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

AMERICAN RIVER RECREATION ASSOCIATION, AMERICAN WHITEWATER, CALIFORNIA OUTDOORS, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, FOOTHILL CONSERVANCY, FRIENDS OF THE RIVER, HILDE SCHWEITZER, AND THERESA SIMSIMAN'S OPPOSITION TO PG&E'S PETITION FOR RECONSIDERATION OF THE WATER QUALTIY CERTIFICATION FOR THE CHILI BAR HYDROELECTRIC PROJECT

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) hereby respond in opposition to Pacific Gas and Electric Company's (PG&E) Petition for Reconsideration of the Water Quality Certification for the Chili Bar Hydroelectric Project (FERC No. 2155). The Petition is without merit and should be rejected by the State Water Board.

I. INTRODUCTION

The Conservation Groups are signatories to the Upper American River Project/Chili Bar Settlement Agreement (Settlement), which has been submitted to the Federal Energy Regulatory Commission (FERC) for approval as the basis for the new license for the Chili Bar Project. We support the Settlement and are concerned that PG&E's Petition may disturb the agreements reached in the Settlement and may further delay FERC's issuance of a new license. Many of the Conservation Groups are also members of the California Hydropower Reform Coalition and so are generally concerned about PG&E's efforts to redefine the State Water Board's authority to condition certifications issued for FERC licensing proceedings.

After five years of relicensing negotiations, Conservation Groups, resource agencies, and licensees Sacramento Municipal Utilities District (SMUD) and PG&E reached settlement on measures for incorporation into the new licenses for the Chili Bar Project and the operationally connected Upper American River Project in January 2007. PG&E filed the settlement for approval by the Federal Energy Regulatory Commission (FERC) as the basis for the new license for the Chili Bar Project. *See* eLibrary no. 20070201-0070.

The Board issued a draft Water Quality Certification (Certification) for the relicensing on January 11, 2012. PG&E provided comments on the draft Certification on February 10, 2012. Conservation Groups filed comments on the draft and PG&E's response on February 13, 2012.

We expressed concerns that PG&E's comments primarily addressed general legal issues relating to the Board's authority under Section 401 of the Clean Water Act. We recommended that the Board conduct a workshop to resolve PG&E's concerns to the extent possible. The Board declined our request.

The State Water Board issued the final Certification on November 9, 2012. PG&E filed the Petition for Reconsideration on December 6, 2012. The State Water Board noticed the Petition for public comment on December 21, 2012.

II.
ARGUMENT

A. The Petition Does Not Raise Any Live Substantive Disputes.

PG&E notes in its petition that "several of PG&E's comments [on the draft Certification] were adequately addressed in the final Certification." Petition, p. 3. In fact, *all* of the substantive issues raised by PG&E that dealt with *specific* requirements in the draft Certification were resolved in the final Certification. Thus, the Petition is limited to general legal issues. These issues, moreover, go to the Board's prospective and hypothetical exercise of reserved authority under changed circumstances in the future, with one exception that goes to hypothetical future "revocation upon judicial or administrative review." Petition, p. 5.

PG&E states that it is "aggrieved" by various aspects of the Certification. Petition, p. 3. We question this as a matter of fact and law. First, we question whether PG&E can be aggrieved by an uncertain and prospective exercise of the Board's reserved authority, or whether PG&E's claim of grievance becomes ripe only upon the Board's exercise of reserved authority. We believe the proper course is for PG&E to reserve its objections until such time as the Board actually exercises its reserved authority. The doctrine of ripeness favors actual rather than hypothetical disputes.

Further, a hypothetical dispute now would further delay FERC's issuance of a new license for the Chili Bar Project. Relicensing took over five years, and there has been a subsequent five year time lag between execution of the settlement and issuance of the final Certification. We strongly disagree with PG&E's Petition to the extent it seeks to further delay the Board's issuance of the Certification and FERC's issuance of a new license in order to marginally reduce PG&E's perceived exposure to potentially greater liability for water quality compliance in the future. The Petition is inconsistent with PG&E's oft-stated concerns about delays in issuance of 401 Certifications related to the relicensing of hydroelectric projects.[1]

Second, we dispute the extent to which PG&E could potentially be aggrieved by changes to the Certification given its discretion to operate the Project is limited by physical constraints and operations at the Upper American River Project upstream. The Chili Bar Project partially re-regulates the discharge from the White Rock Powerhouse of the Upper American River Project. Because of the small amount of storage at Chili Bar Reservoir, the Chili Bar Project's ability to

[1] *See, e.g.*, letter from Mark Krausse, PG&E, to the State Board, available at http://www.waterboards.ca.gov/board_info/agendas/2012/jun/cmmnt3/mark_krausse.pdf.

shape release of inflowing water from the South Fork American upstream and from White Rock Powerhouse is very limited. Power production is not optimized at Chili Bar; rather, Chili Bar Powerhouse is operated largely to benefit whitewater boating in the South Fork American River downstream. With these constraints, it is difficult to understand how modification of the Certification under the Board's reserved authority could actually harm PG&E's interests. Operation of the Chili Bar Project will continue to be dependent on the magnitude and timing of releases from the Upper American River Project, and PG&E will continue to have little flexibility in this operation.

B. The Specific Claims Made in the Petition Are Without Merit.

In Section V of its Petition, PG&E describes its objections to the Certification and proposes modifications. These specific claims are without merit for the reasons discussed below.

1. Reservation of the Board's Authority is Proper.

PG&E objects to the reservations of the Board's authority contained in Conditions 12, 17 – 21, 26, and 32 – 33. *See* Certification, pp. 24, 25-27. It objects that these reservations of authority:

> … appear to contravene the express terms of the Federal Power Act, which provides in relevant part that "Licenses … may be altered … only upon mutual agreement between the Licensee and the Commission.…" 16 U.S.C. § 799. Moreover, Section 401of the Clean Water Act, 33 U.S.C. § 1341, does not allow a water quality certification to be withdrawn once it is issued. Consequently, PG&E questions whether these Conditions are permissible expressions of the State Water Board's authority and respectfully requests that they be re-drafted to conform to such authorities.

Petition, p. 4.

The State Water Board issues water quality certification under authority of Clean Water Action section 401 and implementing state law (*see* CA Water Code § 13160; 23 CCR § 3855 *et seq.*), not the Federal Power Act (FPA). Section 401 gives the State broad authority to protect state water quality from FERC-licensed projects. Indeed, FERC must incorporate the water quality certification into any license without modification. *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 111 (2d Cir. 1997).

The courts have previously rejected arguments that the state's authority under Section 401 contravenes the FPA:

> We have no quarrel with the Commission's assertion that the FPA represents a congressional intention to establish "a broad federal role in the development and licensing of hydroelectric power." *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 496, 110 S.Ct. 2024, 2028, 109 L.Ed.2d 474 (1990). Nor do we dispute that the FPA has a wide preemptive reach. *Id.* The CWA, however, has diminished this

> preemptive reach by expressly requiring the Commission to incorporate into its licenses state-imposed water-quality conditions. *See* 33 U.S.C. § 1341(a)(1).

Am. Rivers, Inc. v. F.E.R.C., supra, 129 F.3d at 111.

In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, the U.S. Supreme Court held that States have authority to "condition certification upon any limitations necessary to ensure compliance with state water quality standards or *any* other 'appropriate requirement of State law.'" 511 U.S. 700, 714 (1994) (emphasis added). It cited the U.S. Environmental Protection Agency's (EPA) regulations in support:

> Our view of the statute is consistent with EPA's regulations implementing § 401. The regulations expressly interpret § 401 as requiring the State to find that "there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." 40 CFR § 121.2(a)(3) (1993) (emphasis added). See also EPA, Wetlands and 401 Certification 23 (Apr.1989) ("In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, ... and with 'any other appropriate requirement of State law'").

Id., 712.

The reservations of authority contained in Conditions 12, 17 – 21, 26, and 32 – 33 are a permissible condition of a water quality certification. In order to assure that the Project complies with water quality standards and other requirements of state law for the 30- to 50-year term of the license, the Board must maintain ongoing oversight and have the ability to modify the conditions of certification in light of changed circumstances or new information.

Further, the courts have held that reservations of authority do not run afoul of FPA section 6, 16 U.S.C. § 799. In *State of California v. Federal Power Commission,* the court upheld FERC's reservation of authority as a license condition:

> The section 6 requirement that the terms and conditions of a license be expressed in the license must not be given a construction which is impracticable of application. When the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable, the license terms cannot possibly speak with definiteness and precision concerning the matter. Under these circumstances, it is sufficient, under section 6, to include in the license a condition reserving the problem, including the licensees' rights to test the validity of any future action taken.

State of Cal. v. Fed. Power Commn., 345 F.2d 917, 924-25 (9th Cir. 1965). In *Wisconsin Public Service Corporation v. F.E.R.C.,* the court followed the precedent established in *State of California* and upheld the Secretary of Interior's reservation of authority to prescribe fishway

prescriptions in a new license. 32 F.3d 1165, 1169-1170 (1994). The Petition does not offer any arguments for why the court's logic in *State of California* should not be controlling here.

PG&E has not objected to the Board's exercise of its reserved authority to modify the water quality certification for PG&E's Pit 1 Hydroelectric Project (FERC No. 2687). There, PG&E and the U.S. Fish and Wildlife Service have expressed concern that flushing flows required under the water quality certification and incorporated into the FERC license are causing adverse impacts to state and federally listed endangered Shasta crayfish. In response, PG&E advocated that the Board use its reserved authority to amend the water quality certification to eliminate the flushing flows. *See* Letter from Charles White, PG&E, to Victoria Whitney, SWRCB (June 24, 2009). The Board specified in its response that amendment of the water quality certification was a discretionary action requiring that the Board comply with CEQA, and since that time has been working with PG&E to process the request for certification amendment. *See* Letter from Victoria Whitney, SWRCB, to Charles White, PG&E (Aug. 28, 2009); *see also* State Water Board, Order WQ2010-0009 (July 6, 2010). FERC Staff has supported the Water Board's exercise of its authority to amend the water quality certification to eliminate flushing flows. *See* letter from Heather Campbell to Dorothy Rice (April 15, 2010), FERC eLibrary no. 20100416-0012). PG&E has offered no explanation for why the Board's reservation of authority at Pit 1 is appropriate, but is not appropriate here.

Finally, PG&E suggests that the Board cannot modify a certification because the Clean Water Act does not allow "a water quality certification to be withdrawn…." The Petition does not cite any legal authority for this statement. In fact, Section 401 is silent on its face with respect to whether a certification can be withdrawn. The Petition offers no basis for why the Board's interpretation of its authority is unreasonable or should not stand.

2. <u>Condition 32 Does Not Violate PG&E's Right to Due Process</u>.

PG&E objects to Condition 32, which provides: "[t]he 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." Certification, p. 27. PG&E requests that the State Water Board amend Condition 32 to provide unconditional right to notice and opportunity for hearing.

An unconditional right to notice and hearing for any modification to the certification is unnecessary to protect PG&E's right to due process. Under 23 CCR § 3867, PG&E has the right to petition the State Water Board for reconsideration of any Board action relevant to certification. PG&E also has the right to petition the Superior Court for writ of mandate to correct an action by the State Water Board. Cal. Water Code § 13330. Further, any modification of the certification that may cause potentially significant effects on the environment that were not previously evaluated are subject to compliance with the California Environmental Quality Act, which has procedures for public review and hearing.

An unconditional right to hearing would place an unnecessary strain on already limited state resources. Plainly there should be some threshold of materiality to trigger any hearing requirement; ministerial changes should not suffice. For example, changes in monitoring

equipment or sites based on problems with equipment or monitoring results should not require formal notice or trigger the opportunity for hearing.

3. The State Water Board Should Have the Authority to Revoke the Certification for Non-Compliance.

Condition 33 of the Certification states that "this certification is subject to modification or revocation upon administrative or judicial review...." Certification, p. 27. PG&E objects to inclusion of the phrase "or revocation." Petition at p. 5. It claims that CWA section 401 "does not allow a water quality certification to be withdrawn once it is issued." *Id.*

As stated above, Section 401 is silent on the issue of whether a certification can be withdrawn. Further, PG&E's interpretation is inconsistent with Section 401(a)(5), which provides for suspension or revocation of the federal license upon a judgment that the project has been operated in violation of applicable water quality standards. Thus, Congress considered violation of water quality standards legitimate cause for revocation of a federal license for a project. It is illogical that Section 401, the whole purpose of which is to allow States to protect water quality from degradation by federal activities, 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.

The State Water Board should have the right to revoke the certification for systematic and serious non-compliance with the conditions of certification. The potential for revocation is an important tool for assuring compliance with water quality standards. We note that it is an authority rarely exercised by the Board. Indeed, we have found no instances of a certification issued for a hydropower project being revoked. Thus, PG&E's concerns regarding the State Water Board's misuse of this authority are overblown.

4. The Certification's Reference to the Basin Plan is Proper.

Condition 22 states: "[t]his certification is contingent on compliance with all applicable requirements of the Basin Plan." Certification, p. 26. PG&E objects that this condition is "unduly vague," because it does not specify which requirements are applicable to PG&E. PG&E also argues that it is "unfair for a compliance determination to hinge on the opinion of future regulators." *See* Petition, p. 5.

We do not understand the basis for PG&E's claim. PG&E operates 26 hydroelectric projects in California. Most, if not all, of these projects are subject to a water quality certification that requires compliance with water quality standards as stated in the applicable Basin Plan. PG&E has managed to properly interpret its obligations for these other projects. Surely PG&E and its counsel can determine the provisions of the Basin Plan that apply to the Chili Bar Project.

Further, PG&E overstates the changeability of the Basin Plan. It is true that the Basin Plan is subject to review every three years, but that does not mean that changes to all provisions are made every three years. 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.

PG&E has the legal and technical resources to understand the Basin Plan, including any changes in the Basin Plan that may occur over the term of the license. The Board should not modify this Condition.

5. <u>The Certification Properly Considers the Potential Reintroduction of Anadromous Fish</u>.

Condition 12 ("Reintroduction of Anadromous Fish") of the Certification states:

> It is possible that anadromous fish passage will be restored at Nimbus and/or Folsom Dams on the American River downstream of the Project during the course of the Commission license term. Prior to the restoration of fish passage at Nimbus and/or Folsom Dams, the Licensee shall consult with CDFG, USFWS, NMFS and State Water Board staff to determine whether changes are needed in the certification conditions to protect beneficial uses associated with anadromous fish. The Deputy Director reserves authority to modify or add conditions to this certification based on the outcome of the consultation process.

Certification, p. 24.

PG&E objects to this Condition on several grounds. First, PG&E objects to the Condition to the extent it relies on National Marine Fisheries Service's (NMFS) March 2009 Biological and Conference Opinion on the Long-term Operation of the Central Valley Project and the State Water Project (Biological Opinion). Petition, pp. 6-7. PG&E states that the U.S. District Court for the Eastern District of California found the Biological Opinion to be "arbitrary, capricious, and unlawful," and remanded to NMFS to provide a revised opinion by 2016.

PG&E mis-represents the status of the Biological Opinion, which has been accepted and is being implemented by the U.S. Bureau of Reclamation (Bureau). On September 20, 2011, Judge Wanger issued a decision on several motions for summary judgment brought by Plaintiffs claiming various legal deficiencies in the Biological Opinion itself and the Bureau's acceptance of the Opinion, and oppositions and cross-motions filed by the Federal Defendants and Defendant Intervenors. *See In re Salmonid Consolidated Cases*, 791 F.Supp.2d 802, 959 (E.D. Cal 2011). The decision held in part: "[a]ll Plaintiffs' motions for summary judgment that Reclamation violated the ESA and/or the APA are DENIED; Federal Defendant and Defendant Intervenors' cross motions are granted." *Id.*, p. 278. It explained that while some of the specific findings made in the Opinion were not adequately explained or supported and required further consideration by NMFS on remand, the overall finding of jeopardy was lawful:

> It is undisputed that the law entitles the winter-run and spring-run Chinook, CV steelhead, Southern DPS of green sturgeon, and Southern Resident killer whales to ESA protection. Plaintiffs have succeeded on some of their challenges to the BiOp's

> justifications and analyses of Delta and Stanislaus River operations. The BiOp discusses and prescribes RPAs to address many other sources of harm, including adverse temperature conditions and blockages caused by dams on the Sacramento River. The BiOp's jeopardy conclusion is lawful. Project operations negatively impact the Listed Species and adversely modify their critical habitat in various ways that remain incompletely described and quantified.

Id, p. 959. The Plaintiffs in that case did not directly challenge, and so the decision did not address, the element of the Biological Opinion that calls for the Bureau to establish a fish passage program to reintroduce listed salmon and steelhead above Shasta Dam. The Bureau is proceeding to implement this requirement. *See, e.g.,* Tim Holt, "Groups Mull Plan to Reintroduce Chinook Salmon in Upper Sacramento, McCloud Rivers," Record Searchlight (Dec. 29, 2012) (Attachment 1).

PG&E states that the Condition is vague, because it requires a consultation "prior to restoration of fish passage" but does not specify how much "prior." We agree that it would be helpful for the Board to describe the procedures, including schedule, for consultation with more specificity. However, the Board should reject PG&E's recommendation that such consultation take place "within 120 days after physical completion and initiation of operation of fish passage facilities at Nimbus and/or Folsom Dams." Plainly, flows necessary to support and pass fish must be determined prior to or concurrent with the design of the fish passage facilities, not following construction and operation of such facilities. However, PG&E has aggressively opposed defining flow requirements incident to reintroduction of anadromous fish upstream of Central Valley rim dams in several proceedings,[2] and has not supported defining such flow requirements in *any* relicensing. The Board should define a practical time frame for consultation, but should reject PG&E's request that consultation occur after construction and operation of fish passage facilities.

PG&E also objects to Condition 12 because it includes a reservation of authority. For the reasons discussed in Section II.B.1, this argument is without merit.

The South Fork of the American River is designated for cold freshwater habitat and cold freshwater spawning, reproduction, and/or early development. *See* Basin Plan, p. II-6.00. Condition 12 is a proper condition of certification because it is necessary to assure protection of these designated uses during the 30- to 50-year term of the new license. *See PUD No. 1 of Jefferson County, supra*, 511 U.S. at 713-14.

Condition 12 is consistent with the Settlement Agreement, which PG&E has signed. In other proceedings, several of the present commenters have advocated that FERC and the State Water Board define the flow and other resource conditions needed to support reintroduction of anadromous fish in project-affected waters upstream of Central Valley rim dams prior to the issuance of the new license. We did not advocate for determination of fish flows as part of this relicensing because we believe that the habitat in the South Fork American River is less conducive to reintroduction of anadromous fish than the habitat in several other rivers upstream

[2] Drum-Spaulding relicensing; McCloud-Pit relicensing.

of Central Valley rim dams, and that the likelihood of reintroduction of anadromous fish to the South Fork American is thus less than in several other watersheds. The Settlement Agreement is silent on the issue, but allows a reservation of authority by the State Board and defines this as not being inconsistent with the Settlement. *See* Settlement, § 3.1.3.

PG&E has actively sought in multiple venues to avoid and/or delay reintroduction of anadromous fish to waters upstream of Central Valley rim dams that are affected by its hydroelectric projects. Given this context, we request that the 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).

6. The Certification Properly Considers Climate Change.

Condition 21 allows the State Board, in response to changing climate conditions, 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." Certification, p. 26. "PG&E objects to this Condition on the grounds that it is inappropriate to require PG&E to mitigate for a harm to which the Project is not contributing." Petition, p. 7.

PG&E's objection is without merit because it is based on the *non sequitor* that the Project does not cause climate change. Condition 21 is necessary to assure that the project does not have adverse effects due to changed conditions related to climate change during the 30- to 50-year term of the new license. Under changed climate conditions, the Project may cause harm that it does not cause under current climate conditions. The Board may need to address such harm in order to protect beneficial uses, but it is not possible today to quantify or even identify that potential harm or to know how soon it might appear. A reservation of authority is appropriate to address this issue.

III. CONCLUSION

The Board should reject PG&E's Petition for Reconsideration for the reasons stated above.

Dated: January 10, 2013

Respectfully submitted,

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DECLARATION OF SERVICE

Chili Bar Hydroelectric Project (P-2155)

I, Nicholas Niiro, declare that I today served the attached "Opposition to PG&E's Petition for Reconsideration of the Water Quality Certification for the Chili Bar Hydroelectric Project," by electronic mail to Michael Maher at the State Water Resource Control Board (mmaher@waterboards.ca.gov) and by first-class mail to:

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Dated: January 10, 2013

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Attachment 1

Groups mull plan to reintroduce chinook salmon in upper Sacramento, McCloud rivers

By Tim Holt Special to the Record Searchlight

Posted December 29, 2012 at 2:31 p.m.

After an absence of more than 70 years, chinook salmon and steelhead may be returning to their native waters in the Upper Sacramento and McCloud rivers.

Spurred by dwindling numbers of steelhead and winter- and spring-run chinook in Central Valley waters, an ad hoc committee of federal and state agencies has been studying the possibility of their reintroduction above Shasta Dam to boost their numbers and their overall health.

According to a 2009 report by the National Marine Fisheries Service, populations of all three runs have plummeted since the 1960s and are listed as endangered or threatened. A pilot program to transport salmon and steelhead past Shasta Dam to the McCloud River and the Upper Sacramento River has been under study for the past year and a half.

"It would be a pretty complicated effort, and a lot of details still need to be worked out," said Don Reck, a natural resources specialist with the Bureau of Reclamation at Shasta Dam. He said that the primary spot for trapping the fish would likely be at Keswick Dam and that they would probably be a combination of wild and hatchery fish. Reck noted that the re-introduction program is still "several years away" from implementation.

Among the details still to be worked out are whether water temperatures in the McCloud and Upper Sacramento will support the re-introduced fish, and which agency would actually do the transporting. Those involved in this preliminary study include the federal Bureau of Reclamation, the National Marine Fisheries Service, the state Fish and Wildlife Service, and the state Water Quality Control Board.

The 2009 federal report cites, as reasons for the steep decline in the salmon and steelhead populations, a 98 percent loss of their historic "riparian and floodplain" habitat below Shasta Dam and a 95 percent loss of their historic spawning habitat above the dam. The re-introduction program, if implemented, aims to recover some of that lost spawning habitat above the dam.

"We're down to one population of winter run chinook below the dam," notes Reck. "If it's successful, the re-introduction program would create another population of these fish, and an increased buffer against the possibility of extinction."