Code Regs., tit. 14, § 15221, subd. (b).) The FERC 2019 EIS (which, as noted above, FERC plans to supplement) does not comply with the CEQA Guidelines as it does not identify mitigation measures, consider incorporation of mitigation to reduce Project impacts, or provide an analysis of potential mitigation measures. Section 5.2, *Unavoidable Adverse Impacts*, of FERC's 2019 EIS does not comply with the CEQA Guidelines, which require a description of "any significant impacts, including those which can be mitigated but not reduced to a level of insignificance." (Cal. Code Regs., tit. 14, § 15126.2, subd. (c).) The FERC 2019 EIS provides only a general discussion of unavoidable impacts without specifying their magnitude, duration, or the specific environmental resources affected. YCWA's Supplemental Analysis must comply with all relevant CEQA Guidelines and augment analyses performed during the NEPA process before the CEQA analysis can be considered complete. In relation to this Project, additional discussion and analysis are needed for all resource areas to comply with CEQA.

(9) Stand-alone or Project-specific Analysis of the Secondary Spillway Could Constitute Impermissible Piecemealing: Page 19 of the NOI states:

Acceptance of the expected new license by YCWA would authorize YCWA to construct and operate a new secondary spillway (which is known as the Atmospheric River Control or ARC Spillway), located south of the existing New Bullards Bar Dam spillway in the upper left abutment area. YCWA is in the process of preparing a project-specific draft EIR for its planned ARC Spillway. YCWA plans to release a draft EIR for public comment for the spillway as a separate project in early 2023. YCWA also plans to apply to FERC for an amendment to the existing FERC license that would allow spillway construction ahead of completion of relicensing. If FERC approves a spillway specific amendment to the existing FERC [Project] license, then YCWA would not rely on or wait for the new FERC license [for the Project] as FERC authorization for the ARC Spillway.

As explained in the State Water Board's December 10, 2020 Comments on YCWA's Notice of Preparation for the ARC Spillway, State Water Board staff are concerned that stand-alone or project-specific environmental review of the ARC Spillway project could constitute piecemealing, which is impermissible under CEQA. YCWA's November 9, 2020 Notice of Preparation for the ARC Spillway states that YCWA "expects and intends" for the ARC Spillway to be "covered by the new FERC license."⁵ As noted in the State Water Board's previous comments, State Water Board staff are also concerned that the description of the ARC Spillway project and the project-specific environmental review YCWA is undertaking will not provide the State Water Board with a full analysis of the impacts of related relicensing activities and alternatives.

"There is no dispute that CEQA forbids 'piecemeal' review of the significant environmental impacts of a project. This rule derives, in part, from [California Code of Regulations, title 14,] section 21002.1, subdivision (d), which requires the lead agency . . . to 'consider[] the effects, both individual and collective, of all activities involved in [the] project.'" (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1358.) "The requirements of

⁵ State Water Board staff note that the Project Description in YCWA's Amended Final License Application to FERC describes the Project as composed of existing facilities as well as the ARC Spillway. Accordingly, the FERC 2019 EIS analyzed the environmental effects of constructing, operating, and maintaining the ARC Spillway. Like CEQA, NEPA requires that related or connected actions be considered in a single NEPA document and prohibits the practice of artificially dividing a project into separate components, referred to as "segmenting" or "segmentation." (See, e.g., *Food & Water Watch v. Federal Energy Regulatory Commission* (D.C. Cir. 2022) 28 F.4th 277, 291; *American Rivers v. Federal Energy Regulatory Commission* (D.C. Cir. 2018) 895 F.3d 32, 54; 40 C.F.R. § 1502.4(a).)

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

CEQA cannot be avoided by piecemeal review which results from 'chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.'" (*Rio Vista Farm Bur. Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370 [quoting *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284].) Moreover, the CEQA Guidelines define the term "Project" to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" (Cal. Code Regs., tit. 14, § 15378, subd. (a).)

- (10) **CEQA Supplemental Analysis Related to Condition 1 of the 2020 Water Quality Certification:** YCWA's NOI acknowledges uncertainty regarding a water quality certification for the Project, and what conditions such a certification may require. Page 24 of the NOI states that YCWA expects the terms of a certification would be similar to those of the 2020 water quality certification, and that "to plan for this possibility, the Supplemental Analysis will evaluate the Proposed Project's environmental impacts both with and without incorporation of the 2020 [water quality certification] conditions by projecting and analyzing implementation of the 2020 [State Water Board water quality certification] conditions and the associated environmental, economic, and social effects." State Water Board staff are available to assist YCWA with any questions or clarifications needed to analyze the conditions of the 2020 water quality certification.

State Water Board staff would like to clarify that the minimum instream flows required by Condition 1 are included in Condition 1(A) and are the flows that should be analyzed in any CEQA analysis evaluating the environmental, economic, or social effects of the 2020 water quality certification. Additionally, the 2020 water quality certification requires water year type determinations consistent with YCWA's water rights rather than YCWA's Final License Application (FLA) proposal. Therefore, when analyzing conditions of the 2020 water quality certification, YCWA should implement the water year type determinations as required by its water rights and not its FLA proposal.

Condition 1(D) provides for future reconsiderations of minimum instream flows, but does not contain flow requirements. Though YCWA has provided its assumptions of potential future flow scenarios associated with Condition 1(D), these assumptions are speculative and not reasonable. YCWA's 1(D) projections speculate that the future flows required by the certification would be a combination of: (1) 55 percent unimpaired flow; and (2) CDFW's flow proposal made as part of FERC's Project relicensing process. YCWA's modeled flows for Condition 1(D) take the highest of these two flow proposals and apply it for any given day. YCWA also claims that this would result in warmer lower Yuba River water temperatures and less water supply. As the State Water Board's responsibility in relation to Clean Water Act section 401 is to protect water quality and associated beneficial uses, YCWA's projections of Condition 1(D) flows are not consistent with the State Water Board's obligations or mission. YCWA's

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

projections also do not represent a probable outcome of Condition 1(D) and, as explained below, are inconsistent with the State Water Board's direction regarding adaptive management of flows.

On September 13, 2021, the State Water Board provided YCWA comments on how YCWA can model potential future scenarios associated with Condition 1(D). In summary, State Water Board staff recommended YCWA model scenarios that would be representative of potential outcomes of the Sacramento/Delta Update to the Bay-Delta Plan⁶, which included: (1) 45 percent of unimpaired flow at the mouth of the Yuba River; (2) 55 percent of unimpaired flow at the mouth of the Yuba River, and (3) YCWA's proposed voluntary agreement. Staff further provided that though modeling efforts to date have used the Sacramento Water Allocation Model (SacWAM) and applied modeling requirements on a monthly time step year-round at the mouth of the Yuba River, South Yuba River, and Middle Yuba River; the Bay-Delta planning process has contemplated that a percent of unimpaired flow requirement could be treated as a block of water to be managed adaptively. Additionally, in October 2021, staff provided model runs as requested by YCWA.

On November 16, 2021, YCWA responded that it plans to model 45 percent and 55 percent unimpaired flows, but that it did not think modeling unimpaired flows as aggregated blocks of water from January – June would be possible. YCWA further declined to model its proposal for a voluntary agreement to achieve reasonable protection of fish and wildlife beneficial uses through the Sacramento/Delta Update to the Bay-Delta Plan, citing ongoing discussions and other uncertainties. State Water Board staff do not have a proposal for a method to model aggregated blocks of water from January – June, although such methods are possible in principle, particularly given the adaptive range of percent unimpaired flows contemplated by the July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan.⁷ However, subsequent to the November letter, on March 29, 2022, YCWA entered into a Memorandum of Understanding Advancing a Term Sheet for the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan, and Other Related Actions (VA MOU).⁸ State Water Board staff are currently evaluating YCWA's proposal along with the other proposals included in the VA MOU as an alternative for the Sacramento/Delta Update to the Bay-Delta Plan. If it is

⁶ The State Water Board is developing Bay-Delta Plan amendments focused on the Sacramento River and its tributaries (including the Yuba River), Delta eastside tributaries, Delta outflows, and interior Delta flows. This effort is referred to as the Sacramento/Delta Update to the Bay-Delta Plan.

⁷ Available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf

⁸ Available at: [https://resources.ca.gov/-/media/CNRA-](https://resources.ca.gov/-/media/CNRA-Website/Files/NewsRoom/Voluntary-Agreement-Package-March-29-2022.pdf)

[Website/Files/NewsRoom/Voluntary-Agreement-Package-March-29-2022.pdf](https://resources.ca.gov/-/media/CNRA-Website/Files/NewsRoom/Voluntary-Agreement-Package-March-29-2022.pdf)

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

YCWA's position that its voluntary agreement proposal constitutes reasonable protection of water quality and associated beneficial uses, that scenario should be modeled and analyzed as a potential representation of Condition 1(D) flows.

- (11) **Under *County of Butte*, YCWA Must Comply with CEQA by Evaluating Reasonable Alternatives and Mitigation, and is Not Preempted from Considering Mitigation that May Conflict with a FERC License:** On page two of the NOI, YCWA states:

The California Supreme Court recently ruled that a California government agency licensee generally must comply with CEQA in connection with FERC licensing or relicensing of a project in the state. (*County of Butte v. Department of Water Resources*, decided Aug. 1, 2022.) The court explained that the CEQA document serves as an informational source for the California agency's own decision-making regarding relicensing. It informs the decision about whether to accept the particular license and its terms and conditions, whether to request FERC to incorporate other terms into the license or seek reconsideration by FERC, and potential mitigation measures that may fall outside of FERC's jurisdiction. CEQA review also aids the assessment of options going forward.

However, . . . the *County of Butte* court also concluded that CEQA is preempted by federal law to the extent that a CEQA requirement or action interferes or is inconsistent with the FERC license, FERC relicensing process under federal law, or FERC's exclusive jurisdiction over the FERC-licensed project. For example, YCWA may be barred from incorporating mitigation measures under CEQA that would conflict with a term of the FERC license.

State Water Board staff note that YCWA's statement diverges from the California Supreme Court's *County of Butte* opinion in several respects. As an initial matter, YCWA's characterization of "FERC's exclusive jurisdiction over the FERC-licensed project" is not supported by the California Supreme Court's opinion. In *County of Butte*, the Court acknowledged FERC's exclusive licensing authority ((2022) 13 Cal.5th 612, 620, 634, 635) as well as its sole jurisdiction over licensing processes (see, e.g., *Id.* at p. 620), but also noted that the FPA and Clean Water Act provide roles for states in FERC-licensed projects through savings clauses and Clean Water Act section 401 water quality certifications. (*Id.* at pp. 623, 631.)

Second, in *County of Butte*, the Court explained that when the FERC licensee is an agency of the state such as YCWA, the CEQA document "also informs decisionmaking about potential measures that may be outside of *or compatible with* FERC's jurisdiction." (13 Cal.5th at p. 620, emphasis added.) YCWA's statement that CEQA informs "potential mitigation measures that may fall outside of FERC's jurisdiction" would omit consideration of mitigation or other measures

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

that may be compatible with FERC's jurisdiction, such as those compatible with a FERC license's terms and conditions. YCWA's statement also presumes that mitigation or other measures that exceed the requirements imposed by terms of a FERC license will necessarily conflict with the FERC license and be preempted. State Water Board staff are concerned that YCWA's characterization of *County of Butte* could result in premature narrowing of the scope of mitigation and alternatives considered through CEQA. State Water Board staff note that CEQA, which the NOI acknowledges YCWA must comply with, requires the consideration of a reasonable range of project alternatives and mitigation measures for each potentially significant environmental impact. (Cal. Code Regs., tit. 14, § 15126.6, subd. (a); Pub. Resources Code, §§ 21002.1, subd. (a), 21061, 21100, subd. (b)(3); Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(1).)

At this stage in the CEQA process, the State Water Board is providing input regarding the scope and content of environmental analysis as a Responsible Agency. As FERC has not completed its supplemental EIS or issued a license,⁹ the terms and conditions of such a license are not certain. Thus, YCWA cannot determine whether a particular mitigation measure "would conflict with a term of the FERC license." In *County of Butte*, the Court held that nothing prohibits or preempts an agency of the state such as YCWA from considering mitigation or other measures that conflict with the terms of conditions of a FERC license. On the contrary, the Court stated, "we are aware of no federal law — and the concurring and dissenting opinion cites none — that limits an applicant's ability to analyze its options or the proposed terms of the license before [amending its license application or seeking reconsideration after FERC has issued a license]." (13 Cal.5th at p. 634.) The Court also concluded that an agency of the state "can undertake CEQA review . . . in order to assess its options going forward. Nothing about such use of CEQA review is incompatible with federal authority." (*Id.* at pp. 634-635.) Therefore, State Water Board staff believe that it would be premature and improper for YCWA to choose not to analyze alternatives or mitigation measures solely due to a theoretical conflict. State Water Board staff request that YCWA fulfill its obligation to comply with CEQA by analyzing a reasonable range of alternatives and mitigation measures for each potentially significant environmental impact, as required by CEQA.

- (12) Inadequate Floodplain Restoration Analysis in NEPA Document:** FERC's 2019 EIS does not explain how the FERC staff recommendation of planting 100 acres of riparian vegetation would increase the duration of flooding. YCWA's Supplemental Analysis should analyze floodplain impacts and mitigation measures using a method that considers duration of floodplain inundation. The Supplemental Analysis should also fully characterize the method used, including detailing flow assumptions (e.g., would a No Project scenario include Yuba Accord flows, unimpaired flows, or existing flow releases from other hydroelectric

⁹ As FERC is required to comply with NEPA and the ESA, the supplemental EIS will necessarily precede issuance of a FERC license.

Attachment: Comments on Yuba County Water Agency's November 7, 2022 Notice of Intent for the Yuba River Development Project Relicensing

projects currently operating in the Yuba River system) and any data gaps. The Supplemental Analysis should also consider additional restoration actions (e.g., floodplain lowering or additional flow releases) to accompany riparian vegetation planting.

(13) Corrections to Statements in the NOI: State Water Board staff note the following corrections to statements in the Licensing Background section of YCWA's NOI:

- Page one of the NOI states, "At the [State Water Board's] request, YCWA withdrew and refiled its application for a [water quality certification] on August 3, 2018." The State Water Board disagrees with YCWA's characterization of the email exchange that occurred in 2018 prior to YCWA's withdrawal and resubmittal of its application for certification. As YCWA had not even begun the CEQA process and at that time state law did not allow the State Water Board to issue a certification before the completion of CEQA, State Water Board staff reached out to YCWA to remind it of the one-year deadline. In this email exchange, State Water Board staff explained that YCWA could either withdraw and resubmit its application a few weeks before the one-year deadline or the State Water Board would issue a denial without prejudice. YCWA understood its options and chose to withdraw and resubmit.
- Page two of the NOI states, "On July 20, 2020, the [State Water Board] purported to issue a [water quality certification] with 50 conditions" This date is incorrect; the State Water Board issued the 2020 water quality certification for relicensing of the Project on July 17, 2020.
- Page two of the NOI states, "In a ruling dated June 28, 2022, the Fresno County Superior Court ordered the SWRCB to set aside and vacate the 2020 WQC." This date is incorrect. Although the Fresno County Superior Court issued an order granting YCWA's motion on June 28, 2022, the court did not enter a judgment or issue a writ of mandate ordering the Board to set aside and vacate the 2020 certification until August 4, 2022. As YCWA's NOI acknowledges, the State Water Board has appealed the superior court's decision and judgment.