



July 7, 2012

Charles Hoppin, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Tam Doduc, Member
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Felicia Marcus, Member
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Steven Moore, Member
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Fran Spivey-Weber, Member
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Caren Trgovcich, Chief Deputy Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Request for Amendment to SWRCB Resolution Nos. 2011-0038 Regarding Abeyance of Klamath Hydroelectric Project Clean Water Act Section 401 Water Quality Certification Process and Related California Environmental Quality Act Process, FERC Project No. 2082.

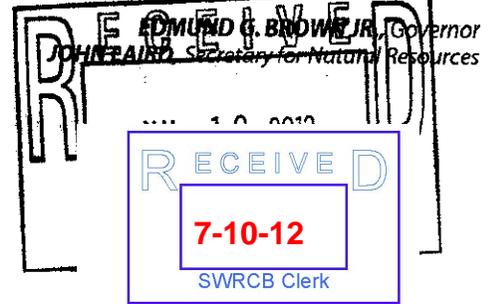
Dear Board Members:

The California Natural Resources Agency (Agency) respectfully requests the State Water Resources Control Board (SWRCB) amend SWRCB Resolution No. 2011-0038, allowing the Parties to the Klamath Hydroelectric Settlement Agreement (KHSA) additional time to continue to their implementation efforts.

SWRCB Resolutions 2010-0049, 2010-0024, and 2011-0038 placed the Clean Water Act section 401 water quality certification process for PacifiCorp's Klamath Hydroelectric Project in abeyance for an interim period. Pursuant to the terms of Resolution 2011-0038, "a finding by the Executive Director or Chief Deputy Director that the environmental review process for the Secretarial Determination is not being done in a manner that will facilitate completion of the State Water Board's 401 certification process for the relicensing proceeding should that become necessary because the Secretarial Determination does not occur by April 30, 2012," is grounds for reconsidering proposals to lift the abeyance and begin 401 proceedings.

1416 Ninth Street, Suite 1311, Sacramento, CA 95814 Ph. 916.653.5656 Fax 916.653.8102 <http://resources.ca.gov>

Baldwin Hills Conservancy • California Coastal Commission • California Coastal Conservancy • California Conservation Corps • California Tahoe Conservancy
Coachella Valley Mountains Conservancy • Colorado River Board of California • Delta Protection Commission • Delta Stewardship Council • Department of Boating & Waterways • Department of Conservation
Department of Fish & Game • Department of Forestry & Fire Protection • Department of Parks & Recreation • Department of Resources Recycling and Recovery • Department of Water Resources
Energy Resources, Conservation & Development Commission • Native American Heritage Commission • Sacramento-San Joaquin Delta Conservancy • San Diego River Conservancy
San Francisco Bay Conservation & Development Commission • San Gabriel & Lower Los Angeles Rivers & Mountains Conservancy • San Joaquin River Conservancy
Santa Monica Mountains Conservancy • Sierra Nevada Conservancy • State Lands Commission • Wildlife Conservation Board



Importantly, the absence of a secretarial determination does not evidence an absence of progress, nor does it establish that the SWRCB will be unable to use the final environmental documentation presently being developed in the event the 401 certification process must proceed. On the contrary, the more time the SWRCB gives the Agency and the Department of the Interior to ensure environmental review is complete and accurate, the more likely such review can be used successfully in the future by the SWRCB in the 401 certification process should that become necessary. Further, the Agency has made every effort to incorporate the views and input of the SWRCB so that the document reflects its unique jurisdiction over a potential dam removal.

As a reminder, over 40 stakeholders, including both Oregon and California, the federal government, irrigators, environmentalists and various tribes have worked hard to further the goals of the agreements, complete environmental and other scientific review and craft legislative language for Congress' consideration. This broad coalition reflects historically competing interests, all of whom agree that nothing has caused deterrence from the goal of obtaining a Secretarial Determination, and nothing has triggered dissolution of the Agreements or extension of the time period for dam removal, which continues to be slated for 2020.

To this end, the parties are presently seeking a legislative hearing so that the issues plaguing the Klamath can be fully explained and vetted before Congress and the requisite authority for a Secretarial Determination can be sought. Notably, legislation has been introduced in both houses, and the Agency believes it is critically important that the state give Congress the ability to act before it assumes the Agreements have failed. California and the federal government are also wrapping up their joint responses to voluminous public comments and completing their environmental review obligations. Both of these processes necessitate time and patience.

Lifting the abeyance is not a symbolic or isolated decision. It has very real consequences, and could have a series of negative impacts that would all but ensure a death blow to these Agreements. For instance, lifting the abeyance would likely force many of the settlement parties to participate in highly contentious proceedings before the SWRCB and courts, undermining the very intent of the Agreements and threatening these currently unified efforts. The following are just some of the anticipated problems a dual approach to the Agreements and the 401 proceeding are expected to result in:

- Surcharges being permitted by both the California and Oregon Public Utilities Commissions for the purpose of financing dam removal could be halted, leading to a lack of identifiable financing for dam removal;
- Mixed and confusing signals to Congress that legislation authorizing the Secretarial Determination is not necessary, resulting in the inability of the parties to obtain authority for a Secretarial Determination;
- Protracted litigation would be re-initiated by parties who willingly stipulated to putting those matters aside pending full implementation of the Agreements;
- Inconsistent approach with Oregon's Department of Environmental Quality, which has agreed to an abeyance pending the Secretarial Determination, whenever that may be issued;
- Force parties committed to settlement to expend scarce resources on relicensing procedures to the detriment of the coalition;

- Spark potential new litigation;
- Potentially result in the cessation of voluntary interim measures directed at Pacific Corp by the KHSA for the purpose of habitat restoration, water quality improvement, and resource management which cannot be replicated prior to the completion of the 401 process.

As the Agency made clear in its correspondence to you on September 22, 2010, and again in May of 2011, the KHSA does not require the enactment of legislation by any particular date, and such legislative enactment—a precursor to the contemplated Secretarial determination—cannot be predicted, although the parties continue to work towards a resolution in this regard.

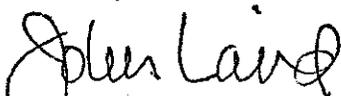
Therefore, the Agency respectfully requests an amendment to continue the abeyance so that such legislation can be fully realized and the environmental review completed and certified before the Agreements are put into jeopardy. This would permit a Secretarial determination, at which time the SWRCB's need to proceed to the 401 certification process would be clear.

It should be noted, the Agency acting on behalf of the Governor has no intention of allowing any party to indefinitely avoid its obligations under the Clean Water Act, least of all Pacific Corp. The Agency and others are actively working to implement the Agreements.

Finally, as was mentioned previously, some parties have incorrectly suggested that the SWRCB will somehow waive its right to consider the 401 certification for this project if it does not act. That is not the case. As a reminder, the KHSA recognizes California's and Oregon's authorities under section 401 of the federal Clean Water Act, establishing a process whereby the settlement Parties must 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, nor can it, as the SWRCB was not party to the Agreements. Rather, it asks that the SWRCB exercise its discretion to not process Pacific Corp's certification application for an interim period. It also requires Pacific Corp to withdraw and resubmit its application annually so there is no potential for a constructive waiver. Pacific Corp has been diligent in this regard and has gone on record recognizing any period for the 401 process to be completed has been tolled pending the implementation efforts. FERC has never deemed there to be a waiver of the 401 under such circumstances, and is unlikely to in this instance given Pacific Corp's express withdrawal and resubmission, and given its role as moderator of energy supply. Thus, there is no legal risk to the SWRCB relative to this issue.

For all of the foregoing reasons, the Agency respectfully requests you amend Resolution 2011-0038 to allow Congress the additional time it needs to take up this important legislative task, thereby allowing a Secretarial Determination on this matter. Thank you for your consideration.

Sincerely,



John Laird
Secretary for Natural Resources