

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
JULY 17, 2012**

REVISED ITEM 11

SUBJECT

CONSIDERATION OF A PROPOSED RESOLUTION REGARDING THE SECTION 401 WATER QUALITY CERTIFICATION APPLICATION FOR THE KLAMATH HYDROELECTRIC PROJECT, FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 2082

DISCUSSION

PacifiCorp Energy (PacifiCorp) owns and operates the Klamath Hydroelectric Project (KHP), under a license from the Federal Energy Regulatory Commission (FERC), FERC Project No. 2082, which expired in 2006. The KHP continues to operate under annual extensions of its original FERC license (issued in 1956), as it undergoes the FERC relicensing process. The primary hydroelectric components of the KHP on the mainstem of the Klamath River include one dam in Oregon (J.C. Boyle) and three dams in California (Copco 1, Copco 2, and Iron Gate). The Bureau of Reclamation (Bureau) manages the Klamath Irrigation Project upstream of the KHP in Oregon. The Bureau controls flows into the KHP in accordance with biological opinions issued by the National Oceanic and Atmospheric Administration's National Marine Fisheries Service and the United States Fish and Wildlife Service (USFWS).

The Klamath River is listed as an impaired waterbody for nutrients, temperature, microcystin and dissolved oxygen. Blue-green algal blooms occur in the Klamath River downstream of Iron Gate Dam and in Iron Gate and Copco Reservoirs. Two of these toxic blue-green algae are *Anabaena flos-aquae* and *Microcystis aeruginosa*. *Anabaena flos-aquae* produces neurotoxins and *Microcystis aeruginosa* produces microcystin—a liver toxin. These algal blooms have led to the annual issuance of state health advisories during the late summer and early fall.

The anadromous fish populations in the Klamath River watershed have declined significantly in recent years, which may be related to various factors that negatively affect the fish populations and their habitat. These factors include fish passage blockage at Iron Gate Dam in California that prevents access to upstream habitat, parasitic fish diseases in the watershed, and poor water quality. The KHP causes or contributes to some of these problems. For example, the presence of the KHP reservoirs (i.e., Iron Gate and Copco) can lead to elevated water temperatures in late summer and early fall, compared to conditions without the KHP. Elevated water temperatures in Iron Gate Reservoir can also lead to low dissolved oxygen concentrations in the Klamath River downstream of Iron Gate Dam.

The State Water Resources Control Board (State Water Board) and the North Coast Regional Water Quality Control Board (North Coast Regional Water Board or Regional Board) have complementary authorities related to the water quality and beneficial uses of the Klamath River, and specifically related to the KHP. The North Coast Regional Water Board develops the region's water quality control plan (basin plan) and associated total maximum daily loads (TMDLs), and implements the waste discharge elements of applicable plans and TMDLs. In December 2010, the United States Environmental Protection Agency approved the North Coast Regional Water Board's TMDL for the Klamath River, which included an action plan to address

temperature, dissolved oxygen, nutrients, and microcystin impairments. The North Coast Regional Water Board has determined that KHP removal would result in full compliance with TMDL load allocations.

The State Water Board is responsible for preparing Clean Water Act section 401 water quality certifications for FERC projects. Because the Federal Power Act preempts state environmental regulation in most other contexts, the water quality certifications process is the only regulatory mechanism the State has to address the KHP's water quality impacts. This process requires that applicants for federal permits (or permit amendments) for actions that may result in a discharge to the surface waters of a state must also apply for state water quality certification, which certifies that the project will operate to meet state water quality standards. The state agency responsible for certification may condition or deny certification as necessary to meet water quality standards or other applicable requirements of state law. The federal permit may not be issued without either a waiver or issuance of water quality certification. Any conditions of the certification become part of the federal permit (i.e., KHP FERC license). In this case, the State Water Board is responsible for determining whether and under what conditions the KHP can operate to meet state water quality standards.

Klamath Hydroelectric Settlement Agreement & Abeyances

PacifiCorp and many interested state, tribal and local government agencies, non-governmental organizations, and other stakeholders negotiated the Klamath Hydroelectric Settlement Agreement (KHSA). Execution of the KHSA occurred on February 18, 2010. The KHSA provides a framework for decision-making regarding removal of four KHP dams on the Klamath River mainstem, and implementation of a decision to remove them. Implementing the dam removal process outlined in the KHSA depends, among other things, on enactment of federal legislation to halt the FERC relicensing process and to grant the Secretary of the United States Department of the Interior (Secretary) the authority to determine whether dam removal is in the public interest and would advance salmon restoration (Secretarial Determination). Under the KHSA, dam removal is scheduled to occur in 2020.

In the KHSA, PacifiCorp agreed to implement certain "Interim Measures" in the time period prior to dam removal that would address water quality problems in the Klamath River. The North Coast Regional Water Board has found that these measures, culminating in dam removal, could constitute an acceptable TMDL implementation plan. Such voluntary implementation by PacifiCorp can achieve the same result as a water quality certification (i.e., project compliance with water quality standards). The State Water Board and North Coast Regional Water Board have certain advisory and/or approval roles in developing and implementing some of these KHSA Interim Measures, even though neither the State Water Board nor Regional Board is a signatory to the KHSA. With the North Coast Regional Water Board taking the lead, both the State and Regional Board have participated in consultation on the Interim Measures.

Three measures are particularly relevant to this discussion:

- Interim Measure No. 10 requires that PacifiCorp provide a one-time funding of \$100,000 for a basin-wide water quality workshop. The workshop will inform the decision-making for Interim Measure No. 11, which will focus on nutrient reduction in the Klamath Basin, including constructed wetlands, water quality accounting, and other treatment technologies. The Interim Measure No. 10 workshop is planned for September 11-13, 2012. Following the workshop, in March 2013 a post-Interim Measure No. 10 workshop

report will be produced, which will include 30-percent design documents for projects that received favorable review.

- Interim Measure No. 11 identifies nutrient reduction projects in the watershed intended to provide water quality improvements in the mainstem Klamath River, while also addressing water quality, blue-green algae, and public health concerns in Project reservoirs and low dissolved oxygen concentrations in the J.C. Boyle Reservoir. Interim Measure No. 11 requires that upon the effective date of the KHSA until the Secretarial Determination, PacifiCorp will spend up to \$250,000 per year for studies or pilot projects developed in consultation with the Interim Measures Implementation Committee (IMIC)¹. The studies, pilot projects, and information generated at the water quality workshop specified in Interim Measure No. 10 will inform a priority list of projects. Upon an Affirmative Determination², PacifiCorp will fund up to \$5.4 million to implement projects approved by the Oregon Department of Environmental Quality, the State Water Board, and the North Coast Regional Water Board, and up to \$560,000 per year of annual expenses.
- Interim Measure No. 15 commits PacifiCorp to spending \$500,000 per year for water quality monitoring to support dam removal, nutrient removal and permitting studies, and to protect public health through algae and algal toxin monitoring.

The Klamath Basin Restoration Agreement (KBRA) is a companion agreement to the KHSA intended to resolve disputes regarding the amount, timing, and other conditions of water diversion and delivery for agriculture, National Wildlife Refuges, and related uses within the Bureau's Klamath Reclamation Project and by non-federal entities in the Upper Klamath Basin related to instream flows and lake levels. The KBRA also includes extensive habitat restoration.

As set forth in the KHSA, PacifiCorp requested a stay of the water quality certification process, in a letter dated March 17, 2010. On May 18, 2010, the State Water Board adopted [Resolution No. 2010-0024](#), which holds in abeyance the processing of PacifiCorp's KHP water quality certification application in light of the settlement. The KHSA and KBRA would significantly change the proposed project and also address water quality matters that are beyond the scope of the water quality certification, such as the removal of J.C. Boyle Dam, instream flows entering California and Oregon, diversions from the Klamath River, and significant habitat restoration in Oregon that would impact California water quality and anadromous species that travel through California. The abeyance in State Water Board Resolution No. 2010-0024 includes a set of triggers, based primarily on the KHSA's timeline for major settlement milestones, which would cause the abeyance to lift. Most of these triggers would lift the abeyance unless the trigger is resolved within 90 days of the date specified in the resolution, or unless the State Water Board acts to extend the abeyance period.

¹ The IMIC is comprised of representatives from the: Yurok Tribe, Karuk Tribe, California Department of Fish and Game (CDFG), North Coast Regional Water Board, Oregon Department of Fish and Wildlife, The Klamath Tribes, Oregon Water Resources Department, PacifiCorp, USFWS, Bureau, Oregon Department of Environmental Quality, California Trout, Federation of Fly Fishers – Northern California Council, American Rivers, Bureau of Land Management, Institute for Fisheries Resources, and State Water Resources Control Board.

² An "Affirmative Determination" is a Secretarial Determination that recommends dam removal, while a "Negative Determination" recommends against dam removal. The State of Oregon and the CDFG would have to concur with the Secretary's Affirmative Determination within 60 days of any Affirmative Determination's publication in the Federal Register in order for the KHSA to continue in effect.

On October 5, 2010, and August 16, 2011, the State Water Board adopted Resolution Nos. [2010-0049](#) and [2011-0038](#), respectively. These resolutions extended the abeyance despite missed deadlines related to the introduction and enactment of federal legislation, in light of the continued progress made towards other KHSA milestones and the development of information that would be useful in the State Water Board's water quality certification process, should it restart. Federal legislation (Senate Bill 1851 and House Bill 3398) was introduced on November 10, 2011. Because federal legislation, while introduced, has not yet been enacted, the Secretary has not made the determination as specified in the KHSA and the deadline of April 30, 2012 in State Water Board Resolution No. 2010-0024 has passed.

Next Steps/Current Decision

If the State Water Board takes no action by July 29, 2012, the abeyance will lift and the water quality certification process will resume. The State Water Board may allow this to occur or it may extend the abeyance. State Water Board staff developed a rough timeline for issuance of a water quality certification and associated environmental documents for the KHP, and estimate that the water quality certification process would take approximately two years from restart to issuance of a final water quality certification.

The State Water Board received public comment from parties both in support of and in opposition to an abeyance. Recently, the State Water Board received letters from the Hoopa Valley Tribe (letter dated March 2, 2012) and the Sierra Club (letter dated May 1, 2012) requesting that the State Water Board exercise its regulatory authority and resume processing of the KHP water quality certification. On May 25, 2012, the Hoopa Valley Tribe filed a petition with FERC requesting a declaratory order finding either that PacifiCorp has not been diligent in pursuing its application or that the State Water Board and the Oregon Department of Environmental Quality have waived their authority to issue water quality certification by holding their respective processes in abeyance until March 31, 2012. The State Water Board joined a number of other parties in opposition to that petition on June 25, 2012.

In a letter dated May 14, 2012, the Karuk Tribe submitted a letter to the State Water Board on behalf of the Parties to the KHSA (Parties) requesting a continuance of the abeyance of the water quality certification process until March 31, 2013, to allow the Parties additional time to implement the KHSA, including enactment of the federal legislation. Additionally, on June 7, 2012, and June 11, 2012, the State Water Board received a letter from the Secretary of the California Natural Resources Agency and the Salmon River Restoration Council, respectively, requesting that the State Water Board support a resolution to continue the abeyance of the KHP water quality certification process. **On July 10, 2012, the California Natural Resources Agency sent a second letter clarifying that the Parties had requested the March 31, 2013 date under the assumption that the State Water Board would grant a 90 day grace period, and that the Parties intended that the abeyance continue until the end of that period.**

Any continuance of the abeyance could be conditioned upon measures to improve water quality in the Klamath River Basin and inform processing of the water quality certification process, should it resume.

POLICY ISSUE

Should the State Water Board allow the existing abeyance of PacifiCorp's water quality certification for the KHP to lift or continue to hold it in abeyance? If the State Water Board does continue to hold the further processing of the water quality certification in abeyance, under what conditions should it do so?

FISCAL IMPACT

None.

REGIONAL BOARD IMPACT

The KHP is located in the North Coast Regional Water Board's region.

STAFF RECOMMENDATION

Staff recommends that the State Water Board adopt the attached resolution extending the abeyance of processing PacifiCorp's water quality certification for the KHP.

State Water Board action on this item will assist the Water Boards in reaching Goal 4 of the Strategic Plan Update: 2008-2012 to comprehensively address water quality protection and restoration, and the relationship between water supply and water quality, and describe the connections between water quality, water quantity, and climate change, throughout California's water planning processes.

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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2012-

SECTION 401 WATER QUALITY CERTIFICATION APPLICATION FOR THE KLAMATH HYDROELECTRIC PROJECT, FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 2082

WHEREAS:

1. The Klamath River, which runs from southeastern Oregon through Northern California, suffers from impaired water quality, and its fish populations, including the federally listed Coho salmon and other culturally and economically important species, have severely declined compared to historic numbers;
2. PacifiCorp owns and operates the Klamath Hydroelectric Project (KHP), located in both California and Oregon, under Federal Energy Regulatory Commission (FERC) License No. 2082, which expired on March 1, 2006;
3. PacifiCorp applied to FERC to relicense the KHP, and applied to the State Water Resources Control Board (State Water Board) under section 401 of the Clean Water Act for a water quality certification that certifies the KHP, once relicensed would meet state water quality standards;
4. Activities in Oregon over which the State of California has little or no authority impact the water quality of the Klamath River in California;
5. Over the course of the FERC relicensing process, which began in late 2000, interested state, tribal and local governments, non-governmental organizations, irrigators, PacifiCorp, and other stakeholders met to reach an agreement concerning whether and how the KHP should be relicensed;
6. These negotiations expanded to address a host of other water-related issues in the Klamath River Basin, and have resulted in the signing of two separate but related agreements: the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement (KHSA), which both address activities in California and Oregon;
7. The State Water Board strongly supports the resolution of longstanding disputes on the Klamath River, both in California and in Oregon, and is pleased that an agreement among a large number of diverse stakeholders was reached;
8. The KHSA and KBRA contain measures, that if fully implemented, have the potential to improve water quality and fisheries health not only in California but also upstream in Oregon. Many of the restoration and water quality improvement measures in the KBRA that would occur in Oregon would also improve water quality and fisheries health in California;

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9. The KHSA provides a framework for decision-making regarding removal of four KHP dams on the Klamath River mainstem, and implementation of a decision to remove the dams. Under the KHSA, dam removal is scheduled to occur in 2020;
10. Federal and state resource agencies, together with other stakeholders and PacifiCorp, have produced a significant body of evidence that removing these dams could improve Klamath River water quality and fisheries' health. Results from the studies done during both the FERC relicensing proceeding and the subsequent environmental review process undertaken as part of the KHSA suggest that removal of the KHP would lead to improvement in environmental conditions in the Klamath River watershed;
11. The United States Department of the Interior – Bureau of Reclamation and the California Department of Fish and Game (CDFG) conducted extensive analysis of the environmental impacts and economics of dam removal under the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). The *Klamath Facilities Removal Draft Environmental Impact Statement/Environmental Impact Report* (DEIS/EIR) was released for public comment on September 21, 2011;
12. Interim measures described in the KHSA have the potential to mitigate conditions on the Klamath River that harm water quality and beneficial uses. The interim measures also provide for studies and monitoring that will be important for improving water quality and beneficial use protection on the Klamath River long-term, and for increasing understanding of the water quality dynamics in the KHP, in the Klamath River downstream and throughout the upper Klamath Basin;
13. The KHSA also provides timelines for implementation and key measurable steps that can assist the State Water Board to determine whether adequate progress is being made under the KHSA;
14. Key milestones under the KHSA that have been achieved or substantially achieved include:
 - Release of the DEIS/EIR for public comment in September 2011;
 - Introduction of federal legislation (Senate Bill [SB] 1851 and House Bill [HB] 3398) to implement the KHSA on November 10, 2011;
 - Approval by the public utility commissions in Oregon and California for the collection of funds to pay for dam decommissioning. The California Public Utilities Commission (CPUC) approved PacifiCorp's request for: 1) a surcharge of \$13.76 million collected over nine years; 2) institution of two trust accounts for the deposit of the surcharge; and 3) depreciation of the rate base of the KHP assets and amortization of the relicensing and settlement costs associated with the KHP on an accelerated basis. PacifiCorp is also required to file annual KHSA status reports with the CPUC; and
 - Commencement, by PacifiCorp, of 21 interim measures to improve environmental conditions within the KHP to benefit aquatic habitat and listed species, improve water quality, and improve hatchery operation.

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15. Three key KHSA milestones that have not been achieved as anticipated are:

- Passage of federal legislation (SB 1851 and HB 3398) that suspends the FERC proceeding and grants the Secretary of the United States Department of the Interior (Secretary) certain authorities;
- A determination by the Secretary whether dam removal will (1) aid in the recovery of the salmonid fisheries in the Klamath River Basin; and (2) be in the public's interest;³ and
- A commitment by the state of California for up to \$200 million in funding toward the costs of dam removal.

The KHSA may only be terminated if specific events contrary to the KHSA occur. The State Water Board's continued processing of PacifiCorp's 401 water quality certification is not an event that can trigger termination of the KHSA;

16. The State Water Board adopted Resolution No. [2010-0024](#) on May 18, 2010 which placed the processing of PacifiCorp's water quality certification application in abeyance. That resolution contained a set of triggers that would lift the abeyance unless: (i) the trigger is resolved within 90 days of the date specified in the resolution; or (ii) the State Water Board acts to further extend the abeyance;

17. On two occasions, the State Water Board reevaluated progress under the KHSA after failure to meet a deadline in an abeyance resolution. Both times the State Water Board revisited its decision whether to continue the abeyance, it determined that progress towards other KHSA milestones, and the potential of the KHSA and KBRA to affect changes beyond the scope of what the State Water Board could do alone, warranted an extension of the abeyance, and amended Resolution No. 2010-0024 to reflect those determinations. (See Resolution Nos. [2010-0049](#) and [2011-0038](#).);

18. One of the circumstances that trigger a lifting of the abeyance under Resolution No. 2010-0024 is failure of the Secretary to make a determination regarding dam removal by April 30, 2012. The Secretarial Determination did not occur by April 30, 2012, nor has it occurred so far in the 90-day cure period because the federal legislation, will introduced, has not yet been enacted. Without further action by the State Water Board, the abeyance will lift on July 29, 2012;

19. Parties to the KHSA have sent letters to the State Water Board requesting an extension of the abeyance until March 31, 2013, and then clarified that they had intended the abeyance to extend until the end of June. The State Water Board has also received letters requesting it exercise its regulatory authority and resume processing of the KHP water quality certification;

20. The State Water Board recognizes that the process of securing passage of legislation through Congress is complicated and uncertain;

³ This decision is defined as the "Secretarial Determination." An "Affirmative Determination" is a decision that recommends dam removal, while a "Negative Determination" recommends against dam removal. The State of Oregon and CDFG would have to concur with the Secretary's Affirmative Determination within 60 days of any Affirmative Determination's publication in the Federal Register in order for the KHSA to continue in effect.

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21. The State Water Board would benefit from a review of progress under an abeyance through the time period requested before the abeyance automatically ends; and
22. PacifiCorp or other Parties to the KHSA have agreed to fund measures to ensure that the work under the Interim Measures continues, despite the additional time extension beyond that envisioned at the creation of the KHSA:
 - \$50,000 to support development of 30-percent design documents that result from the post-Interim Measure No. 10 workshop final report, ensuring that the value of this Interim Measure is as strong as possible; and
 - \$30,000 to support the Klamath Basin Monitoring Program for an additional year after the existing contract with Humboldt State University Sponsored Programs Foundation expires.

THEREFORE BE IT RESOLVED THAT:

1. The State Water Board:
 - a. Will continue to hold in abeyance PacifiCorp's application for water quality certification for the KHP until June 30, 2013, except as provided in Paragraphs b, c, and d;
 - b. Will immediately resume processing PacifiCorp's application for water quality certification if PacifiCorp fails to withdraw and resubmit an application that complies with California Code of Regulations, title 23, sections 3833.1, 3855 and 3856 at least two weeks before the one-year anniversary of a prior year's submittal, or if the Deputy Director for Water Rights or her designee determines for any other reason that action is necessary to avoid a waiver of water quality certification;
 - c. Will resume processing PacifiCorp's water quality certification application in 30 days if the Executive Director or Chief Deputy Director determines that progress is not being made in a timely manner under the KHSA, notifies the State Water Board and files the determination with FERC;
 - d. May revisit or change this resolution at any time during a noticed public meeting; and
 - e. Will hold at least one public meeting to receive information regarding progress under the KHSA before June 30, 2013.

D R A F T

2. This resolution replaces Resolution Nos. 2010-0024, 2010-0049, and 2011-0038.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 17, 2012.

Jeanine Townsend
Clerk to the Board