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VIA E-MAIL

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: **5/7/13 BOARD MEETING ITEM 8: CONSIDERATION OF A PROPOSED
ORDER ADDRESSING PACIFIC GAS AND ELECTRIC COMPANY'S
PETITION FOR RECONSIDERATION OF THE WATER QUALITY
CERTIFICATION ISSUED FOR THE CHILI BAR HYDROELECTRIC
PROJECT**

Dear Ms. Townsend:

Pacific Gas and Electric Company (PG&E) respectfully submits the following comments on the Draft Order circulated by the State Water Resources Control Board (State Water Board) on April 24, 2013 regarding PG&E's Petition for Reconsideration of Water Quality Certification for the Chili Bar Hydroelectric Project.

PG&E would first like to acknowledge State Water Board staff's recommendation to revise Condition 32 as requested by PG&E. PG&E appreciates staff's support of the requested revision.

PG&E, however, remains concerned about the numerous reservations of authority that remain unchanged in the Draft Order, as well as the conditions relating to compliance with the Basin Plan and the reintroduction of anadromous fish.

First, it does not appear that PG&E's filing of February 4, 2013 was considered by staff. In that filing, styled as "Pacific Gas and Electric Company's Reply to Conservation Groups' Opposition to PG&E's Petition for Reconsideration of the Water Quality Certification for the Chili Bar Hydroelectric Project," PG&E discussed at length the legal underpinnings for its assertion that the reopener provisions are impermissible. In fact, 17 of the brief's 28 pages are dedicated to this argument. The discussion is replete with citations to federal and state case law

as well as to pertinent federal regulations. The Table of Authorities, most of which relates to the issue of the reopeners, is itself three pages in length. Yet, the Draft Order states that “PG&E cites to no legal authority” for its assertions. Draft Order at 4. This is a puzzling statement that suggests staff did not consider PG&E’s filing. The Draft Order acknowledges the filing, noting that “PG&E submitted a response to the comment letters after the 20 day comment deadline.” Draft Order at 2. However, the Draft Order does not discuss at all the substance of the filing or the numerous authorities cited therein, including the leading case of *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991), discussed at length in PG&E’s filing.

To the extent State Water Board staff declined to review PG&E’s February 4, 2013 filing because the filing was submitted “after the 20 day comment deadline,” PG&E believes the decision was improper. There is no language in the State Water Board’s rules that prohibit an applicant for a water quality certification from filing a reply to comments submitted on a water quality certification. The conservation groups’ comments, to which PG&E replied, raised new legal arguments not previously addressed in this proceeding. It was proper for PG&E to file a reply so as to give the State Water Board the benefit of a complete legal briefing before it decides the complicated legal issues presented.

Consequently, PG&E respectfully requests that the State Water Board duly consider PG&E’s February 4, 2013 filing before rendering a decision on PG&E’s Petition. A copy of the filing is attached.

Second, PG&E remains concerned about Condition 22. That Condition requires compliance “with all applicable requirements of the Basin Plan.” PG&E respectfully reiterates its contention that the condition is vague since it purports to require PG&E to comply with “all applicable requirements” of the water quality plan for the Sacramento and San Joaquin River Basins, yet fails to state which of the literally hundreds of requirements contained in that Basin Plan are in fact “applicable” to PG&E. PG&E has further noted that State Water Board staff agreed to delete this condition from the final water quality certifications issued for both the Spring Gap-Stanislaus and Pit 3, 4 & 5 projects after PG&E objected (on the same grounds) to their inclusion in the draft certifications for those projects.

Moreover, and as discussed in PG&E’s February 4, 2013 filing, in *East Bay Municipal Utility District et al. v. State Water Resources Control Board et al.*, Alameda County Case No. RG 10512151, the State Water Board argued – and the court agreed – that Basin Plan provisions assigning mass-based numerical waste load allocations to named dischargers “do not by themselves prohibit any conduct or require any actions on the part of dischargers. They merely set goals. What dischargers are required to do is specified in the waste discharge permits (NPDES permits) that they are required to obtain from Regional Water Boards.” State Water Board’s December 22, 2010 Brief on the Merits, 7:11-13 (emphasis added).

Thus, the State Water Board took the position that there could be no enforcement jeopardy associated with the Basin Plan unless and until specific requirements were articulated in

a future approval issued to the discharger. Here, the “future approval” – a 401 certification – has been issued, and its Condition 22 does not have the requisite specificity to put PG&E on notice of “[w]hat dischargers are required to do.”

It is PG&E’s understanding, then, that the Basin Plan’s primary purpose is to provide guidance to permit writers as to what measures to incorporate into a permit; it is not itself intended primarily as a compliance document. Consequently, PG&E questions the propriety of purporting to incorporate wholesale “all applicable requirements” of the Basin Plan.

As opposed to the broad, unduly vague and un-workable language presently found in Condition 22, PG&E is not generally opposed to the inclusion of more specific language regarding the Basin Plan identical to that found in the water quality certifications for PG&E’s Hat Creek 1 & 2 Hydroelectric Project, FERC Project No. 2661 (Condition No. 7), and Pit 1 Hydroelectric Project, FERC Project No. 2687 (Condition No. 6). That language reads as follows:

“In order to protect the beneficial use designations identified in the Basin Plan, the operation of the project shall not add the following substances to surface waters:

- Taste or odor-producing substances to impart undesirable tastes to domestic and municipal water supplies or odors to fish flesh or other edible products of aquatic origin or to cause nuisance or adversely affect beneficial uses;*
- Perceptible floating material including, but not limited to, solids, liquids, foams, or scums which could result in degradation of water quality;*
- Suspended or settleable material in concentrations that cause a nuisance or adversely affect beneficial uses;*
- Oil, greases, waxes, or other materials in concentrations that result in a visible film, or coating on the surface of the water or on objects in the water;*
- Toxic pollutants present in the water column, sediments, or biota in concentrations that adversely affect beneficial uses; that produce detrimental response in human, plant, animal, or aquatic life; or that bioaccumulate in aquatic resources at levels which are harmful to human health; and*
- Coliform organisms attributable to animal or human wastes.”*

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PG&E respectfully requests that the above language be substituted for the current language in Condition 22.

Finally, while PG&E continues to object to Condition 12 (“Reintroduction of Anadromous Fish”) in its entirety for the reasons stated in its Petition and in its February 4, 2013 filing, PG&E does appreciate the State Water Board staff’s effort to make the Condition less vague. However, the trigger it proposes for PG&E to consult with the resource agencies and State Water Board staff is premature. Condition 12, as re-drafted, requires PG&E to consult “[w]ithin 90 days of a determination by a state or federal agency to restore anadromous fish passage to the waters above Folsom Dam.” In a footnote, staff states that “identification of passage above Folsom Dam in the plan referenced in LF 2 would serve as a ‘determination’ by a state or federal agency to restore anadromous fish passage, and would be a trigger to initiate consultation as outlined in Condition 12.” PG&E respectfully suggests that this triggering event is premature since the simple “identification” of the issue by the Bureau of Reclamation (Reclamation) in a plan will not ensure the reintroduction of anadromous fish. Many additional steps would be required, not the least of which would be the approval of the plan by the National Marine Fisheries Service.

Indeed, the trigger proposed by staff in the footnote is inconsistent with the text of Condition 12 itself. The mere mention in a plan of the possibility of reintroduction cannot reasonably be interpreted as “a determination” to reintroduce anadromous fish above Folsom Dam, particularly where the plan’s author, Reclamation, does not have the authority to effectuate the reintroduction. Clearly, a “determination” is something stronger than the inclusion of a line item in a plan submitted by an agency without jurisdiction to effectuate it. PG&E continues to believe the appropriate timing for consultation should be within 120 days after physical completion and initiation of operation of fish passage facilities at Nimbus and/or Folsom Dams. By way of compromise, PG&E could support a trigger tied to the initiation of physical on-site construction of fish passage facilities at Nimbus and/or Folsom Dams. PG&E respectfully requests that, at a minimum, Condition 12 be re-drafted accordingly.

PG&E appreciates the opportunity to submit this letter and thanks the State Water Board for its consideration of these important issues.

Very truly yours,



Matthew A. Fogelson

Attachment

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

**In the Matter of
Water Quality Certification for the
Chili Bar Hydroelectric Project**

FERC Project No. 2155

**PACIFIC GAS AND ELECTRIC COMPANY'S
REPLY TO CONSERVATION GROUPS' OPPOSITION TO
PG&E'S PETITION FOR RECONSIDERATION OF
THE WATER QUALITY CERTIFICATION
FOR THE CHILI BAR HYDROELECTRIC PROJECT**

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February 4, 2013

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

**In the Matter of
Water Quality Certification for the
Chili Bar Hydroelectric Project**

FERC Project No. 2155

**PACIFIC GAS AND ELECTRIC COMPANY'S
REPLY TO CONSERVATION GROUPS' OPPOSITION TO
PG&E'S PETITION FOR RECONSIDERATION OF
THE WATER QUALITY CERTIFICATION
FOR THE CHILI BAR HYDROELECTRIC PROJECT**

INTRODUCTION

Pacific Gas and Electric Company ("PG&E") respectfully submits this Reply to the Opposition to PG&E's Petition for Reconsideration of the Water Quality Certification for the Chili Bar Hydroelectric Project ("Petition") filed jointly by American River Recreation Association, American Whitewater, California Outdoors, California Sportfishing Protection Alliance, Foothill Conservancy, Friends of the River, Hilde Schweitzer, and Theresa Simsiman (collectively, "Conservation Groups").

PG&E takes seriously its commitment to environmental stewardship, which is why it has committed significant time and financial resources and partnered with state and federal resource agencies and non-governmental organizations across California to improve habitat for

anadromous salmonids at several of its hydroelectric Projects.¹ PG&E also takes seriously its commitment to its customers to endeavor to keep energy prices as low as possible. PG&E's Petition seeks to balance these interests by focusing on a few, narrow legal issues, the resolution of which could have significant economic consequences for PG&E's customers.

Because the issues raised in its Petition are important, and because, as discussed below, its positions on the issues are amply supported by the law, PG&E respectfully requests that the State Water Resources Control Board ("State Water Board") grant PG&E's Petition and reject the Conservation Group's Opposition.²

ARGUMENT

I. CERTIFYING AGENCIES MAY NOT UNILATERALLY MODIFY, AMEND, OR REVOKE A WATER QUALITY CERTIFICATION ISSUED UNDER SECTION 401 OF THE CLEAN WATER ACT ONCE IT HAS BEEN INCORPORATED INTO A FEDERAL LICENSE OR PERMIT (Conditions 12, 17-21, 26 and 32-33).

In its Petition, PG&E objected to the numerous reservations of authority contained in the certification that purport to allow the State Water Board to change unilaterally the requirements of PG&E's FERC license.³ PG&E welcomes the opportunity to expand herein on the arguments

¹ Among other initiatives, PG&E is a primary partner in the Battle Creek Salmon and Steelhead Restoration Project, a collaborative, multi-party effort that through modifications to facilities and operations at PG&E's Battle Creek Hydroelectric Project, including modification to instream flow releases, will reestablish approximately 42 miles of prime salmon and steelhead habitat in the North and South Forks of Battle Creek, plus an additional six miles of habitat in the tributaries of Battle Creek. PG&E has also for many years partnered with the resource agencies to maximize the cool water benefits of PG&E's DeSabra-Centerville Hydroelectric Project for Chinook salmon in Butte Creek, and has committed to decommissioning its Kilarc-Cow Creek Hydroelectric Project, which will restore natural streamflows to approximately eight miles of streams tributary to the Sacramento River.

² PG&E notes that its Petition should not unduly delay the licensing process for the Chili Bar project. As a practical matter, it is PG&E's understanding that FERC intends to issue a new license for the Chili Bar Project roughly concurrently with its issuance of a new license for the Upper American River Project ("UARP") in order to facilitate implementation of the two licenses which will likely have overlapping requirements. A water quality certification for the UARP has not yet been issued by the State Water Board. Consequently, issuance of a new license for the UARP is not imminent.

³ For example, Condition 21, discussed further in Section V, *infra*, reserves to the State Water Board the authority to "modify or add conditions in this certification to require additional monitoring and/or other measures, as needed, to verify that Project operations meet water quality objectives and protect the beneficial uses assigned to Project-affected stream reaches."

raised in its Petition concerning the inability of certifying agencies under Section 401 of the Clean Water Act (“CWA”), 33 U.S.C. § 1341, unilaterally⁴ to modify, amend or revoke a certification once it has been incorporated into a federal permit or license. As discussed below, PG&E’s position is based on the statutory text of Section 401, federal case law, the implementing regulations of the U.S. Environmental Protection Agency (“EPA”), state case law, and analogous federal certification frameworks.

A. The Text of CWA Section 401, as Interpreted by the Federal Courts, Supports PG&E’s Position.

Section 401(a)(3) of the CWA, 33 U.S.C. § 1341(a)(3), expressly governs when a state may render inoperative a prior water quality certification. It allows a state to do so only in extremely limited circumstances: where a certification was issued in association with a federal permit for construction of a project and where the federal permit to operate the project has not yet been issued; and then only if there are changes in “(A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements.” 33 U.S.C. § 1341(a)(3).⁵

The leading case analyzing Section 401(a)(3) and examining a certifying agency’s ability to disavow a certification is *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991). In *Keating*, petitioner sought to build a small hydroelectric plant on a creek in Inyo County, California. Petitioner filed with the Federal Energy Regulatory Commission (“FERC”) an application for

⁴ PG&E agrees that a certification may be modified if both the licensee and FERC *concur* in the modification, as is the case with PG&E’s Pit 1 Hydroelectric Project, cited in Conservation Group’s brief (“Brief”) at 5. The issue PG&E raised in its Petition, however, addresses the very different question of whether the certifying agency may *unilaterally* modify a certification over the objections of the licensee and/or FERC. As discussed herein, it may not.

⁵ Section 401(a)(3) also contains a timeliness requirement: the state must notify the relevant federal licensing agency of its intention to render inoperative a certification within 60 days of the time it is itself notified that an application for an operating license is pending. 33 U.S.C. § 1341(a)(3).

new license under the Federal Power Act, and submitted a request for water quality certification to the Regional Water Quality Control Board. While the applications were pending respectively before FERC and the Regional Board, petitioner applied for a nationwide dredge-and-fill permit from the Army Corps of Engineers pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. The Army Corps issued the Section 404 permit to petitioner, relying on a water quality certification issued by the State Water Board that authorized the activities set out in the Corps' nationwide permit. The Regional Board, however, ultimately denied petitioner's separate, project-specific application for water quality certification. Faced with both a certification issued by the State Water Board and a denial of certification issued by the Regional Board, FERC asked the State Water Board for clarification of the project's certification status. The State Water Board responded that "the Regional Board's action vitiated the state's earlier certification given in connection with the Corps nationwide permits." *Id.* at 620. FERC then suspended consideration of petitioner's license application until such time as petitioner secured an approved state certification, concluding that it was "powerless to act on Keating's application." *Id.* FERC maintained that "the issue of whether a state certifying agency has legally revoked validly issued project-specific or blanket water quality certification is reviewable in the state courts, not by this Commission." *Id.* at 621.

The question on appeal was whether or not FERC had the authority to decide whether the state's purported revocation of its prior certification was proper. *Id.* at 622. The Court held that FERC had such authority, stating "[w]e have no doubt that the question posed is a matter of federal law, and that it is one for FERC to decide in the first instance." *Id.*

The Court's reasoning is directly relevant to the issues raised in PG&E's Petition for Reconsideration. In reaching its conclusion regarding the scope of FERC's authority, the Court

reasoned that while the states are afforded certain authority under Section 401 of the CWA, once a certification is incorporated into a federal license, the statute reserves to the federal licensing agency authority over that license. The court stated as follows:

Nor do we doubt the propriety of a federal agency's refusal to review the validity of a state's decision to grant or deny a request for certification in the first instance, before any federal license or permit has yet been issued. Such a decision presumably turns on questions of substantive state environmental law – an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence. It is for these reasons that a number of courts have held that disputes over such matters, *at least so long as they precede the issuance of any federal license or permit*, are properly left to the states themselves. [Citations omitted]. The certification power of the states under section 401 is not, however, unbounded. Whatever freedom the states may have to impose their own substantive policies in reaching initial certification decisions, the picture changes dramatically once that decision has been made and a federal agency has acted upon it.

Id. at 623 (emphasis in original). The Court expressly rejected “the state’s claim of a general reservation of discretionary authority to revoke prior blanket certification as to particular projects at any time and apparently for any reason. Such a broad reservation of authority cannot be squared with Congress’ purpose in section 401(a)(3).” *Id.*

While *Keating* involved the purported revocation of a certification after issuance of a federal license, the logic of its holding is equally applicable to state efforts to modify or amend a certification through the exercise of a reopener condition. After all, Section 401(a)(3) does not speak of “revocation” or “modification.” It simply provides a (limited) mechanism for states to render a prior certification inoperative. Whether a state attempts to render a prior certification inoperative by “revoking” it, or by “modifying” it, is irrelevant to the reach of the statutory text. Either way, the ability to render the prior certification inoperative is limited by the text. Indeed, it would make little sense to prohibit a state from revoking a certification, but allow it to

completely re-write a certification; the same federal interests are at issue in both scenarios. It is also worth noting that the condition that the court found objectionable in *Keating* purported not only to reserve discretionary authority to revoke certification, but also to “set additional conditions of certification.” *Id.* at 620.

Thus, as discussed extensively in *Keating*, the CWA, through Section 401(a)(3), establishes a limited mechanism for states to modify, amend or revoke a water quality certification. States may do so when the certification is issued in connection with a federal construction permit, when the corresponding federal operating permit has not yet been issued, and where the other statutory requirements of Section 401(a)(3) are satisfied. Consequently, there is absolutely no statutory basis for imputing a right to modify, amend or revoke a certification in any other context, including after FERC issues a new hydropower operating license pursuant to Section 15 of the Federal Power Act. Given that Congress specified in great detail the limited circumstances where modification or revocation of a certificate was permitted, it is difficult to believe that Congress would have intended states to have the implied authority to modify *any* certificate for *any* reason through the use of reservation of authority conditions. If Congress had so intended, there would have been no need for it to have included subsection (a)(3) in Section 401. The *Keating* court recognized this truism: “if a state could revoke a prior certification at any time and for any (or no) reason, section 401(a)(3) would be rendered meaningless. Obviously, such a result would make no sense.” *Id.* at 623. The provisions of § 401(a)(3) demonstrate that Congress knows how to provide states with the authority to render inoperative a certification, and does so when that is its intent.

In addition, in the section of the CWA pertaining to the issuance of point source discharge permits (§ 402 of the CWA), Congress specifically provided that those permits could

be terminated or modified by the states or EPA (depending on which entity issued the permit) “for cause,” including “change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.” See 33 U.S.C. §§ 1342(a)(3) and (b)(1)(C)(iii). These provisions again demonstrate that Congress knows how to craft reopener provisions that allow for permit modifications when it wants them. It also undercuts the argument that Congress, in crafting the section immediately preceding § 402, intended to grant the states implied authority to change any certificate for any reason through reopener provisions.⁶

In short, while Congress has determined that unilateral modification of a certificate by the state may, in limited circumstances, be appropriate prior to the issuance of a federal operating license incorporating that certificate, the rules are different once the federal operating license is issued in reliance on the state certification. At that point, the federal licensee may operate the project as licensed and the state may not attempt to shut it down or re-engineer the project by revoking or substantially modifying its certification.

The First Circuit has also so concluded, holding in the context of a federal discharge permit that once the state issues a certification, and a federal permit is issued in reliance on that state certification, the state’s subsequent efforts to modify the certificate are unavailing. In *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73 (1st Cir. 1993), the Court dismissed the state’s effort to stay its certification or otherwise render it non-final once it had been incorporated into a federal discharge permit. The Court acknowledged “the central role that the states were intended to play under the Clean Water Act.” *Id.* at 80. But the court then continued as follows:

⁶ It is important to note as well that § 402 permits cannot be issued for terms exceeding five years. 33 U.S.C. § 1342(b)(1)(B). One would think that if Congress determined it necessary to provide specifically for “for cause” modifications of § 402 permits even though they are only five years in duration, it would have been even more specific had it wanted states to have the authority to modify § 401 certificates, which are of potentially unlimited duration.

Yet that role is to be played within the framework of the procedures fixed by the statute and EPA regulations. Indeed, precisely because two different jurisdictions are expected to collaborate on a permit, there is a special need for compliance with the rules of the road. Here the [state] stay came *after* the permit and – strictly from a procedural standpoint – EPA was entitled to disregard it, unless and until EPA’s regulations governing a post-permit stay was satisfied.

Id. (emphasis in original).² See also *Caribbean Petroleum Corp. v. EPA*, 28 F.3d 232 (1st Cir. 1994)(affirming EPA issuance of NPDES permit incorporating certification notwithstanding request by certifying agency that EPA delay consideration of permit pending reconsideration of certification).

The Third Circuit has similarly recognized the more limited role for states once a certification has been issued and incorporated into a federal license or permit. In *Pennsylvania Department of Environmental Resources v. FERC*, 868 F.2d 592 (3rd Cir. 1989), the Court rejected the state’s challenge to a FERC license for which certification had already been issued, noting that Section 401 “gives states exclusive authority only to *issue* a certification, *prior to licensing, . . .*” *Id.* at 598 (emphasis supplied).

All of these decisions comport with the enforcement framework established in Section 401 which reserves to the federal permitting or licensing agency, and not to the state certifying agency, the authority to revoke or suspend a certification. For example, Section 401(a)(5) provides as follows: “Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked *by the Federal agency issuing such license or permit* upon the entering of a judgment under this chapter

² As noted below, EPA has issued regulations severely limiting when a certification may be modified once it has been incorporated into a federal discharge permit under § 402 of the CWA. See 40 C.F.R. § 124.55(b).

that such facility or activity has been operated in violation of the applicable provisions of [the CWA].” 33 U.S.C. § 1341(a)(5)(emphasis supplied).

To similar effect is Section 401(a)(4) of the CWA which authorizes the federal licensing agency, and not the state, “after public hearing,” to suspend a federal construction permit that incorporates a state certification, if the following conditions are met: (1) “Prior to the initial operation of [the] federally licensed or permitted facility or activity, . . . which facility or activity is not subject to a Federal operating license or permit,” and (2) after the state has been afforded an opportunity by the federal licensee “to review the manner in which the facility or activity shall be operated or conducted,” (3) the state notifies the federal licensing agency “that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements.” 33 U.S.C. § 1341(a)(4). This provision reflects clearly Congress’ intent to reserve solely to the federal licensing agency the authority to suspend a federal permit, even where the basis for suspension is an alleged violation of the state’s “applicable effluent limitations or other limitations or other water quality requirements.”⁸

While Conservation Groups argue that “[i]t is illogical that Section 401, . . . would give the federal government the right to suspend or revoke a license for non-compliance with water quality standards but deprive the State the right to suspend or revoke the underlying certification for similar cause,”² in fact, it is not illogical at all. Rather, it fits squarely within the statutory scheme which establishes that once a certification is issued, it becomes a creature of federal law and is incorporated into the federal permit or license. 33 U.S.C. § 1341(d). It also fits within our

⁸ Note as well that Congress made clear in the CWA that EPA can, in certain circumstances, enforce the terms of state-issued discharge and dredge-and-fill permits. See 33 U.S.C. § 1319(a)(1). Consequently, its reticence regarding the ability of states to enforce federal permits containing state certifications is telling.

² Brief at 6.

federalist constitutional structure. For a state unilaterally to change the terms of a federal permit after that federal permit has been issued would render federal law subservient to state law in contravention of the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, § 2, and undermine wholesale the preemptive reach of federal law. As the First Circuit observed, “precisely because two different jurisdictions are expected to collaborate on a permit, there is a special need for compliance with the rules of the road.” *Puerto Rico Sun Oil Company*, 8 F.3d at 80. As discussed above, the rules of the road, set by Congress, mandate federal control over the permit or license once it has been issued by the federal agency.

In short, the text and structure of Section 401 compel the conclusion that a state may not unilaterally modify, amend or revoke a water quality certification once it has been incorporated into a federal permit or license. Federal case law supports this plain reading of the text.

B. EPA’s Regulations Support PG&E’s Position.

In addition to the statutory text and federal case law interpreting that text, regulations promulgated by EPA, the primary federal agency charged with administering the Clean Water Act, support PG&E’s interpretation of Section 401. EPA’s certification regulations expressly prohibit unilateral modifications of certifications by certifying agencies. EPA’s certification regulations provide as follows with respect to modifications: “The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.” 40 C.F.R. § 121.2(b). Thus, under EPA’s regulations the certifying agency may not unilaterally modify a certification. Instead, the federal licensing or permitting agency and EPA must both agree to any modification.

Moreover, this regulation is likely inapplicable where a federal license or permit has already been issued in reliance on a state certification. Instead, given the discussion above, the

regulation is appropriately applicable only where a federal license or permit has not already been issued. *See Puerto Rico Sun Oil Company*, 8 F.3d at 80 (interpreting certification stay provision of 40 C.F.R. § 122.44(d)(3) as only applicable “before EPA has issued its own permit”); *see also* 40 C.F.R. § 124.55(b)(governing state’s ability to modify certification issued in support of NPDES permit; state may issue a modified certification only “if there is a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification. . . . If the certification . . . is received after final agency action on the permit, the Regional Administrator may modify the permit on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency”)(emphasis supplied).

C. State Case Law Supports PG&E’s Position.

Several state courts have addressed the issue of whether a state may modify, amend or revoke a certification once it has been incorporated into a federal permit or license and have concluded, like the federal appeals court decisions discussed above, that the states do not have such authority.

In *City of Shoreacres v. Texas Commission on Environmental Quality*, 166 S.W.3d 825 (Tex. Ct. of App. 2005), the appeals court held that “states are not authorized under the Clean Water Act to unilaterally revoke, modify or amend a state water quality certification after the certification process for a federal permit is complete.” *Id.* at 834-35. That is because “once a project has been granted a federal permit, it proceeds under the authority of that permit, not the state-issued water quality certification.” *Id.* at 834. The Court continued, “After certification, the Act allows states to continuously monitor projects and notify a federal permitting agency of

any water quality change that threatens the project's continued compliance with the Clean Water Act." *Id.*

The South Carolina Supreme Court has also squarely held that a state certifying agency "does not have statutory, regulatory or federal authority to suspend or revoke a 401 Certification after it has been granted by the agency and the appeals process expired." *Triska v. Dept. of Health and Env'tl. Control*, 355 S.E.2d 531, 533-34 (S.C. 1987). Rather, "[t]he proper procedure for [the certifying agency] to utilize, if it has concerns about changes in the water quality, is to *notify* the permitting agencies of the problems in order for these agencies to review the permits." *Id.* at 534 (emphasis in original).

Although PG&E questions the relevance of state law in the present context, it would note that California Water Code § 13160 gives the State Water Board the authority to "give any certificate" required under the CWA, but does not mention the authority to modify, amend or revoke such a certification after it has been incorporated into a federal permit or license. Since California administrative agencies may only exercise those powers conferred by statute,¹⁰ the absence of any such statutory authority precludes its exercise.

D. The Analogous Certification Framework Under the Coastal Zone Management Act Supports PG&E's Position.

Nor is the limited, post-license role of the states under the CWA certification process an outlier. In fact, the certification process under the CWA resembles the certification process under the Coastal Zone Management Act ("CZMA"), which also prescribes state involvement once a federal permit is issued. *See* 16 U.S.C. § 1451 et seq. Section 307 of the CZMA provides as follows:

... any applicant for a required Federal license or permit to conduct an activity . . . affecting any land or water use or natural resource of the

¹⁰ *See 20th Century Ins. Co. v. Quakenbush*, 64 Cal.App.4th 135 (1998).

coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved [coastal zone management] program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. . . . At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. . . . No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until [other statutory requirements are met].

16 U.S.C. § 1456(C)(3)(A). Thus, under the CZMA framework, the applicant, not the state, submits a certification to the federal licensing or permitting agency. However, the state must issue a concurrence to the certification, and, as under the CWA, may attach conditions to its concurrence. *See* 15 C.F.R. § 930.4. And similar to the CWA, no federal permit may issue without the state's concurrence. Once the federal license or permit is issued, however, the state may not revoke its concurrence. Instead, if the state believes the permitted activity is no longer consistent with the state's coastal zone management program, the state may file a written objection with the Director of the Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration. *See* 15 C.F.R. § 930.65 (b)-(d). The Director may then take certain actions, but the State may not: "The CZMA does not provide the State agency with the authority to enforce its concurrence (or conditions) beyond the State's consistency decision deadline. . . . Once a State agency has concurred, even with conditions, the State agency retains no further consistency authority over the project (unless the project has changed and not begun . . .). *Coastal Zone Management Act Federal Consistency Regulations*, 65 Fed.Reg. 77,124, 77,127 (Dec. 8 2000). *See also New York v. DeLyser*, 759 F.Supp. 982 (W.D.N.Y. 1991)(State does not have implied right of action under CZMA even

where it objected to construction application, permit was denied by federal agency, but applicant built structure anyway).

Thus, the State's inability to modify, amend or revoke a water quality certification issued pursuant to Section 401 of the CWA once a federal license or permit has been issued in reliance on the state certification, is consistent with the certification framework under the CZMA. These frameworks are not "illogical," as Conservation Groups contend, but consistent with Congressional intent. While Congress clearly recognized the important role of the states under these regulatory programs, it placed certain constraints on that role consistent with our federalist constitutional structure and the supremacy of federal law.

E. The Cases Cited in the Conservation Groups' Brief Do Not Address the Issue.

The cases cited in the Conservations Groups' brief do not address whether a state may unilaterally modify, amend or revoke a certification once it has been incorporated into a federal license or permit. Indeed, PG&E has no quarrel with the holdings of the cited cases or how they are characterized in the Conservation Groups' brief. The cases simply are not relevant to the analysis of the issue.

In *American Rivers v. FERC*, 129 F.3d 99 (2nd Cir. 1997), the Court endorsed petitioners' contention that "the plain language of § 401(d) [of the CWA] indicates that FERC has no authority to review and reject the substance of a state certification or the conditions contained therein and must incorporate into its licenses the conditions as they appear in state certifications." *Id.* at 106. PG&E does not disagree with this proposition. But it does not address the question at hand: whether states may unilaterally modify, amend or revoke a certification once it has been incorporated into a federal permit or license. In fact, the *American Rivers* court clearly stated that "the real issue in dispute is not whether there are limits on the

certifying agency's authority to impose conditions on federal licensees, but whether the Commission is empowered to decide when the conditions exceed the permissible limits." *Id.* at 110 (internal quotation and citation omitted). Thus, the issue of the states' substantive authority to impose certain conditions in a certification (including reopener conditions) was not before the court.

In *Wisconsin Public Service Corp. v. FERC*, 32 F.3d 1165 (7th Cir. 1994), the Court held that FERC has the authority to include in hydropower licenses a reopener clause "requiring the licensees to construct, operate and maintain such fishways as might in the future be prescribed by the Secretary of the Interior pursuant to Section 18 of the Federal Power Act." *Id.* at 1165. Again, PG&E does not disagree with this proposition. But that is because, as the Court held, Congress specifically stated as much. Section 18 of the Federal Power Act provides as follows: "The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be prescribed by the Secretary of Commerce or the Secretary of Interior, as appropriate." 16 U.S.C. § 811. As the Court observed, "Congress addressed the situation here specifically with the provisions contained in Section 18." 32 F.3d at 1169. Likewise, and problematically for the Conservation Groups' argument, Congress addressed in Section 401(a)(3) of the CWA whether states may unilaterally modify, amend or revoke their certifications "at any time and for any or (no) reason." *Keating*, 927 F.2d at 623. As discussed above, they cannot. That Congress provided the *federal* licensing agency with limited reopener authority related to *fishway prescriptions* does not somehow confer on a *state* certifying agency *unlimited* reopener authority. There is no parallel.

Moreover, and critical to the Seventh Circuit's holding, was the fact that FERC had committed itself to holding hearings before requiring the installation of fishways: "we emphasize

that our approval of the Commission's construction of the statute here is significantly dependent upon its commitment to conduct such hearings." 32 F.3d at 1170. Notably, Conservation Groups have stated opposition to PG&E's request that the State Water Board, at a minimum, similarly ensure PG&E an opportunity to be heard before it acts to change any certification conditions. *See Section II, infra*. The Conservation Group's opposition to this modest request cannot be squared with *Wisconsin Public Service Corp.*

In *California v. Federal Power Commission*, 345 F.2d 917 (9th Cir. 1965), the Court upheld a license condition allowing the Federal Power Commission, after the first twenty years of project operation, to alter the minimum stream flow requirements "after notice and opportunity for hearing and upon a finding based on substantial evidence that such minimum flows are available and are necessary and desirable and consistent with the provisions of the Act." *Id.* at 922. Again, PG&E does not quarrel with the general proposition, at issue in the case, that the federal licensing agency, currently FERC, may modify the terms of a hydropower license upon notice and hearing and pursuant to an objective standard if it has reserved authority to do so in a license. The problem with the Conservation Groups' argument is that they would confer on a *state* agency an *unconditional* right to modify a federal license (and without reference to any applicable standard). Moreover, as was the case in *Wisconsin Public Service Corp.*, the Ninth Circuit highlighted the importance to its holding of "the licensees' rights to test the validity of any future actions taken," *id.* at 925, a right the Conservation Groups would have the State Water Board deny PG&E. *See Section II, infra*.

Finally, in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Supreme Court held that the state could include in its certification minimum stream flows since such a requirement was designed to ensure compliance with state water

quality standards. The case did not discuss Section 401(a)(3) of the CWA, nor even tangentially address the issue of whether the state may unilaterally modify, amend or revoke a certification after it has been incorporated into a federal license. To suggest that a state may do so, under the rubric of “ensuring compliance with state water quality standards,” reads Section 401(a)(3) out of the CWA. Such a result “would make no sense,” *Keating at 623*, and cannot possibly be teased from the Supreme Court’s opinion in the case.

In summary, the text of the CWA is clear: a state may unilaterally modify, amend or revoke a certification only in certain limited situations. After issuance of a federal hydropower license by FERC is *not* one of those situations. Federal and state case law supports this plain reading of the statutory text. So too do EPA’s regulations and the analogous concurrence framework of the CZMA. Conservation Groups’ opposing citations are not relevant.¹¹

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¹¹ Note as well that a purported revocation of a certification after it has been incorporated into a federal license would arguably not affect the validity of the license but would instead free the licensee from having to comply with the certification conditions. As FERC noted in issuing a new license for a project where the state certification by its terms expired after 15 years:

The CWA requires a water quality certification in order for the Commission to *issue* a license. There is no requirement that a licensee seek a certification during the term of its license, absent an amendment application that would require a certification. Therefore, any termination of the certification during the license term would end the conditions of the certification, but would have no effect on the validity of the license.

Appalachian Power Company, 129 FERC ¶ 62,201, 64,576 (2009)(emphasis in original). See also *Triska*, 355 S.E.2d at 534 (“Even if [the state agency] had authority to revoke Certification in the instant case, it would be a futile act unless the permitting agencies subsequently suspended and revoked their respective permits”); *Keating*, 927 F.2d at 623 n. 4 (noting Army Corps’ policy that where “a state ‘decertifies’ a general or individual permit after the Corps has issued the permit in good faith reliance on the original certification, the Corps does not recognize an obligation to revoke the Corps permit but may elect to modify or revoke the permit at its own discretion”). Perhaps it is for this reason that State Water Board staff, in response to objections, deleted from the water quality certifications for both PG&E’s Pit 3, 4 & 5 Project and Spring Gap-Stanislaus Project language conferring on the State Water Board a right to revoke a certification. See *Water Quality Certification for the Spring Gap-Stanislaus Hydroelectric Project*, FERC Project No. 2130, Condition 29 (Order WR 2009-0039); *Water Quality Certification for the Pit 3, 4 & 5 Hydroelectric Project*, FERC Project No. 233, Condition 21 (Order WQ 2007-001).

II. DUE PROCESS REQUIRES THAT, AT A MINIMUM, A LICENSEE BE AFFORDED NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE A CERTIFYING AGENCY MAY MODIFY, AMEND, OR REVOKE A CERTIFICATION (Condition 32).

In its Petition, PG&E made the modest request that, at a minimum, sufficient due process be afforded PG&E before the State Water Board acts to change any certification conditions.¹² Specifically, PG&E requested that Condition 32, which reads as follows: “The State Water Board may provide notice and an opportunity to be heard in exercising its authority to add or modify any of the conditions of this certification” (emphasis supplied), be changed to provide as follows: “The State Water Board shall provide notice and an opportunity to be heard in exercising its authority to add or modify any of the conditions of this certification” (emphasis supplied). As PG&E pointed out in its Petition, similar language conferring an unconditional right to receive notice and an opportunity to be heard before the State Water Board acts to modify a water quality certification is found in numerous water quality certifications issued by the State Water Board.¹³

Conservation Groups object to this modest request, arguing that it is “unnecessary to protect PG&E’s right to due process.” Brief at 5. PG&E respectfully disagrees, as do Congress, the federal courts and FERC.

Section 401(a)(5) of the CWA provides that a federal license or permit containing a state certification “may be suspended or revoked by the Federal agency issuing such license or permit

¹² To be clear, PG&E reiterates its position, discussed at length, above, that a state certifying agency does not have statutory authority to unilaterally modify, amend or revoke a certification once it has been incorporated into a federal license or permit. That full due process may be afforded a licensee before such action is taken on a certification does not change the analysis.

¹³ See e.g. *Water Quality Certification for the Spring Gap-Stanislaus Hydroelectric Project*, FERC Project No. 2130, Condition 33 (Order WR 2009-0039); *Water Quality Certification for the Pit 3, 4 & 5 Hydroelectric Project*, FERC Project No. 233, Condition 25 (Order WQ 2007-001); *Water Quality Certification for the Department of Water Resources Oroville Facilities*, FERC Project No. 2100, Condition G12 (Order WQ 2010-0016).

upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of [the CWA].” 33 U.S.C. § 1341(a)(5)(emphasis supplied). Thus, the statute expressly requires the full due process protections attendant a “judgment” before significant action can be taken on a license.¹⁴

Furthermore, and as noted previously, both the Seventh Circuit in *Wisconsin Public Service Corp.* and the Ninth Circuit in *California v. Federal Power Commission*, in affirming FERC’s authority to include specific reopener provisions in a hydropower license, emphasized the importance to their holdings of the licensee’s ability to have a hearing before the reopener was exercised. See *Wisconsin Public Service Corp.* 32 F.3d at 1170, and *California v. Federal Power Commission*, 345 F.2d at 925.

Finally, FERC’s standard fish and wildlife reopener condition confers an unconditional right to a hearing. Article 15 of Form L-5 provides that a licensee “shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate . . . such reasonable facilities . . . as may be ordered by the Commission . . ., after notice and opportunity for hearing.” *Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States*, 54 F.P.C. 1792, 1837 (1975).

Thus, it is clear that nothing short of notice and an opportunity to be heard is required before significant action may be taken on a license or permit. Notwithstanding the weight of this authority, the Conservation Groups state that such protections are “unnecessary” in part because “any modification of the certification that may cause potentially significant effects on the

¹⁴ While Section 401(a)(5) addresses “suspension” and “revocation” of a license, a modification of a license could rise to the level of a “suspension” or “revocation” depending on the nature of the modification. Cf. *U.S. v. Linick*, 195 F.3d 538, 542 (9th Cir. 1999)(observing that permit terms can be so onerous as to “render impractical” the permit).

environment that were not previously evaluated are subject to compliance with the California Environmental Quality Act, which has procedures for public review and hearing.” Brief at 5.

There are at least four shortcomings with this argument. First, as stated in the CEQA Guidelines, “CEQA does not require formal hearings at any stage of the environmental review process.” 14 C.C.R. § 15202(a). *See also* 14 C.C.R. § 15087(i) (“Public hearings are encouraged, but not required as an element of the CEQA process”); *Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors*, (1974) 38 Cal. App. 3d 272. Thus, there is no guarantee that a hearing on a certification modification would be conducted under the auspices of CEQA.

Second, once a final CEQA document is issued for a project, there is an extremely high bar for a lead agency to conduct additional environmental review on the project. *See* 14 C.C.R. § 15162 (requiring, for example, “substantial changes” to the project that will require “major revisions” to the prior environmental documentation). Thus, depending on the nature of the proposed modification, the State Water Board might not be allowed to undertake further environmental review, thereby precluding a CEQA hearing on the modification.

Third, a CEQA hearing has an entirely different purpose, and different scope, than a hearing on whether to modify a § 401 certification. Indeed, the CEQA process is merely a public information tool, designed to provide the public with information on the potential *environmental impacts* of a decision. It is ancillary to the agency decision itself, which is a different matter altogether. Consequently, a CEQA hearing is aimed at obtaining public comment so that the lead agency can respond and make its determination on *environmental impacts* before adopting an environmental document. A CEQA hearing would not address purely *economic* considerations. *See generally* 14 C.C.R. § 15131.

And finally, even if economic considerations were addressed in a CEQA hearing, a “hearing” under CEQA is not the same as a hearing where full due process protections are afforded the participants. The CEQA Guidelines state as follows: “A public agency may include, in its implementing procedures, procedures for the conducting of public hearings pursuant to this section. The procedures may adopt existing notice and hearing requirements of the public agency for regularly conducted legislative, planning, and other activities.” 14 C.C.R. § 15202(f). Thus, it is not clear what protections might be available at any given CEQA “hearing.” But a license is a property right that implicates the Due Process Clause. *See Bell v. Burson*, 402 U.S. 535, 539 (1971). And, thus, nothing less than a hearing comporting with due process is required. As the Supreme Court has stated: “We have described ‘the root requirement’ of the Due Process Clause as being ‘that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.’” *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)(quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

For all these reasons, the public hearing framework under CEQA does not afford sufficient due process for a modification of a certification.

Conservation Groups are also concerned that “[a]n unconditional right to hearing would place an unnecessary strain on already limited state resources.” Brief at 5. They worry that “ministerial” changes could be subject to hearing. But that concern, of course, assumes that PG&E would actually invoke its right to a hearing over ministerial modifications. There is no reason to believe PG&E would do so. Certainly, sacrificing completely PG&E’s due process rights just to ensure it does not request a hearing over ministerial matters would be a wholly disproportionate and, PG&E respectfully suggests, unreasonable response. *See Bell*, 402 U.S. at 540 (“In cases where there is no reasonable possibility of a judgment being rendered against a

licensee, Georgia's interest in protecting a claimant from the possibility of an unrecoverable judgment is not, . . . a justification for denying the process due its citizens"). "Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement." *Id.*

III. THE CERTIFICATION CONDITION RELATING TO COMPLIANCE WITH THE BASIN PLAN IS UNDULY VAGUE (Condition 22).

PG&E remains concerned about Condition 22 which provides, "This certification is contingent on compliance with all applicable requirements of the Basin Plan." In its Petition, PG&E objected that the condition is vague since it purports to require PG&E to comply with "all applicable requirements" of the water quality plan for the Sacramento and San Joaquin River Basins, yet fails to state which of the literally hundreds of requirements contained in that Basin Plan are in fact "applicable" to PG&E. PG&E further noted that State Water Board staff agreed to delete this condition from the final water quality certifications issued for both the Spring Gap-Stanislaus and Pit 3, 4 & 5 projects after PG&E objected (on the same grounds) to their inclusion in the draft certifications for those projects.¹⁵

The Conservation Groups object to PG&E's request for the same consideration in the Chili Bar certification. They contend that "most, if not all" of PG&E's 26 FERC-licensed hydro projects are subject to the same requirement regarding the Basin Plan and the company has been able to manage its compliance obligations on those projects. Brief at 6. In fact, the certification for only *one* of PG&E's 26 FERC-licensed hydroelectric projects, the Kern Canyon

¹⁵ Compare Draft Water Quality Certification for the Spring Gap-Stanislaus Project, FERC Project No. 2130, Draft Condition 23, with Water Quality Certification for the Spring Gap-Stanislaus Hydroelectric Project, FERC Project No. 2130 (Order WR 2009-0039); and Draft Water Quality Certification for the Pit 3, 4 & 5 Project, FERC Project No. 233, Draft Condition 13 with Water Quality Certification for the Pit 3, 4 & 5 Hydroelectric Project, FERC Project No. 233 (Order WQ 2007-001).

Hydroelectric Project, FERC Project No. 178, contains similarly vague language relating to compliance with the Basin Plan.

PG&E reiterates its objection to this condition and notes that in *East Bay Municipal Utility District et al. v. State Water Resources Control Board et al.*, Alameda County Case No. RG 10512151, the State Water Board argued – and the court agreed – that Basin Plan provisions assigning mass-based numerical waste load allocations to named dischargers “do not by themselves prohibit any conduct or require any actions on the part of dischargers. They merely set goals. What dischargers are required to do is *specified* in the waste discharge permits (NPDES permits) that they are required to obtain from Regional Water Boards.” State Water Board’s December 22, 2010 Brief on the Merits, 7:11-13 (emphasis added).

Thus, the State Water Board took the position that there could be no enforcement jeopardy associated with the Basin Plan unless and until *specific* requirements were articulated in a future approval issued to the discharger. Here, the “future approval” – a 401 certification – has been issued, and its Condition 22 does not have the requisite *specificity* to put PG&E on notice of “[w]hat dischargers are required to do.”

It is PG&E’s understanding, then, that the Basin Plan’s primary purpose is to provide guidance to permit writers as to what measures to incorporate into a permit; it is not itself intended primarily as a compliance document. Consequently, PG&E questions the propriety of purporting to incorporate wholesale “all applicable requirements” of the Basin Plan.

PG&E’s Petition also stated an objection to Condition 22 on the grounds that the Basin Plan is routinely changed from time to time, thereby making discernment of what are the “applicable requirements” even more difficult. In addition, this serial changing of the Basin Plan, coupled with the language of Condition 22, would effectuate constant unilateral

modifications of the certification, which, as discussed at length above, is not permissible. Conservation Groups acknowledge that the Basin Plan is subject to review every three years, but counsel that “As a matter of practice, the scope of changes made in the course of triennial review are limited, and any changes to the Basin Plan are subject to public review and hearing.” Brief at 6-7. PG&E finds little comfort in this counsel since, among other reasons, opinions can vary as to how “limited” any given change to the Basin Plan might be and it is PG&E that would have the resulting compliance obligation. For all these reasons, PG&E respectfully requests that Condition 22 be deleted, as was done in the cases of the Spring Gap-Stanislaus and Pit 3, 4 & 5 water quality certifications.¹⁶

IV. THE CERTIFICATION CONDITION RELATING TO THE REINTRODUCTION OF ANADROMOUS FISH IS IMPROPER (Condition 12).

PG&E continues to object to Condition 12 which states that “[i]t is possible that anadromous fish passage will be restored at Nimbus and/or Folsom Dams on the American River downstream of Chili Bar during the course of the Commission license term.” The Condition requires PG&E “prior to the restoration of fish passage” to consult with the resource agencies and the State Water Board “to determine whether changes are needed in the certification conditions to protect beneficial uses associated with anadromous fish.” The Condition further reserves to the Deputy Director authority to modify or add conditions to the certification based on the outcome of the consultation process.

For the reasons discussed at length above, PG&E does not believe this reservation of authority is permissible. PG&E further objected to the Condition because it is premised on the National Marine Fisheries Service’s (“NMFS”) March 2009 Biological and Conference Opinion

¹⁶ PG&E is not generally opposed to the inclusion of more specific language regarding the Basin Plan identical to that found in the water quality certifications for PG&E’s Hat Creek 1 & 2 Hydroelectric Project, FERC Project No. 2661 (Condition No. 7), and Pit 1 Hydroelectric Project, FERC Project No. 2687 (Condition No. 6).

on the Long-term Operation of the Central Valley Project and State Water Project (“OCAP BiOp”). The certification notes that the OCAP BiOp includes a measure to evaluate the feasibility of providing access for steelhead to habitat above Nimbus and Folsom Dams. PG&E pointed out in its Petition that the OCAP BiOp on which the Condition is based was found by the U.S. District Court for the Eastern District of California to be “arbitrary, capricious, and unlawful,” and was remanded to NMFS. *See In re Salmonid Consolidated Cases*, 791 F.Supp.2d 802, 959 (E.D.Cal. 2011). The Court further ordered NMFS to submit a revised final Biological Opinion by February 1, 2016. *Id.*, 1:09-CV-01053 LJO DLB (E.D. Cal., Dec. 12, 2011).

Conservation Groups object that the portion of the OCAP BiOp dealing with the possible reintroduction of anadromous fish upstream of Nimbus and/or Folsom Dams was not invalidated by the Court and that the U.S. Bureau of Reclamation (“BOR”) is proceeding to implement this requirement. Brief at 7-8.¹⁷ However, BOR must comply with NEPA as ordered by the Court before any irreversible and irretrievable commitment of resources can occur. *See, e.g., Conner v. Burford*, 848 F. 2d 1441, 1446 (9th Cir. 1988), and cases cited therein. Further, BOR cannot take any action that would have an adverse environmental impact or limit the choice of reasonable alternatives until it has rectified its violation of NEPA by preparing a final NEPA document. *See* 40 C.F.R. § 1506.1. Thus, even if the portion of the OCAP BiOp dealing with reintroduction was not explicitly invalidated, BOR cannot implement *any* aspect of the reintroduction program that would constitute an irreversible and irretrievable commitment of resources, that could have an adverse environmental impact, or that might limit the choice of reasonable alternatives until

¹⁷ *See also NOAA's National Marine Fisheries Service Response to SWRCB Notice of PG&E's Petition* (January 8, 2013).

BOR has rectified its violation of NEPA. Thus, BOR cannot undertake any steps of the reintroduction process beyond its current studies without first rectifying its violation of NEPA.¹⁸

V. THE REOPENER PROVISION OF CERTIFICATION CONDITION 21 IS IMPROPER.

PG&E continues to have concerns regarding Condition 21 which reserves to the State Water Board the authority to “modify or add conditions in this certification to require additional monitoring and/or other measures, as needed, to verify that Project operations meet water quality objectives and protect the beneficial uses assigned to Project-affected stream reaches.” Although purportedly tied to address potentially changing climate conditions, the reservation is open-ended. For the reasons discussed at length above, PG&E does not believe this reservation of authority is permissible.

The asserted relationship to climate change does not save the measure. Indeed, under CEQA jurisprudence, to be constitutionally valid, mitigation must be reasonably related to an impact *created by the project*, *Nollan v. California Coastal Commission*, 483 U.S. 825, 834-837 (1987), and must be roughly proportional to that impact, *Dolan v. City of Tigard* 512 U.S. 374, 391 (1994). Because PG&E’s project is not contributing to global climate change, no mitigation to address its impacts can legally be required. CEQA does not require a project proponent to fix problems that are unrelated to impacts caused by the project. *See Dolan*, 512 U.S. at 391, fn. 8. While PG&E is concerned with climate change, that concern should not render PG&E legally responsible for mitigating its impacts where those impacts are not caused by PG&E’s project.

¹⁸ In the course of their discussion of Condition 12, the Conservation Groups request that the State Water Board “explicitly address flow and other conditions needed to protect designated uses associated with resident and anadromous fish in pending and future certification proceedings where reintroduction of anadromous fish during the term of the new license is reasonably foreseeable (e.g., Yuba-Bear, Drum-Spaulding, and McCloud-Pit hydroelectric projects).” Brief at 9. PG&E objects to this request. The current proceeding regarding PG&E’s Petition for Reconsideration of the Chili Bar water quality certification is not the proper forum in which to address, let alone resolve, issues unrelated to the Chili Bar project.

VI. CONSERVATION GROUPS' REMAINING ARGUMENTS ARE WITHOUT MERIT.

A. The Issues Raised in PG&E's Petition are Ripe for Review.

The Conservation Groups state that PG&E's concerns about the numerous reservations of authority contained in the Certification are "prospective and hypothetical," Brief at 2, and argue, without legal citation, that PG&E's claims might not, therefore, be ripe for review. Yet the same cases cited in the Conservation Groups' Brief for completely different legal propositions refute this unsupported assertion. The question in both *Wisconsin Public Service Corp.* and *California v. Federal Power Commission* was whether FERC had the authority to include specific reopener provisions in hydropower licenses. At the time of judicial review, FERC had not exercised its claimed reopener authority. Indeed, in *California v. Federal Power Commission*, FERC could not seek to exercise the reopener provision at issue for at least twenty years. Yet the courts had no trouble reaching the merits of the claims. Moreover, PG&E is not certain how it might "reserve its objections," Brief at 2, as suggested by the Conservation Groups, without filing the instant Petition. Indeed, Section 6 of the Federal Power Act conditions licenses on licensees' acceptance of all the terms and conditions of a license. 16 U.S.C. § 799. It is not clear how, after accepting a license, a licensee could later object to the invocation of one of its terms.

B. PG&E Has an Interest in the License Conditions Included in the Project License.

Finally, Conservation Groups assert that it is not possible for PG&E to be aggrieved by any potential modification to the certification because PG&E's "discretion to operate the Project is limited by physical constraints and operations at the Upper American River Project upstream." Brief at 2. In the Conservation Groups' view, this lack of operational "flexibility," Brief at 3, deprives PG&E of any possible interest in a modification of the certification. PG&E fails to

understand this argument. By its logic, PG&E's time in helping craft a relicensing settlement agreement was not well spent since the terms of the settlement, and resulting FERC license, would hardly matter to PG&E. But obviously, license terms impact a Project's economics. So too could a modification to the certification. For example, if the State Water Board sought to modify the certification to require the installation of fish passage or fish screening facilities, it would severely impact the Project's economics. One could conjure many additional examples of possible modification to the certification that could impact the Project's economics, notwithstanding the asserted lack of "flexibility" PG&E has over Project operations.

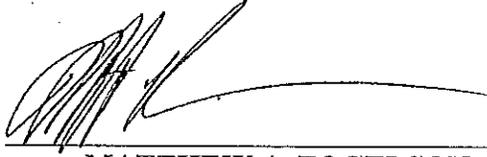
CONCLUSION

For the reasons stated herein, PG&E respectfully requests that the State Water Board reject the Conservation Group's Opposition and grant PG&E's Petition.

DATED: February 4, 2013

Respectfully submitted,

PACIFIC GAS AND ELECTRIC COMPANY

By: 

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**CERTIFICATE OF SERVICE
BY ELECTRONIC MAIL AND U. S. MAIL**

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department B30A, 77 Beale Street, San Francisco, CA 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On the 4th day of February, 2013, I served a true copy of:

**PACIFIC GAS AND ELECTRIC COMPANY'S (U 39 E)
REPLY TO CONSERVATION GROUPS' OPOSITION TO
PG&E'S PETITISON FOR RECONSIDERATION OF
THE WATER QUALITY CERTIFICATION
FOR THE CHILI BAR HYDROELECTRIC PROJECT**

XX] **Electronic-Mail:** By serving the enclosed document, via electronic mail transmission, to Michael Maher, State Water Resource Control Board (mmaher@waterboards.ca.gov); Pamela Creedon, Central Valley Regional Water Quality Control Board (pcreedon@waterboards.ca.gov); and to the parties on the official Service List for FERC Docket No. 2155 who have provided electronic mail addresses.

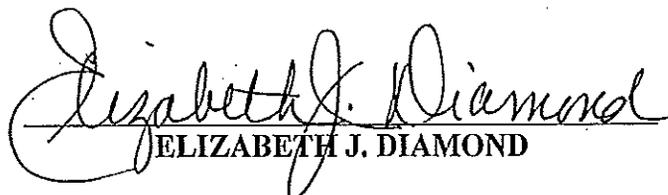
[XX] **U. S. Mail:** By placing the enclosed document in sealed envelopes, with postage fully pre-paid, for mailing to the parties on the Service List for FERC Docket No. 2155; and to:

Mr. Michael Maher
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95812-0100

Ms. Pamela Creedon
Central Valley Regional Water Quality
Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6289

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Executed on this 4th day of February, 2013 at San Francisco, California.


ELIZABETH J. DIAMOND