



FRIENDS
OF THE
RIVER

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Mr. Charles Hoppin, Chair
Mr. Tom Howard, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-011

August 10, 2011



Re: Water Quality Certification for Klamath Hydroelectric Project (FERC P- 2082)

Friends of the River respectfully requests that the State Water Resources Control Board (State Water Board) **not** amend Resolution Nos. 2010-0024 and 2010-0049 to allow for a continued abeyance of the Clean Water Act Section 401 (Section 401) certification process for the Klamath Hydroelectric Project. The resolution states that the Environmental Impact Report/ Environmental Impact Statement being developed for the Secretarial Determination may contain information valuable for a California Environmental Quality Act (CEQA) document crafted as part of the Section 401 certification process. We strongly urge the Board Members to have a candid discussion with their own staff who are following the administrative draft development to confirm that any of the information will be useful.

While PacifiCorp, the California Resources Agency, and various Settlement Parties support an amendment that removes any language regarding federal legislation, we wish to highlight several key points regarding the existing language of the abeyance and provide more clarification. In addition, we believe the State Water Board needs to be asking some very direct and pointed questions of the Settlement Parties to fully understand the current status of KHSA implementation and its chances for achieving any of the legislative milestones identified in the near future.

There are several issues we wish to note regarding the language of the existing abeyance. First, in their request to remove language referencing federal legislation, PacifiCorp reminds the State Water Board that there is already a mechanism in place to determine whether the KHSA is proceeding in a reasonable and timely fashion. *See* State Water Resources Control Board Resolution No. 2010-0049. This is used to explain away the discrete set of conditions in the current abeyance that were recommended by State Water Board staff and approved. Indeed, the measures that trigger lifting the abeyance set forth

exactly what the State Water Board most likely viewed as indicators of reasonable and timely implementation. The State Water Board had and continues to have the discretion to decide how it will determine whether the KHSA is moving along at a reasonable pace, and set forth determinative time periods affording a “grace period” so that the proponents of the KSHA could prove timely progress and have the incentive to do so.

Second, PacifiCorp has explicitly noted in its June 21, 2011 letter that the KHSA does not require a specific date for introduction or enactment of federal legislation. Other Parties have added that there is no specific date even for the Secretarial Determination, and the Resources Agency has also emphasized these points. This can, and should, be seen as irrelevant. We believe the State Water Board was attempting to provide an appropriate timeline for making a decision when to resume the Section 401 certification processing. The Board Members should have serious concerns when reminded that the KHSA process has no fixed timeline: the State Water Board, as the enforcing agency for water quality under the Clean Water Act, is then left without any idea as to when or if water quality standards will be met.

Third, the current climate in Congress is not favorable for dam removal legislation. In a gridlocked Congress with some representatives hostile toward the deals and to dam removal in general, the prospects for passing the KHSA package are slim. Although the progress reports indicate that federal legislation will be introduced soon, the process has stalled under tight budgets, conservation opposition, and political objection. Even congressional staff for California representatives had been unaware of the latest developments on prospective legislation, and others privately express serious doubt as to passage of the legislation through their Members’ committees. A California representative chairs the House Subcommittee on Water and Power, and has repeatedly made public his position against hydroelectric dam removal with a focus on the Klamath deal in particular¹. All of these factors raise legitimate concerns and questions to pose to the Settlement Parties regarding the passage of KHSA through Congress and its ability to achieve water quality standards. Have authors been secured? Has the draft legislation been finalized? What is the date of introduction? What are the expected obstacles? It is not inappropriate for the State Water Board to ask these questions, for the agency must both 1) determine whether to extend the abeyance and 2) understand if or when the authority over the Klamath Hydroelectric Project will be transferred from FERC and the associated permitting agencies to the Department of the Interior.

Lastly, the Parties have highlighted the interim measures contained within the KHSA as evidence that the process is being implemented in a timely fashion. While these measures contain funding mechanisms, monitoring, and other actions that may not be required during a relicensing, they are not solutions for water quality problems on the Klamath. If the measures are terminated due to the re-instatement of the Section 401 process, those losses will be balanced by the certainty that water quality standards will ultimately be met for the Klamath River through the certification process – standards that are necessary for both wildlife and human needs. The interim measures were crafted without regulatory oversight and approval, yet are being used as a reason to let the KHSA process place water quality analysis on hold.

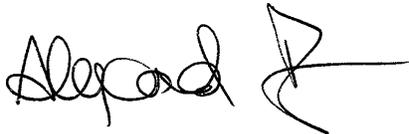
¹ “House approves amendment blocking funding for Klamath Dam removal study”. February 22, 2011.
<http://kdrv.com/news/local/205173>

It is time to face the truth. PacifiCorp has failed to meet the State Water Board's own conditions that would have provided evidence the KHSA process will move forward in a timely fashion. It is understood that passage of legislation takes time – this is why we believe the Resolution amendment in October 2010 allowed for abeyance until August 2011, requiring legislation enactment roughly one-and-a-half years after the KHSA was signed (with draft legislation already crafted at that point). The current Congress is highly unlikely to pass the proposed package of dam removal and the Klamath Basin Restoration Agreement, and the actions of the next Congress are even more speculative. It is time for the Settlement Parties to talk with the State Water Board and the Resources Agency to build a new path towards achieving many of the goals and agreements of the KHSA, but achieve them within the existing statutory framework.

There are opportunities for creative solutions, but those solutions will not be explored without understanding that the path to dam removal does not lie within Congress. The State Water Board must become the catalyst to opening the dialogue on alternative pathways, bringing the Settlement Parties together to discuss realistic answers. While it is true that resources are expended to pursue both federal legislation and a Section 401 water quality certification, the State Water Board has provided the Settlement Parties with a considerable window of opportunity to show that the responsibility for completing a Section 401 relicensing certification will be removed from the State Water Board in the near future. This has not occurred and thus the Parties should bear the burden of both procedures or, in the alternative, recognize that the legislative pathway to dam removal will not provide the solutions hoped for and form an agreement within the FERC process.

We would be happy to answer any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Alexandra Borack", followed by a stylized flourish or arrow pointing to the right.

Alexandra Borack
Conservation Advocate