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STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD  
ORDER WQ 2024-XXXX

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IN THE MATTER OF THE  
STATE WATER RESOURCES CONTROL BOARD'S  
LIMITED OWN MOTION RECONSIDERATION OF  
WATER QUALITY CERTIFICATION FOR  
YUBA COUNTY WATER AGENCY'S YUBA RIVER DEVELOPMENT PROJECT  
(FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 2246)

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## ORDER SETTING ASIDE WATER QUALITY CERTIFICATION

BY THE BOARD:

### I. INTRODUCTION

As discussed in section IV of State Water Resources Control Board (State Water Board or Board) [Order WQ 2024-0046](#), in September 2023, the United States Environmental Protection Agency (USEPA) provided, for the first time, an interpretation of section 401 of the federal Clean Water Act (Section 401) that precludes certifying authorities such as the Board from issuing a water quality certification (certification) in the absence of a currently pending request for certification. (88 Fed.Reg. 66558, 66583 (Sept. 27, 2023).) In light of this USEPA interpretation, on May 7, 2024, the State Water Board adopted Board Order WQ 2024-0046<sup>1</sup> and set aside three certifications for hydropower project licenses. The certifications had been issued in 2020 and 2021 by the Board's Executive Director when there was no currently pending request for certification, where the Board had previously received a request for certification, that request had either been denied or withdrawn, and the project proponent was still actively pursuing a federal hydropower license. Board Order WQ 2024-0046 also dismissed the pending petitions for reconsideration of the certifications it set aside.

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<sup>1</sup> The State Water Board has designated orders and decisions adopted by the Board at a public meeting as precedent decisions, unless the decision or order indicates otherwise, or is superseded by later enacted statutes, judicial opinions, or actions of the Board. (Board [Order WR 96-01](#), at p. 17, fn. 11; see Gov. Code. § 11425.60.)

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Consistent with Board Order WQ 2024-0046, this order sets aside the certification for a hydropower project license for the Yuba River Development Project (YRDP), Federal Energy Regulatory Commission (FERC) Project No. 2246, issued when there was no currently pending request for certification, where the Board had previously received a request for certification, that request had been denied or withdrawn, and the project proponent—here, Yuba County Water Agency (YCWA)<sup>2</sup>—was still actively pursuing a federal hydropower license.<sup>3</sup> The Board’s Executive Director issued this certification on July 17, 2020. On December 15, 2020, the State Water Board amended Condition 23 of the YRDP certification and related text to enable proceeding on reconsideration by adopting Board [Order WQ 2020-0043](#).

As discussed in section III.G of Board Order WQ 2024-0046, following the adoption of Board Order WQ 2020-0043, the State Water Board received timely petitions for reconsideration of the YRDP certification. Due to the YRDP certification being set aside by this order, there is no longer any action of the Board to be reconsidered. Therefore, to avoid the unnecessary expenditure of resources, this order also dismisses the following petitions for reconsideration:

- Yuba County Water Agency’s August 14, 2020 Petition for Reconsideration of the July 17, 2020 Water Quality Certification for Yuba County Water Agency’s Yuba River Development Project (FERC Project No. 2246), including Yuba County Water Agency’s January 14, 2021 Amendment and Supplement to this petition;
- California Department of Fish and Wildlife’s January 14, 2021 Petition for Reconsideration of the July 17, 2020 Water Quality Certification, as amended on December 15, 2020, for Yuba County Water Agency’s Yuba River Development Project (FERC Project No. 2246); and
- California Sportfishing Protection Alliance, South Yuba River Citizens League, Friends of the River, Trout Unlimited, and Sierra Club Mother Lode Chapter’s January 14, 2021 Petition for Reconsideration of the July 17, 2020 Water Quality Certification, as amended on December 15, 2020, for Yuba County Water Agency’s Yuba River Development Project (FERC Project No. 2246).

## II. RECONSIDERATION AUTHORITY

The State Water Board may amend its decisions on its own motion, as set forth in California Code of Regulations, title 23, section 3867, subdivision (b)(1), which provides:

The state board and the executive director, when acting as the state board’s designee, may undertake such reconsideration on their own motion. They shall notify the applicant (if any), the federal agency, and all interested persons known to the state board or executive director and give

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<sup>2</sup> Doing business as Yuba Water Agency.

<sup>3</sup> Issuance of certifications for classes of activities is not at issue in this proceeding and this order does not express any opinion on the procedural requirements for general certifications. (See Cal. Code Regs., tit. 23, § 3861.)

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those notified the opportunity to submit information and comments before taking a final reconsideration action (as listed in Subsection 3869(a) of this Chapter).

The State Water Board provided notice to the applicant, YCWA; the federal agency, FERC; and all interested persons by notice issued on July 15, 2024.

The State Water Board is authorized to take a variety of actions on reconsideration. California Code of Regulations, title 23, section 3869, subdivision (a) provides:

Following examination of the petition and any necessary portion of the record, the state board or executive director, when acting as the state board's designee, may:

- (1) refuse to reconsider the action or failure to act of the executive director (state board only), regional board, or executive officer if the petition fails to raise substantial issues that are appropriate for reconsideration;
- (2) deny the petition upon a finding that the original action or failure to act was appropriate and proper;
- (3) set aside or modify, if possible, the previous action or take new appropriate action; or
- (4) direct the executive director (state board only), executive officer, or regional board to take appropriate action.

### III. LEGAL AND YRDP PROCEDURAL BACKGROUND

The legal background set forth in sections III.A through III.C of Board Order WQ 2024-0046 remains accurate and applicable. Section III.G of Board Order WQ 2024-0046 provides procedural background related to the YRDP. The following paragraph summarizes YRDP-related procedural events subsequent to the Board's adoption of State Water Board Order WQ 2024-0046 on May 7, 2024.

Until recently, the YRDP certification and any further proceedings on it were stayed by Code of Civil Procedure section 1094.5, subdivision (g) due to the posture of the state court litigation and the Board's pending appeal. On June 6, 2024, the State Water Board and YCWA filed a joint request asking the California Court of Appeal to lift the automatic stay imposed by Code of Civil Procedure, section 1094.5, subdivision (g) for the sole purpose of allowing the Board to consider the adoption of an order setting aside the YRDP certification and dismissing the pending petitions for reconsideration of that certification in light of USEPA's September 2023 interpretation of Section 401. On June 17, 2024, the Court of Appeal granted this joint request and filed an order lifting the stay.

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## IV. THE STATE WATER BOARD DEFERS TO USEPA'S INTERPRETATION

In Board Order WQ 2024-0046, the State Water Board deferred to USEPA's new interpretation concerning authority to issue a certification in the absence of a currently pending request for certification:

although the State Water Board believes its issuance of the certifications at issue was proper and its interpretation of Section 401 remains reasonable, in light of USEPA's recently stated interpretation, the State Water Board defers to USEPA's new interpretation and sets aside these certifications.

(State Water Board Order WQ 2024-0046 at p. 19.)

As part of its analysis, the State Water Board concluded that USEPA's interpretation would likely be given *Chevron* deference. (State Water Board Order WQ 2024-0046 at pp. 15-16, 18; see generally *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 844 (*Chevron*)). *Chevron* has since been overruled. (*Loper Bright Enterprises v. Raimondo* (June 28, 2024, Nos. 22-451 and 22-1219) 603 U.S. \_\_\_\_ [2024 WL 3208360] (*Loper Bright*)). While the effects of *Loper Bright* amount to a major change in circumstances in other contexts, we conclude that it does not provide an adequate basis for departing from the precedent set in State Water Board Order WQ 2024-0046.<sup>4</sup>

*Loper Bright* directs courts to exercise independent judgment to determine the meaning of federal statutory provisions. (*Loper Bright, supra*, 2024 WL 3208360 at \*13.) The Supreme Court explained, however, that the exercise of independent judgment has “from the outset” involved according respect to interpretations of those in the executive branch of the federal government who carry out the law. (*Id.* at \*9 [citing opinions from 1809 and 1827].) The Supreme Court further stated that courts may “seek aid” or “guidance” from interpretations of federal agencies charged with administering a particular statute. (*Id.* at \*13.) In cases challenging federal agency action, a court reviews the matter “with the agency’s ‘body of experience and informed judgment’ . . . at its disposal” and agency expertise may increase the persuasive value of the agency’s interpretation. (*Id.* at \*17 [quoting and citing *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140].)

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<sup>4</sup> As with a court, an administrative agency may modify or overrule an agency precedent in appropriate circumstances, but doing so requires a reasonable explanation and a square confrontation of the prior decision. (State Water Board [Order WR 2009-0061](#), at pp. 9-10.)

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Thus, while USEPA's interpretation is no longer subject to *Chevron* deference, it will still be given some deference. The State Water Board anticipated this potential:

It also appears likely that courts will give substantial weight to USEPA's interpretation and give little or no weight to the State Water Board's view, even if federal agencies are given less deference than under *Chevron*.

(State Water Board Order WQ 2024-0046 at p. 19.) And the other factors taken into consideration in Board Order WQ 2024-0046 have not changed. Accordingly, this order follows State Water Board Order WQ 2024-0046.

The Board's future actions are neither bound nor determined by the certification set aside by this order. Thus, to avoid the unnecessary expenditure of resources revisiting certification actions and conditions that have been set aside, the Board also finds it appropriate to dismiss the pending petitions for reconsideration of the YRDP certification.

## V. CONCLUSION

Due to USEPA's newly stated interpretation that Section 401 of the Clean Water Act precludes certifying authorities from issuing a certification in the absence of a currently pending request for certification, we act on our own motion and set aside the certification previously issued by the State Water Board for hydropower licensing of the Yuba River Development Project. In light of this certification being set aside, and to prevent the unnecessary expenditure of resources on issues related to this set-aside certification, it is also appropriate to dismiss the pending petitions for reconsideration of this certification.

## VI. ORDER

### IT IS HEREBY ORDERED THAT

1. The following water quality certification is set aside:
  - a. Water Quality Certification for Yuba County Water Agency's Yuba River Development Project (FERC Project No. 2246), issued by the State Water Resources Control Board on July 17, 2020, and amended on December 15, 2020.
2. The following petitions for reconsideration are dismissed:
  - a. Yuba County Water Agency's August 14, 2020 Petition for Reconsideration of the July 17, 2020 Water Quality Certification for Yuba County Water Agency's Yuba River Development Project (FERC Project No. 2246), including Yuba County Water Agency's January 14, 2021 Amendment and Supplement to this petition;

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- b. California Department of Fish and Wildlife's January 14, 2021 Petition for Reconsideration of the July 17, 2020 Water Quality Certification, as amended on December 15, 2020, for Yuba County Water Agency's Yuba River Development Project (FERC Project No. 2246); and
- c. California Sportfishing Protection Alliance, South Yuba River Citizens League, Friends of the River, Trout Unlimited, and Sierra Club Mother Lode Chapter's January 14, 2021 Petition for Reconsideration of the July 17, 2020 Water Quality Certification, as amended on December 15, 2020, for Yuba County Water Agency's Yuba River Development Project (FERC Project No. 2246).

## **CERTIFICATION**

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 18, 2024.

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Courtney Tyler  
Clerk to the Board