UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

In the matter regarding	)	
Upper North Fork Feather River Hydroelectric Project	)	**Project No. 2105**
	)	
License Applicant:	)	
Pacific Gas and Electric Company	)	
	)	
	)	
	)	

STATE WATER RESOURCES CONTROL BOARD'S REQUEST FOR REHEARING OF JULY 16, 2020 DECLARATORY ORDER ON WAIVER OF WATER QUALITY CERTIFICATION (172 FERC ¶ 61,064)

Pursuant to 16 U.S.C. § 825l and to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or Commission), 18 C.F.R. § 385.713, the California State Water Resources Control Board (State Water Board), the state agency with water quality and water pollution control authority pursuant to both the Porter-Cologne Water Quality Control Act, Cal. Water Code div. 7, and the federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (Clean Water Act), hereby submits a request for rehearing of the Commission's July 16, 2020 "Order on Waiver of Water Quality Certification," 172 FERC 61,064 (Decision), regarding Pacific Gas and Electric Company's (PG&E) proposed relicensing of the Upper North Fork Feather River Hydroelectric Project (FERC Project No. 2105).

The Commission's Decision was based primarily on the D.C. Circuit Court of Appeal's recent determination in *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (D.C. Cir. Jan. 25, 2019) (*Hoopa*) that the States of California and Oregon had waived their water quality certification (certification) authority with respect to the relicensing of the Klamath Hydroelectric Project. As discussed in greater detail below, the Commission has improperly expanded the holding in *Hoopa* to find waiver based on a set of facts that are fundamentally different than the facts that formed the basis for the Court's decision in *Hoopa*. In addition, the Commission's Decision is predicated in part on a mischaracterization of some of the facts relevant to this proceeding.

I. LEGAL BACKGROUND

Section 401 of the Clean Water Act, 33 U.S.C. § 1341 (Section 401) requires every applicant for a federal license or permit for an activity that may result in a discharge into waters of the United States to provide the licensing or permitting federal agency with certification that the project will be in compliance with specified provisions of the Clean Water Act, including water quality standards and implementation plans promulgated pursuant to section 303 of the Clean Water Act, 33 U.S.C. § 1313. Section 401 directs the agency responsible for certification to prescribe effluent limitations and other limitations necessary to ensure compliance with the Clean Water Act and with any other appropriate requirement of state law. Section 401 further provides that state certification conditions shall become conditions of any federal license or permit for the project. Section 401 provides for waiver of certification authority if a state "fails or refuses to act on a request for certification within a reasonable amount of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1). The State Water Board is designated as the state water pollution control agency for all purposes stated in the Clean Water Act and any other federal water quality control law. Cal. Water Code, § 13160.

Consistent with the cooperative federalism established in the Clean Water Act, Section 401 allows the states to establish their own procedures for certification. Section 401 requires each state to establish procedures for public notice and for public hearings where the state deems appropriate, 33 U.S.C. § 1341(a)(1), but otherwise sets no express requirements or limitations on what information the states may require or what procedures they may follow.[1]

[1] The United States Environmental Protection Agency (USEPA) has adopted regulations, not yet in effect, that would seek to standardize certain procedures, including setting bare-minimum requirements for a request for certification sufficient to start a review clock, similar to FERC's existing regulations. Proposed 40 C.F.R. § 121.5. The USEPA rule acknowledges that additional information may be necessary. Proposed 40 C.F.R. § 151.7 (e)(1)(iii), (e)(2)(iii). As noted in the State Water Board's comments on the proposed regulations, such standardization is contrary to the structures of cooperative federalism and would be bad policy. When these regulations take effect on September 11, 2020, they should not be read to retroactively set procedures or otherwise limit state authority and control prior to promulgation. See USEPA, Frequently Asked Questions about the Clean Water Act 401 Certification Rule (PDF), at p. 2 https://www.epa.gov/sites/production/files/2020-06/documents/frequently_asked_questions_fact_sheet_for_the_clean_water_act_section_401_certification_rule.pdf [final rules does not apply to requests filed before the effective date of the final rule].

Under California law, the applicable procedures include compliance with the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 et seq. (CEQA), which was modeled after the federal National Environmental Policy Act (NEPA). *City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975). CEQA generally prohibits a state or local agency from issuing a discretionary approval of a project, such as a certification, until after any environmental documentation required under CEQA has been completed and properly issued. Cal. Pub. Res. Code §§ 21006, 21165, 21000; Cal. Code Regs. tit. 14, §§ 15004(a), 15050, 15096(f). The environmental documentation must evaluate the potential environmental impacts of the project, disclose any significant environmental impacts of the project, and evaluate whether any significant environmental impacts could be reduced or avoided through the implementation of project alternatives or mitigation measures. Cal. Code Regs. tit. 14, §§ 15070, 15071, 15126. After the environmental documentation is completed, the state or local agency then considers whether and under what conditions to approve the proposed project. Cal. Code Regs. tit. 14, § 15004. Effective June 29, 2020, the State Water Board may now issue certifications prior to completion of CEQA review, where failure to issue certification presents a substantial risk of waiver of Section 401 authority. Cal. Water Code, § 13160(b)(2).

California law also establishes procedures by which an applicant for certification or other interested person may seek administrative reconsideration or judicial review of any State Water Board action or failure to act as part of the Section 401 certification process. Cal. Code Regs. tit. 23, § 3867; Cal. Water Code, § 13330. These procedures must be followed by any person who seeks to challenge the State Water Board's action. Cal. Water Code § 13330(d).

In *Hoopa*, *supra*, 913 F.3d 1099, the D.C. Circuit Court of Appeals held that the State Water Board and the Oregon Department of Environmental Quality had waived their authority under Section 401 in connection with the relicensing of the Klamath Hydroelectric Project where the Governors of California and Oregon had entered into a written agreement with PacifiCorp, the project owner and operator, to delay water quality certification indefinitely by repeatedly withdrawing and resubmitting PacifiCorp's application for water quality certification. *Id*. at pp. 1103-1105. By its terms, the agreement was intended to hold PacifiCorp's applications for certification in abeyance while the parties pursued decommissioning of the project. *Id*. at pp. 1101-1102. Based on the agreement, the court found that PacifiCorp's withdrawals and

resubmissions were not just similar requests for certification, they were not new requests at all, and PacifiCorp never intended to submit a new request for certification. *Id*. at p. 1104. The court also reasoned that, if allowed, the parties' "withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters." *Id*. Based on this unique set of facts, the court held that the "withdrawal and resubmission scheme" embodied in the agreement was inconsistent with the statutory deadline to act within a year, and therefore the certifying agencies had waived their authority under Section 401.

The court expressly declined to resolve whether the withdrawal and resubmittal of an application for certification would result in waiver under different circumstances. *Hoopa*, *supra*, 913 F.3d at pp. 1104-1105. In particular, the court did not resolve whether the withdrawal and resubmittal of an application would result in waiver in situations involving different requests or incomplete applications because "PacifiCorp's water quality certification request had been complete and ready for review for more than a decade." *Hoopa*, *supra*, 913 F.3d at pp. 1105.

II. FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are set forth in the State Water Resources Control Board's Comments on Pacific Gas and Electric Company's Petition for Declaratory Order, and the Declaration of Jeff Wetzel in Support of the Board's Comments, which were filed with the Commission on June 5, 2020. For ease of reference, the salient facts are summarized below. In addition, recent developments are described, and the Commission's mischaracterization of certain relevant facts in its Decision is addressed.

PG&E owns and operates the Upper North Fork Feather River Project (Project), which is located on the North Fork Feather River and some of its tributaries in Plumas County, California. The Project consists of Lake Almanor, a large storage reservoir formed by Canyon Dam on the North Fork Feather River, two smaller reservoirs, and five powerhouses, connected by tunnels and penstocks.

The Project adversely affects water temperatures in the North Fork Feather River, which was listed in 2006 as impaired for water temperature under Section 303(d) of the Clean Water Act due to hydropower modification. State Water Board Resolution No. 2006-0079; Declaration of Jeff Wetzel in Support of State Water Resources Control Board's Comments on Pacific Gas and

Electric Company's Petition for Declaratory Order (Wetzel Declaration), ¶¶ 7 & 9. Since the beginning of this relicensing proceeding, State Water Board staff have repeatedly requested more information concerning PG&E's ability to control water temperatures in order to protect cold freshwater habitat in the North Fork Feather River by implementing various physical modifications to Project facilities or changes to Project operations. PG&E Petition for Declaratory Order, Attachment B; Wetzel Declaration, ¶¶ 7 & 11. PG&E, State Water Board staff, and other stakeholders have identified 20° Celsius as a temperature target that would comply with the narrative temperature objective and provide reasonable protection of cold water habitat in the North Fork Feather River. Wetzel Declaration, ¶¶ 8 & 11. In response, PG&E and its consultants conducted physical and computer modeling of a variety of temperature control measures, and prepared numerous reports evaluating the ability of those measures to meet the 20° Celsius temperature target. The majority of the reports were generated between 2004 and 2009, although studies were conducted before and after that period, and additional temperature modeling was conducted as recently as 2016. Wetzel Declaration, ¶¶ 7, 8, 11 & 16.

Board staff determined that CEQA required preparation of an Environmental Impact Report (EIR) to address certain issues that were not adequately addressed in the Environmental Impact Statement for the Project prepared by the Commission, including an analysis of the potential environmental impacts of alternative temperature control measures designed to meet water quality objectives. Wetzel Declaration, ¶¶ 10 & 12. The Board initiated the CEQA process in 2005, issued a Draft EIR in 2014, and issued a Revised Draft EIR on May 15, 2020. Wetzel Declaration, ¶¶ 12 14, 15 & 19. Supplemental technical analyses necessary to complete the Revised Draft EIR were completed in 2016 and in March of this year. Wetzel Declaration, ¶ 15. The State Water Board has received public comments on the Revised Draft EIR, but has not yet issued a Final EIR.

In its Decision, the Commission found that the State Water Board did not request any supplemental information from PG&E from 2006 through 2018. Decision, pp. 5, 14, fn. 75, 15-16. This finding is factually inaccurate. The Commission's finding appears to have been based on the letters from the State Water Board to PG&E acknowledging receipt of PG&E's requests for water quality certification, which according to the Commission did not reference "specific information requests." These letters did refer, however, to outstanding requests for supplemental

information. For example, the State Water Board's September 1, 2006 acknowledgement letter states "Pursuant to section 3836 of the California Code of Regulations, State Water Board staff have requested supplemental information to develop the factual record necessary to support the issuance of a Section 401 Certification." PG&E's Petition for Declaratory Order, Attachment B. The fact that the State Water Board did not specify in its acknowledgment letters what supplemental information had been requested does not mean that the Board had not requested supplemental information.

In addition, the Commission's Decision failed to take into account the detailed description of the ongoing development of supplemental information in response to the Board's requests that is contained in the Wetzel Declaration. As described in the Declaration and summarized above, the State Water Board's primary request was for supplemental information concerning the effectiveness and feasibility of a wide variety of temperature control measures, and for an evaluation of the environmental impacts of those measures as required by CEQA. Wetzel Declaration, ¶¶ 11 & 12. Evaluation of temperature control measures and the associated CEQA review was an extremely complex undertaking that required many years to complete. *Id*., ¶¶ 11-15. Ongoing studies of temperature control measures were documented in reports produced between 2004 and 2009, and supplemental analyses were prepared in 2012 and 2016. *Id*., ¶ 11. As referenced above, the CEQA process began in 2005, a Draft EIR was issued in 2014, and a Revised Draft EIR was issued earlier this year. *Id*., ¶¶ 12-14, 18. In short, the State Water Board's request for supplemental information necessary to take affirmative action on PG&E's requests for water quality certification remained outstanding throughout the 2006-2018 period and beyond. The Commission's finding to the contrary is not supported by the evidentiary record, and ironically overlooks the very information gaps that were the primary reason for the State Water Board's inability to issue certification for the Project until recently.

The Project's original Commission license expired in 2004, and the Project has operated under annual licenses since then. As described in PG&E's petition, PG&E first requested certification by letter dated October 9, 2002. During the period between 2003 and 2018, PG&E simultaneously withdrew and resubmitted its request annually before the one-year deadline expired. PG&E's Petition for Declaratory Order, Attachment A. If PG&E had not withdrawn its requests for certification, they would have been denied. PG&E's Petition for Declaratory Order,

Attachment B; Wetzel Declaration, ¶ 16. On February 22, 2019, the State Water Board denied without prejudice PG&E's then-pending request, which had been submitted on February 26, 2018. PG&E submitted a new request on March 6, 2019, which the Board denied without prejudice on March 4, 2020. PG&E's Petition for Declaratory Order, Attachment B; Wetzel Declaration, ¶ 17. PG&E did not petition for administrative reconsideration or judicial review of the denials. Nor did PG&E petition for administrative reconsideration or judicial review of any alleged action or failure to act on any of the previously submitted but later withdrawn requests for certification.

Another factual inaccuracy contained in the Commission's Decision is the assertion that PG&E's applications for certification that were pending between 2013 and 2018 were complete and ready for review. Decision, p. 11. The basis for this assertion is not entirely clear, but it appears to be the State Water Board's acknowledgement letters from 2012 through 2018, which stated that the PG&E's applications for certification met "the application filing requirements" specified in section 3856 of the State Water Board's regulations. Decision, pp. 4, fn. 22, 5. The Commission's reliance on those statements is misplaced because the fact that the applications met filing requirements does not necessarily mean that they were complete and ready for review. In fact, the letters themselves went on to explain that, pursuant to its regulations, the State Water Board could request additional information to "clarify, amplify, correct, or otherwise supplement" the contents of the applications, including "evidence of compliance with the water quality control plan." PG&E Petition for Declaratory Order, Attachment B. In addition, as explained above and set forth in detail in the Wetzel Declaration, PG&E's applications that were pending during the 2013-2018 period were not in fact complete and ready for review because PG&E had not yet fully satisfied requests for supplemental information necessary for the State Water Board to issue certification.

On April 23, 2020, PG&E submitted a petition for an order declaring that the State Water Board had waived its Section 401 certification authority. On June 5, 2020, the State Water Board submitted timely comments on PG&E's petition, identifying a number of reasons why PG&E's petition should be denied. On July 16, 2020, the Commission issued the Decision, declaring that the State Water Board waived its certification authority related to the Projects based on *Hoopa*

and recent Commission precedent. The State Water Board now requests rehearing of the Decision.

The State Water Board released a draft certification for public comment on May 15, 2020 and a final certification on July 15, 2020. The certification requires supplemental releases of up to 250 cubic feet per second from Canyon Dam between June 16 and September 15 to the extent necessary to maintain temperatures of 20° Celsius or less at downstream monitoring locations on the North Fork Feather River. The certification reserves authority to modify the temperature control releases or require additional temperature control measures to be implemented based on monitoring and other information. Wetzel Declaration, ¶¶ 14 & 19. The stated rationale for the supplemental flows and reservation of authority is to ensure that Project operations will be consistent with water quality standards for temperature, and the beneficial uses of both the North Fork Feather River and Lake Almanor will be reasonably protected against the water quality impacts of Project operations. eLibrary no. 20200727-0014, pp. 12-15 (July 15, 2020) (State Water Resources Control Board Water Quality Certification).

II. STATEMENT OF ISSUES

The Commission's determination that the State Water Board has waived its certification authority was improper because the State Water Board never failed or refused to act within one year of a pending request for certification for the Project. Notwithstanding this basic fact, the Commission determined, based on the holding in the Hoopa decision and Commission decisions interpreting that decision, that the State Water Board's "efforts" in connection with PG&E's withdrawal and resubmittal of its applications for certification constituted a failure to act within the meaning of Section 401, and therefore the State Water Board has waived is water quality authority.

The Commission's reliance on the holding in *Hoopa* is in error because the facts in this proceeding are materially different than the set of facts at issue in the *Hoopa* case, and the Commission's determination is predicated in part on findings of fact that are inaccurate. Specifically, this proceeding is distinguishable from the proceeding at issue in the *Hoopa* case because the State Water Board and PG&E did not agree to a "coordinated withdrawal-and-resubmittal scheme" in order to hold PG&E's application for certification in abeyance indefinitely. In addition, PG&E's original application and subsequent applications were not

complete and ready for review, and PG&E's applications were augmented with new information over time.

ISSUE 1. Whether the State Water Board Failed or Refused to Act Within One Year of a Pending Certification Request

The State Water Board never failed or refused to act on a request for certification within one year of a pending request. During the period between 2003 and 2018, PG&E withdrew its certification requests before the one-year deadline expired, and in 2019 and 2020 the State Water Board denied without prejudice PG&E's then-pending request before the deadline. The State Water Board followed its own regulations, which require it to act on a request for certification before the federal period for certification expires. Cal. Code Regs. tit. 23, § 3859. Absent PG&E's voluntary withdrawal of its applications before the expiration of the one-year period to act on them, the State Water Board would have denied the requests for certification. PG&E's Petition for Declaratory Order, Attachment B; Wetzel Declaration, ¶ 16. These facts are uncontested.

The Commission faults the State Water Board for having accepted PG&E's withdrawal and resubmission letters, and maintains that the Board could have denied certification "prior to and upon receipt of" the withdrawal and resubmission letter. (Decision at p. 13, quoting *Southern California Edison Co.*, 170 FERC ¶ 61,135 at p. 25.) Consistent with logic and the Commission's own precedent, however, the State Water Board recognized that an applicant's decision to withdraw its request for certification before expiration of the certification period eliminated any need to approve or deny the withdrawn request. *Nat'l Fuel Gas Supply Corp. Empire Pipeline, Inc.*, 164 FERC ¶ 61,084, paragraphs 40-41 & n. 85 (2018); *New York State Department of Environmental Conservation v. FERC*, 884 F.3d 450, 456 (2nd Cir. 2018). Under these circumstances, the Commission erred in determining that PG&E was not able to effectively withdraw its requests for certification, and therefore the State Water Board was required to act on the withdrawn requests.

Issue 2. Whether a "Coordinated Scheme" to Delay Review and Avoid Federal Authority Was Present, Sufficient to Trigger Waiver under *Hoopa*

The facts in this proceeding do not support the Commission's determination that a "coordinated scheme" to delay review and avoid federal authority was present, sufficient to trigger waiver under *Hoopa*. In *Hoopa,* the court found that the applicant and the certifying agency had a

formal contractual agreement not to act on a certification application, in order to delay the Commission's existing hydroelectric relicensing process indefinitely and allow the parties to pursue project decommissioning instead. That agreement included an explicit requirement that the applicant withdraw and resubmit the same application annually in order to restart the State Water Board's review period so as to avoid waiver. Under those circumstances, the court found that there was a "withdrawal and resubmittal scheme" aimed at indefinite delay that prevented federal action, and concluded that the "scheme" was ineffective to extend the review period. *Hoopa,* 913 F.3d at 1100-01 ("the issue in this case is whether the states waive Section 401 authority by deferring review and agreeing with a licensee to treat repeatedly withdrawn and resubmitted water quality certification requests as new requests.").

The Commission has issued a series of decisions, including *Placer County Water Agency,* 167 FERC ¶ 61,056 (2019) *Constitution Pipeline Company, LLC*, 168 FERC ¶ 61,129 (2019), *Southern California Edison,* 170 FERC ¶ 61,135 (2020), and *Pacific Gas & Electric Co.,* 170 FERC ¶ 61,171 (2020), incorrectly expanding *Hoopa* beyond these facts to find that an "implied" agreement is sufficient to render an applicant's withdrawal and resubmittal of an application ineffective to re-start the review period, and that therefore an agency waives by failing to act on the withdrawn application. In the Decision in this proceeding, the Commission compounded its prior errors by stating that *no* agreement regarding delay or regarding withdrawal and resubmittal – implied or otherwise – is necessary for a withdrawal and resubmittal of an application to result in waiver. Decision, p. 11. The Decision does not explain, however, how a "scheme" can occur absent an agreement, or address what purpose such a "scheme" might serve that would not have been served by denials without prejudice. Finding waiver without an agreement is an unwarranted extension of the *Hoopa* opinion.

In its Decision, the Commission effectively conceded there was no actual agreement to delay review of PG&E's applications in order to circumvent or impede the Commission's authority. Instead, the Commission found waiver based on the State Water Board's statements to PG&E, made in several letters acknowledging receipt of PG&E's certification requests, that PG&E had the option of withdrawing and resubmitting its request for certification if the Board did not have sufficient information to act on PG&E's request within one year. Decision, pp. 11-13. Based on this evidence, the Commission found that that the State Water Board "expected and encouraged"

PG&E to withdraw and resubmit its requests, and that the Board "sought" the withdrawal and resubmittal of PG&E's applications in order to circumvent the statutory deadline. *Id*. The Commission also found that the Board was "complicit" in the applicant's withdrawal and resubmittal of its requests because the Board "accepted" PG&E's withdrawal and resubmission letters. *Id.,* pp. 11-12. The Commission concluded that the Board's supposed "efforts" to compel PG&E to withdraw and resubmit its requests constituted a failure to act within the meaning of Section 401. *Id.*, p. 11.

The Commission's findings that the State Water Board expected, encouraged, and sought the withdrawal and resubmittal of PG&E's requests are unsupported by the Board's factually accurate and neutral statements concerning a procedural option that was available to PG&E, and that the Commission itself had accepted at the time as restarting the time clock. See, e.g., *Nat'l Fuel Gas Supply Corp. Empire Pipeline, Inc.,* 164 FERC ¶ 61,084, paragraphs 40-41 & n. 85 (2018); *New York State Department of Environmental Conservation v. FERC,* 884 F.3d 450, 456 (2nd Cir. 2018). Similarly unavailing is the Decision's interpretation of the Board's failure to reject PG&E's withdrawal and resubmittal letters as evidence of being "complicit" in a "scheme." Contrary to the Commission's findings, the evidentiary record in this proceeding, including the correspondence cited by the Commission and the Wetzel Declaration, supports the finding that the State Water Board merely provided information to PG&E, and PG&E made its own decision to withdraw its certification requests, presumably in order to avoid denial without prejudice.

Another key distinction between the *Hoopa* case and this proceeding is the absence of any agreement or "scheme" to hold in abeyance the processing of otherwise complete applications for certification. In *Hoopa*, the court decried the parties' agreement to effectively shelve applications for certification that the court found were "complete and ready for review . . . . " *Hoopa*, *supra*, 913 Fed.3d. at p. 1105. In this proceeding, by contrast, the information necessary to process PG&E's applications for certification continued to be developed over time.

As summarized above and explained in the State Water Board's comments on PG&E's petition for a declaratory order, PG&E's application lacked critical information concerning the feasibility of infrastructure improvements, operational changes, or other measures that could be implemented in order to bring the Project into compliance with the water quality objectives for

temperature and ensure reasonable protection of cold freshwater habitat in the North Fork Feather River. In addition, the State Water Board could not issue certification until environmental documentation had been prepared evaluating both the potential environmental impacts of the proposed project and any feasible temperature control measures, as required by CEQA. Without that information, the State Water Board was unable to issue certification, and would have denied PG&E's applications if they had not been withdrawn before the one-year deadline. The State Water Board informed PG&E of these deficiencies upon receipt of PG&E's first request for certification and in subsequent correspondence. *See* PG&E's Petition for Declaratory Order, Attachment B. Rather than hold in abeyance the processing and review of PG&E's application, the State Water Board and PG&E used the time afforded by PG&E's withdrawal and resubmission of its applications to develop the information necessary for the Board to take affirmative action on PG&E's application.

In its Decision, the Commission asserted that PG&E's applications for certification that were pending between 2013 and 2018 were complete and ready for review. Decision, p. 11. As explained above, however, this assertion was factually inaccurate.

The Commission also determined that the reason for the State Water Board's delay in taking affirmative action on PG&E's requests for certification was immaterial. Quoting from *New York DEC v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018), the Commission stated that Section 401 establishes a bright-line rule that prohibits delay beyond the statutory one-year deadline, and if a state lacks sufficient information to act on a certification within one year, its remedy is to deny certification. Decision, pp. 15-16. *New York DEC v. FERC* is inapposite because in that case the state did not issue or deny certification within one year of receipt of a request. In the factual context of that case, the determination that a state's reason for delay was immaterial was a reasonable interpretation of Section 401 because the state did in fact delay action on a pending request for certification beyond one year.

In this case, by contrast, the State Water Board never failed or refused to act within one year of a pending certification request. Thus, the issue is whether, pursuant to the *Hoopa* decision, the State Water Board should nonetheless be deemed to have failed or refused to act by the statutory deadline because it engaged in a "coordinated withdrawal and resubmittal scheme" to hold applications for certification in abeyance indefinitely and circumvent federal authority. In

answering this question, the reason for the State Water Board's delay is material because a central fact that informed the court's holding in *Hoopa* was the fact that the parties deliberately attempted to place in abeyance applications that the court found were complete and ready for review. The court expressly declined to resolve whether the withdrawal and resubmittal of an application would result in waiver in situations involving different requests or incomplete applications. *Hoopa*, *supra*, 913 F.3d at p. 1105.

In sum, there was no agreement or scheme to hold processing of complete applications for certification in abeyance in this case. That PG&E elected to withdraw and resubmit its applications, presumably to avoid denial without prejudice for lack of sufficient supporting information and CEQA documentation, does not constitute the type of "coordinated withdrawal and resubmittal scheme" found objectionable in *Hoopa*, and therefore the State Water Board should not be deemed to have waived its certification authority for failure to act within the statutory deadline.

ISSUE 3: Should Any Subsequent Certification Applications Be Considered "New"

The fact that PG&E's applications for certification were augmented over time with substantive new information represents another significant departure from the facts underlying the *Hoopa* decision. In *Hoopa*, the court declined to resolve the issue of how different a request must be to constitute a new request such that it restarts the one-year clock because there was no evidence in that case that the requests for certification were incomplete, or that there were any changes to subsequent requests for certification. *Hoopa*, *supra*, 913 F.3d at pp. 1104-1105. The Decision dismisses the significance of the new information developed over time in this proceeding by suggesting that the new information did not require an amendment to PG&E's FERC license application, or a new request for certification in connection with the amendment. Decision, p. 14. As Commissioner Glick noted in his concurring statement, however, nothing in the Clean Water Act or the *Hoopa* decision provides that a request for certification should not be considered a "new request" unless it is supplemented by new information that requires an amendment to a license application. Decision, Concurring Statement of Commissioner Glick, p. 1.

The Commission appears to concede that the supplemental water quality information developed through 2016 might have rendered at least some of PG&E's requests for certification "new

requests," but concludes that, even if the one-year clock had restarted with PG&E's March 7, 2017 withdrawal and resubmittal, the State Water Board failed to act within one year from that date, and thus waived its authority. Decision, p. 14. PG&E withdrew and resubmitted its application once after its March 7, 2017 request, by letter dated February 26, 2018, obviating the need for the State Water Board to act on its March 7, 2017 request. (The State Water Board denied without prejudice PG&E's two subsequent requests for certification.) Moreover, during the 2017-2020 timeframe, supplemental CEQA information continued to be developed. Wetzel Declaration, ¶ 15. Considering that *Hoopa* expressly left unanswered to what degree serial applications must differ to restart the one-year clock, the Commission erred in finding waiver without addressing all pertinent facts regarding this issue.

ISSUE 4. PG&E Has Failed to Exhaust Its Administrative Remedies

PG&E never requested reconsideration of or otherwise challenged any action or failure to act by the State Water Board prior to PG&E's petition for a declaratory order finding of waiver, despite the clear availability of an administrative remedy to do so. California Code of Regulations, title 23, section 3867 provides that "an aggrieved person may petition the state board to reconsider *an action or failure to act* taken by the executive director." (emphasis added). See *id.* §§ 3838 (a) (delegating authority to the executive director to issue or deny certification), 3859 (a) (requiring executive director to issue or deny certification before the period for certification expires); see also Cal. Water Code, § 13330(a) (authorizing judicial review after remedy of administrative reconsideration is exhausted). PG&E never pursued, let alone even suggested, any different course of action, instead choosing to withdraw its requests for certification.

By failing to exhaust its administrative remedies regarding any alleged failure to act by the State Water Board on prior (withdrawn) requests for certification, PG&E has waived any rights to now allege waiver on that basis. *U.S. v. Superior Court* (1941) 19 Cal.2d 189, 194; *Abelleira v. District Court of Appeal, Third Dist*. (1941) 17 Cal.2d 280, 293. Declaratory relief will not be issued to a party that has failed to exhaust its administrative remedies. *Contractors' State License Bd. v. Superior Court*, 28 Cal. App. 5th 771, 780–82 (Cal. Ct. App. 2018); cf. *Ross v. Blake*, 136 S. Ct. 1850 (2016) (requiring exhaustion of available state administrative remedies before federal court review).

The issue presented by PG&E's failure to exhaust administrative remedies is not whether the Commission has purview to review an issue such as waiver, but whether it is appropriate for the Commission to review an issue that might otherwise be in its purview when the party raising the issue has failed to satisfy a procedural prerequisite for review, and the party aggrieved by that failure objects. Exhaustion of administrative remedies is a procedural prerequisite, so fundamental that it is often referred to as jurisdictional. See, e.g., *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 791 (2006). This reflects the importance of ensuring that administrative agencies whose actions or failures to act are challenged have a fair opportunity to consider and respond beforehand to any issues raised as part of that review. "The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.] The decision-making body 'is entitled to learn the contentions of interested parties before litigation is instituted. If [plaintiffs] have previously sought administrative relief ... the Board will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so.'" *Id.* at 794 quoting *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, 91 Cal.App.4th 342, 384 (2001); see *Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019) ("Fundamental principles of administrative law, however, teach that a federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question.").

The Clean Water Act embodies congressional intent to preserve and protect the primary responsibilities of the states. 33 U.S.C. § 1251 (b). This respect for state laws and state institutions is particularly strong in Section 401, which provides that each state shall adopt its own procedures. *Id.* at § 1341(a)(1). California has adopted administrative procedures for certification that include procedures for administrative reconsideration, not just to review final certification, but for review of any action or failure to act as part of the certification process. Respect for those procedures, and the role of the state under Section 401, dictates that the Commission should not decide the merits of whether certification has been waived, but dismiss the petition for failure to exhaust administrative remedies where an applicant has failed to request administrative reconsideration.

ISSUE 5. Whether the State Water Board's Deadlines to Act on PG&E's Certification Applications Were or Should Be Equitably Tolled

Prior to *Hoopa*, all relevant parties – the Commission, PG&E, and the State Water Board – understood that the State Water Board's one-year deadline to act on PG&E's applications for certification began anew each time PG&E submitted a certification application, regardless of how much the application had changed. The State Water Board reasonably relied on the Commission's explicit conclusion that an applicant's withdrawal and resubmittal of even the same Section 401 request started a new one-year period to act on the resubmitted application. The Commission should therefore, at a minimum, apply the doctrine of equitable tolling to the State Water Board's deadline to have acted on PG&E's certification applications. Statutory deadlines are equitably tolled "if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016). Equitable tolling is especially appropriate here because the State Water Board relied on the Commission's determinations that an applicant's withdrawal and resubmittal of even the same application commenced a new one-year certification period. *Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997) (equitable tolling is appropriate where a party is "misled about the running of a limitations period … by a government official's advice upon which they reasonably relied"); *Jarrell v. U.S. Postal Serv*., 753 F.2d 1088, 1092 (D.C. Cir. 1985); accord *Bull S.A. v. Comer*, 55 F.3d 678, 681 (D.C. Cir. 1995).

The Commission has long held that applicants' withdrawal of an application and resubmittal of an application starts a new one-year certification period, including at the time of PG&E's withdrawals and resubmittals. *Barrish & Sorenson Hydroelectric Co., Inc*., 68 FERC ¶ 62,161, 64,258 (Aug. 12, 1994); *Ridgewood Maine Hydro Partners, L.P*., 77 FERC ¶ 62,201, 64,425 (Dec. 27, 1996); *Cent. Vt. Pub. Serv. Co*., 113 FERC ¶ 61,167, 61,653 at P 19 (Nov. 17, 2005). As recently as 2018—the year of PG&E's most recent withdrawal and resubmittal for the Project—the Commission stated, "[w]e reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1)." *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at P 23 (Jan. 11, 2018), rehearing denied 164 FERC ¶ 61029 (July 19, 2018), order on voluntary remand, 168 FERC ¶ 61129 (Aug. 28, 2019), rehearing denied, 169 FERC ¶ 61199, 62461 (Dec. 12, 2019). The State Water Board relied on the Commission's representations. The State Water Board pursued its rights diligently to make sure

it did not fail to act within the one-year certification period. *Cf. Cent. Vt. Pub. Serv. Co*., 113 FERC ¶ 61,167, 61,653 (Nov. 17, 2005) (contrasting withdrawal and resubmittal of a request for certification, which would have avoided waiver, with a settlement agreement whereby no action was taken on a request for certification for more than one year, which did not avoid waiver). The Commission should apply the doctrine of equitable tolling to avoid subjecting the State Water Board to the inequitable consequences of applying a new, bright-line rule finding waiver anytime an applicant withdraws and resubmits a certification application.

The important factual differences discussed in Issues 2, 3, and 4, above, establish that imposing a waiver in these circumstances is not merely application of the law as decided in *Hoopa*. Rather, it is a Commission policy to adopt an expansive interpretation of *Hoopa*, far beyond what was decided in that case; the Decision simply does not follow from the language of the statute in the absence of facts like the specific ones considered in *Hoopa*. Section 401 states that if a state "fails or refuses to act on a request for certification" within one year after receipt of the request, the state waives certification. Nothing in the statute states or suggests that a state "fails" or "refuses" to act if it takes no further action on a request that has been withdrawn. Nothing in the multiple filings by the State Water Board and in the active work it engaged in on these applications suggests a failure or refusal to act on a pending request. And nothing in Section 401 suggests that if a new request is filed, a prior request that has been withdrawn should be treated as if it was still pending with the original filing date. The *Hoopa* opinion did not interpret the language of the statute to mean that a state has failed or refused to act if it takes no further action on a request when that request has been withdrawn and new request has been filed, but instead found, based on the facts of that case, that the states had "defied" the statute by "shelving water quality certifications" through "deliberate and contractual idleness." *Hoopa*, 913 F.3d at 1104. The *Hoopa* court's reference to "contractual idleness" underscores the point that its holding is based on a formal agreement under which the processing of requests was held in abeyance. The Commission's expansive interpretation of the case, applying waiver far beyond anything addressed in *Hoopa* or in the statutory language, is an application of Commission policy, not judicial precedent. It is the State Water Board's view that policy pronouncement is contrary to the principles of cooperative federalism embodied in Section 401, and should be rescinded. At the very least, the Commission should recognize that it is a policy pronouncement, and not apply

it retroactively in a manner that deprives states of certification authority even though they were acting to preserve that authority in a manner consistent with Commission precedent.

Finally, prior to submitting its waiver request, PG&E never pursued or even suggested any different course of action, choosing instead to withdraw its requests for certification through 2018. The Commission likewise never raised any objections to PG&E's withdrawal and resubmittal, or gave the State Water Board any indication that it intended to move forward without a certification. At no time did the Commission ever raise the issue of potential waiver or suggest that it or PG&E was prejudiced by the delay. As discussed above, *Hoopa* does not foreclose application of equitable tolling in this case where equity so clearly supports it. Nor does *Hoopa* require or justify retroactive application to find waiver of certification under Section 401 in this case.

ISSUE 6. Whether PG&E Is Entitled to the Relief Sought Due to its Unclean Hands

The Decision does not adequately address the equitable doctrine of unclean hands. Under that doctrine, an entity like PG&E asking for equitable relief "must come with clean hands." *Northbay Wellness Group, Inc. v. Beyries,* 789 F.3d 956, 959 (9th Cir. 2015), quoting *Johnson v. Yellow Cab Transit Co*., 321 U.S. 383, 387 (1944); see also *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995) ["suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief because of unclean hands"]. Unclean hands is an applicable consideration in Commission proceedings. *Rocky Mountain Natural Gas Co. v. FERC*, 114 F.3d 297, 299 (D.C. Cir. 1997). Section 401's one-year certification period is subject to equitable defenses. *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982) (Title VII timeliness deadlines are not jurisdictional); *Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F.Supp.2d 168, 176-77 (D.D.C. 2006) (Coastal Zone Management Act's statutory waiver deadline was "subject to waiver, estoppel and equitable tolling.").

Here, PG&E comes to the Commission with unclean hands. PG&E's failure to provide the information necessary to determine the Project's ability to comply with the water quality objective for temperature is the primary reason why the State Water Board could not issue certification within one year after PG&E filed its initial application for certification. PG&E elected to withdraw its applications for Section 401 certification rather than face denial of their applications by the State Water Board, and elected to submit new applications to induce the State

Water Board to continue working on its certification applications with the hopes of obtaining a favorable certification decision. Notwithstanding the fact that PG&E induced the State Water Board not to issue a denial of their applications by withdrawing them when failure to do so would result in denial, PG&E now seeks relief from the Commission claiming that these withdrawals and resubmittals were ineffective to give the State Water Board a new one-year period to act on a request for certification. If PG&E had not elected to withdraw and then resubmit its applications to the State Water Board, the State Water Board would have simply denied the requests for certification, thereby assuring that it did not waive its certification authority, consistent with the State Water Board's own regulations. Conversely, had PG&E submitted a complete application with all the information necessary to support the State Water Board's decision in accordance with the Clean Water Act and CEQA, the State Water Board would have issued certification.

The State Water Board has already issued a final certification for the Project. On June 29, 2020, Governor Newsom signed into law amendments to the California Water Code that provide the State Water Board with the ability to issue certifications before completion of CEQA review, where waiting until completion of CEQA review presents a substantial risk of waiver of certification authority. See Cal. Wat. Code, §13160(b)(2), as amended by Assem. Bill 92, 2019-2020 Reg. Sess., ch 18, § 9. PG&E should not benefit from its own actions in withdrawing and resubmitting its applications for certification, thereby avoiding the imposition of the conditions of certification that should be properly imposed on its Project to protect water quality.

IV. CONCLUSION

For all of the above reasons, the State Water Board requests that the Commission rehear and reconsider its July 16, 2020 Decision. The Commission should recognize that the State Water Board has not waived its certification authority. The Commission should include the state certification conditions as conditions of the new license for the Project as required by Section 401 of the Clean Water Act.

Submitted on this 17th day of August 2020.

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