STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
MAY 18, 2010

ITEM 5

SUBJECT

CONSIDERATION OF A PROPOSED RESOLUTION REGARDING PACIFICORP'S AND DEPARTMENT OF FISH AND GAME'S REQUESTS TO HOLD IN ABEYANCE THE SECTION 401 WATER QUALITY CERTIFICATION APPLICATION FOR THE KLAMATH HYDROELECTRIC PROJECT

DISCUSSION

PacifiCorp owns and operates the Klamath Hydroelectric Project (KHP) which is located on the Klamath River and on Fall Creek, tributary to the Klamath River. The project operates under a license from the Federal Energy Regulatory Commission (FERC), Project No. 2082. That license has expired, and the facility is operating under annual licenses as it undergoes a relicensing process with FERC. Before FERC can issue a new license, PacifiCorp must apply to the State Water Board for certification under section 401 of the Clean Water Act that the KHP will meet state water quality standards. Because of preemption under the Federal Power Act, the state lacks authority to regulate the water quality impacts of the KHP outside the water quality certification arena. Any conditions in the Board's certification become conditions in the FERC license.

Over the course of the FERC relicensing process, interested state, tribal and local governments, non-governmental organizations, PacifiCorp, and other stakeholders met to reach an agreement concerning relicensing the facilities. 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 both California and Oregon. Execution of the KHSA occurred on February 18, 2010.

Among the water-related provisions of the KBRA are a fisheries program, which includes habitat restoration, reintroduction of salmonids above the KHP facilities, monitoring and adaptive management, and a water resources program, which includes allocation of water among major irrigation, tribal and wildlife refuge uses, increased conservation and storage, and power for water management. The KBRA depends upon the removal of four KHP facilities on the Klamath mainstem.

The KHSA provides a framework for decision-making regarding removal of four KHP dams on the Klamath River mainstem, and a framework for removal, if a decision to remove the dams is reached. That framework includes (1) Congressional legislation to halt the FERC relicensing; (2) environmental and cost analysis of dam removal; (3) the securing of dam removal funding from various public and private sources; (4) a determination by the Secretary of the Interior (Secretary) whether dam removal would assist salmonid fisheries restoration and be in the public interest; (5) the implementation of interim environmental protection measures until dam removal or a Secretarial determination or state decision against dam removal; and (6) a process and rough timeline for implementing dam removal if the Secretary determines to move forward with removal and the states concur.

The KHSA has specifically-defined circumstances under which the parties may undertake to terminate the KHSA. However none of these conditions terminate the KHSA automatically. Instead, they allow a party to initiate a dispute-resolution process that allows the parties to reach a consensus on resolving the problem. If consensus cannot be reached by all, the Federal parties, States and PacifiCorp may come up with a mutually agreeable solution, except that this smaller group may not agree to removal of fewer than four facilities. The KHSA also anticipates that PacifiCorp will request a stay of the 401 water quality certification, but does not allow for denial of such a stay to result in termination of the KHSA. In a letter dated March 18, 2010, PacifiCorp requested that the State Water Board suspend processing of its 401 water quality certification application during the interim period. In a memorandum dated March 22, 2010, Department of Fish and Game (DFG) also requested that the State Water Board hold the water quality certification proceedings in abeyance.

The State Water Board must perform an environmental review under the California Environmental Quality Act (CEQA) before issuing a water quality certification for the KHP. The Board issued a Notice of Preparation of an Environmental Impact Report (NOP) on September 30, 2008. The NOP included potential alternatives for dam removal and for continued operation of the dams with voluntary fish passage. Scoping meetings to receive input on potential alternatives were held in October and November 2008. In recognition of the ongoing negotiations, and as outlined in an Agreement in Principle on which the KHSA was based, further progress on the EIR has focused on environmental analysis useful for both the 401 process and the process outlined under the KHSA. The KHSA and the CEQA process initiated for the 401 water quality certification have similarly set out to initially study the potential significant modification of the KHP at a programmatic level.

The proposed resolution grants PacifiCorp's and DFG's requests to hold in abeyance the water quality certification and environmental review process. The abeyance will end if certain events contemplated in the KHSA do not occur.

POLICY ISSUE

Should the State Water Board adopt the proposed resolution?

FISCAL IMPACT

None. PacifiCorp will continue to be responsible for payment of all annual fees associated with the water quality certification application.

REGIONAL WATER BOARD IMPACT

None

STAFF RECOMMENDATION

Staff recommends adoption of the proposed resolution.

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.

D R A F T April 14, 2010

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2010-

REQUEST FOR ABEYANCE IN PROCESSING THE WATER QUALITY CERTIFICATION APPLICATION OF THE KLAMATH HYDROELECTRIC PROJECT

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 has applied to relicense the KHP, and has applied to the State Water Resources Control Board (State Water Board) under section 401 of the Clean Water Act for certification that relicensing would meet state water quality standards.

4. The 401 certification includes consideration of whether one or more KHP dams in California should be removed to comply with water quality objectives or other appropriate requirement of state law.

5. Activities in Oregon over which the State of California has little or no impact influence water quality on the Klamath River in California.

6. There is a great deal of controversy regarding the impact of the KHP on the Klamath River's water quality and on its anadromous fisheries.

7. 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 have met to reach an agreement concerning whether and how the KHP should be relicensed.

8. 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 both California and Oregon.

9. 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 has been reached.

10. The KHSA and KBRA provide the potential for actions to improve water quality and fisheries health not only in California but also upstream in Oregon. Many improvements in Oregon could also improve water quality and fisheries health in California.

11. The KHSA provides a framework for decision-making regarding removal of four KHP dams on the Klamath River mainstem, and a framework for removal, if a decision to remove the dams is reached.

12. Federal and state resource agencies and a significant body of evidence suggest that removing these dams could be an important component of improving Klamath River water quality and fisheries' health.

13. Under the KHSA, the Department of the Interior will conduct further analysis of the environmental impacts and economics of dam removal. Department of Fish and Game will be the lead agency for analyzing removal of the KHP mainstream facilities under the California Environmental Quality Act (CEQA).

14. This analysis would also further the 401 water quality certification process.

15. Interim measures described in the KHSA have the potential to mitigate conditions on the Klamath 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.

16. The KHSA provides timelines for implementation and key measurable steps, including:

    - By March 31, 2012, the Secretary of the Interior will make a determination 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.[1]

    - Federal legislation implementing the KHSA will be introduced within 90 days of the February 18, 2010 effective date of the KHSA.

    - PacifiCorp will submit a request to the California Public Utilities Commission to approve a rate increase for PacifiCorp customers.

    - The State of Oregon and California Department of Fish and Game will concur with any Affirmative Determination within 60 days of its publication in the Federal Register.

    - In the event of an Affirmative Determination, dam removal shall begin and end in 2020.

17. 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.

[1] 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.

THEREFORE BE IT RESOLVED THAT:

The State Water Board:

1. Will hold in abeyance PacifiCorp's application for water quality certification for the Klamath Hydroelectric Project until removal of the California mainstem facilities of the Project unless one or more of the following circumstances occur:

    - PacifiCorp fails to withdraw and resubmit an application that complies with California Code of Regulations, title 23, sections 3833.1, 3855 and 3856 within two weeks of the one-year anniversary of a prior year's submittal, or if the Executive Director determines for any other reason that action is necessary to avoid a waiver of water quality certification.

    - Federal legislation implementing the KHSA is not introduced by June 18, 2010 (120 days after the effective date of the KHSA).

    - The California Public Utilities Commission disapproves the rate changes for PacifiCorp customers.

    - The Secretarial Determination does not occur by April 30, 2012.

    - The Secretary of the Interior makes a Negative Determination.

    - A state does not concur within 90 days of publication of the Affirmative Determination in the Federal Register.

    - Removal of the California facilities does not occur by the end of 2021, unless the failure to remove the facilities occurs because the water year types in 2020 and 2021 were not conducive for removal under the Definite Plan, as defined in the KHSA.

    - Progress towards dam removal is delayed for more than two years, unless the Executive Director makes a finding that there is good cause to believe that progress will start again within six months.

    - Interim measures affecting California water quality are halted without concurrence by the Executive Director.

    - A finding by the Executive Director that removal of the California facilities is unlikely to proceed in a reasonably timely manner.

2. May revisit or change this resolution at any time during a public meeting after due notice to PacifiCorp and other parties to the KHSA.

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 May 18, 2010.

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Jeanine Townsend
Clerk to the Board