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June 21, 2011

Mr. Charles Hoppin, Chair
Mr. Tom Howard, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Request for Amendment to SWRCB Resolution Nos. 2010-0024 and 2010-0049 (May 18, 2010, as amended October 5, 2010) Regarding Abeyance of Klamath Hydroelectric Project Clean Water Act Section 401 Water Quality Certification Process and Related California Environmental Quality Act Process

Dear Mr. Hoppin and Mr. Howard:

For the reasons set forth herein, PacifiCorp Energy respectfully requests the State Water Resources Control Board (SWRCB) to amend SWRCB Resolution Nos. 2010-0024 and 2010-0049 (amending SWRCB Resolution 2010-0024), to allow PacifiCorp and other Parties to the Klamath Hydroelectric Settlement Agreement (KHSAs) to continue to focus their respective efforts on implementation of the KHSAs. SWRCB Resolutions 2010-0049 and 2010-0024 placed the Clean Water Act section 401 water quality certification process for PacifiCorp's Klamath Hydroelectric Project (KHP) in abeyance for an interim period. Pursuant to the terms of the Resolutions, the abeyance period will expire on August 16, 2011, at which time the SWRCB may resume processing PacifiCorp's water quality certification application, unless federal legislation is enacted to implement the KHSAs and the Klamath Basin Restoration Agreement (KBRA) by that date. As the KHSAs do not require the enactment of legislation by a date certain and federal legislation likely will not be enacted by August 16, 2011, PacifiCorp respectfully requests an amendment to the Resolutions to eliminate the provisions of the Resolutions that condition the abeyance on federal legislation. This modification would be consistent with other provisions of Resolution 2010-0024 that direct the SWRCB to resume processing PacifiCorp's application for water quality certification if the Executive Director finds that dam removal is unlikely to proceed in a reasonably timely manner.

Background

On February 18, 2010, the parties listed in **Attachment A** to this letter (Parties) executed the KHSAs. The KHSAs are historic agreements that lay out the process for additional

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studies, environmental review, and a decision by the Secretary of the Interior in 2012 (Secretarial Determination) regarding whether removal of four main stem Klamath River dams within the Klamath Hydroelectric Project owned by PacifiCorp: 1) will advance restoration of the salmonid fisheries of the Klamath Basin; and 2) is in the public interest, including consideration of potential impacts on affected local communities and tribes. Three of the dams are in California (Iron Gate, Copco No.1 and Copco No. 2), and one is in Oregon (J.C. Boyle). The Secretarial Determination will be based on: 1) new scientific studies and a re-evaluation of existing studies found in the Federal Energy Regulatory Commission (FERC) record and from other sources, and 2) an evaluation of the potential environmental impacts of such an action pursuant to the National Environmental Policy Act (NEPA), CEQA, and other applicable laws. The KHSA additionally provides for the interim operation of the dams and a process to transfer, decommission, and remove the dams.

Section 6.5 of the KHSA requires the Parties, with the exception of the Oregon Department of Environmental Quality (ODEQ), to submit a request to the SWRCB and to ODEQ to hold in abeyance, for an interim period, the water quality certification process for PacifiCorp's KHP (FERC No. 2082), including associated review under the California Environmental Quality Act (CEQA). During this abeyance period PacifiCorp committed to withdraw and resubmit its water quality certification application as necessary to avoid waiver of certification under the Clean Water Act.

On May 18, 2010 the SWRCB approved the abeyance request by Resolution No. 2010-0024. Resolution No. 2010-0024 includes a number of conditions, the occurrence of which would cause the termination of the abeyance. One such condition was the introduction of federal legislation to implement the KHSA, by June 18, 2010 (plus a 90 day period to cure any defaults). Unlike many of the other conditions of the Resolution, the introduction of federal legislation condition is not an express requirement of the KHSA. Rather, recognizing that the introduction of legislation requires the cooperation of and substantial actions by elected officials and interests other than the settlement Parties, the KHSA requires only that the Parties use best efforts to support introduction of federal legislation in furtherance of the settlement and set a goal for introduction after the effective date of KHSA.

On September 16, 2010, PacifiCorp requested an amendment to the Resolution's language regarding federal legislation. PacifiCorp noted that while the Parties had diligently pursued introduction of legislation, congressional schedules and conflicting priorities had prevented the introduction of federal legislation. The California Natural Resources Agency also commented to clarify that the KHSA does not require federal legislation to be introduced or enacted by any certain date, and requested that the abeyance on water quality certification proceedings remain separate from the introduction of federal legislation. A letter submitted on behalf of the Klamath Water Users' Association on September 21, 2010 echoed many of the

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same concerns expressed by the Resources Agency and PacifiCorp. On October 5, 2010, the SWRCB modified Resolution No. 2010-0024 to extend the deadline for federal legislation to May 17, 2011, but included a requirement that the federal legislation be enacted by that date (as opposed to introduced, as specified in the original Resolution). (Resolution 2010-0049.)

As currently written, Resolution No. 2010 – 0049 would cause the California water quality certification process to resume if federal legislation is not enacted by August 16, 2011. Given that the enactment of federal legislation by that date is uncertain, PacifiCorp respectfully requests that the SWRCB modify Resolution Nos. 2010-0024 and 2010-0049 to remove the conditions relating to federal legislation. As noted above, the KHSA Parties have limited control over the schedules and priorities of Congress. Indeed, to date, delays in federal legislation have had little to do with the KHSA. Even without the legislation condition, the SWRCB has substantial opportunity and authority under Resolution Nos. 2010-0024 and 2010-0049 to terminate the abeyance should progress on the KHSA be unreasonably delayed or frustrated. (See SWRCB Resolution No. 2010-0024, ¶ 3).

Federal Legislation

The Parties are actively pursuing federal legislation. (See **Attachment B**, *Klamath Hydroelectric Settlement Agreement Implementation Report*, PacifiCorp, June 2011; and **Attachment C**, *Klamath Basin Coordinating Council Annual Report*, May 2011.) The scope of the proposed legislation is broad and involves implementation of a complex framework of actions. The proposed federal legislation will authorize the federal government to implement the KHSA and the KBRA, and to take other actions related to the Agreements.¹ The legislation specifies that operation of the four dams will continue under FERC annual licenses pending the Secretarial Determination and, in the event of an affirmative Secretarial Determination, until dam removal is completed. In the event of a negative Secretarial Determination, PacifiCorp will resume the FERC relicensing process, including the section 401 water quality certification processes in California and Oregon.

Current Status of KHSA

Since the signing of the KHSA in February 2010, significant progress has been made by PacifiCorp and the settlement Parties to obtain necessary state public utility commission regulatory approvals to implement the KHSA and to implement Interim Measures and other projects and programs to improve water quality conditions and benefit aquatic species in the

¹ In addition to the necessary federal authorizations and funding for the KHSA and KBRA, the proposed legislation includes critical protections for PacifiCorp and its customers in six western states, including liability protection and cost caps for PacifiCorp and its customers that make dam removal under the KHSA a preferable alternative to relicensing the facilities.

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Klamath River. The following is a brief summary of the Parties' accomplishments since the KHSA was executed. Please see **Attachment B**, *Klamath Hydroelectric Settlement Agreement Implementation Report*, PacifiCorp, June 2011, for a detailed description of implementation activities that have occurred under the KHSA. It is important to keep in mind that these actions have resulted from the KHSA, and would not currently be implemented but for the KHSA.

Interim Measures Implemented by PacifiCorp

- PacifiCorp, in consultation with the Interim Measures Implementation Committee, has developed study plans for pre-Secretarial Determination studies and pilot projects, which will include:
 1. continued development of a water quality accounting and tracking framework;
 2. evaluation of treatment provided by wetlands;
 3. testing of an intake cover for water quality control at Iron Gate reservoir;
 4. pilot testing of environmentally-safe algaecide on Copco reservoir water;
 5. evaluation of J.C. Boyle reservoir dissolved oxygen improvement technologies; and
 6. evaluation of organic matter removal from Keno reservoir and the Upper Klamath River.
- PacifiCorp has collaborated with various agencies and tribes to develop and fund the implementation of a comprehensive 2011 water quality monitoring plan that includes baseline and public health monitoring from Link River dam to the estuary. Public health data is distributed every two weeks to inform regulatory entities on the need to post public health advisories. The monitoring will continue through December 2011.
- PacifiCorp adjusted instream flow releases in the Fall Creek bypass reach from 0.5 cfs to 5 cfs on May 18, 2010.
- PacifiCorp has begun funding 100 percent of the operations and maintenance costs of the Iron Gate Hatchery. PacifiCorp has also purchased a fish marking system for the Iron Gate Hatchery to continue 25 percent constant fractional marking of Chinook salmon produced at the hatchery, which was begun in 2009. The marking system was used for the spring 2011 marking season and is expected to provide data on the contribution of the hatchery to basin salmon escapement.
- PacifiCorp has been implementing Interim Conservation Plan (ICP) measures to benefit listed species, and filed a Habitat Conservation Plan for coho salmon on February 14, 2011.
- PacifiCorp has provided more than \$1.5 million in funding for coho salmon habitat improvements under a Coho Enhancement Fund..
- A flow variability plan has been implemented to improve conditions for coho salmon, consistent with the Bureau of Reclamation's biological opinion on project operations.
- PacifiCorp funded the development of a Hatchery and Genetics Management Plan (HGMP) for the Iron Gate Hatchery, which was submitted to the National Marine Fisheries Service for review in September 2010. PacifiCorp is funding, and the California Department of Fish and

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Game (CDFG) is implementing, a number of early actions called for in the HGMP, such as genetic analysis for broodstock management and bird netting on coho raceways to reduce predation.

Regulatory implementation

- Necessary regulatory approvals were obtained from the California Public Utilities Commission to collect surcharges from California customers of PacifiCorp to fund dam removal costs for KHSA implementation on May 6, 2011. The California customer surcharges are designed to provide \$16 million in funding for dam removal in 2020.
- Necessary regulatory approvals were obtained from the Oregon Public Utility Commission (OPUC) to collect surcharges from Oregon customers of PacifiCorp to fund dam removal costs for KHSA implementation on September 16, 2010. The Oregon customer surcharges are designed to provide \$184 million in funding for dam removal in 2020. The Oregon dam removal trust accounts currently have a balance of approximately \$17.7 million.

Studies and Environmental Review implementation

On June 14, 2010, the Department of Interior published its Notice of Intent to prepare an Environmental Impact Statement/Environmental Impact Report (EIS/EIR) pursuant to NEPA, and CFDG published its Notice of Preparation pursuant to CEQA on June 21, 2010. The agencies will prepare a joint document.

Comments on 401 Process from Other Parties

Several non-settlement parties recently have submitted comment letters to the SWRCB expressing concerns that PacifiCorp would like to specifically address in this letter. In a letter dated April 13, 2011, the Hoopa Valley Tribe asserts that the SWRCB has abdicated its section 401 certification authority by granting an abeyance as called for in the KHSA. This is not true. The KHSA recognizes California's and Oregon's authorities under section 401 of the federal Clean Water Act, and established a process whereby the settlement Parties would request that the States hold the 401 processes in abeyance for an interim period to allow the Parties to focus efforts and resources on implementing the KHSA. The KHSA does not request the SWRCB to abdicate or waive its certification authority in any way, but only that the SWRCB exercise its discretion to not process PacifiCorp's certification application for an interim period. The KHSA expressly obligates PacifiCorp to withdraw and resubmit its water quality certification applications with the SWRCB and ODEQ for the very purpose of ensuring that the States do not waive their respective certification authorities. In Resolution No. 2010-0024 the SWRCB reserved its discretion to move forward with the water quality certification process if the KHSA is not proceeding at a reasonable pace.

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The letter also claims that the KHSA has suspended the FERC relicensing process until at least 2020, "allowing it at least fourteen additional years of unmitigated power generation beyond the date of license expiration." As discussed above, the KHSA obligates PacifiCorp and other parties to implement a broad range of Interim Measures that are designed and expected to improve water quality, fisheries and habitat in the Klamath River, or to improve understanding of those resources. Implementation of these improvements is underway and in the absence of the KHSA, these investments and programs would not occur and the Klamath River would not obtain the benefits of these activities.

Conclusion

For the reasons set forth herein, PacifiCorp requests that the SWRCB amend Resolution Nos. 2010-0024 and 2010-0049 to remove the condition linking abeyance of the water quality certification to federal legislation while leaving intact the remaining conditions, including the discretion of the SWRCB to move forward with processing PacifiCorp's application for water quality certification should reasonable progress in implementing the KHSA not occur. Please contact the undersigned if you would like additional information.

Sincerely,



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Counsel to PacifiCorp Energy

encls.

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