

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2012-0039**

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;

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.

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;¹ 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;

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. 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.

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.

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.

AYE: Chairman Charles R. Hoppin
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore
Board Member Felicia Marcus

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board