



Hoopa Valley Tribal Council

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LEONARD E. MASTEN JR
CHAIRMAN

April 5, 2012

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Hoopa Valley Tribe's Request to Move Forward on the Application for the Klamath Hydroelectric Project (P-2082)

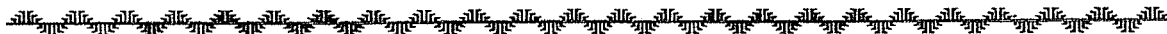
Dear Ms. Townsend:

The Hoopa Valley Tribe (Tribe) urges the Board to stop the repeating cycle allowing PacifiCorp to avoid relicensing of the Klamath Hydroelectric Project (P-2082), and to take decisive action on PacifiCorp's § 401 certification. As you know, PacifiCorp's fifty-year license to operate the Klamath Project expired six years ago, on March 1, 2006. Yet, PacifiCorp continues to operate the Project under annual licenses that incorporate terms and conditions originally issued in 1954. The annual licenses lack meaningful mitigation for the Project's significant impacts to water quality, fish, and other aquatic organisms in the Klamath River.

FERC completed all the steps required to relicense the Project in 2007, but an agreement between PacifiCorp and the States of California and Oregon (the Klamath Hydroelectric Settlement Agreement (KHSAs)), has delayed the final necessary step. That is, agencies of state government (not including the Board) have agreed that PacifiCorp's § 401 certification application under the Clean Water Act should not be processed. This agreement usurps the Board's and FERC's authority over relicensing proceedings by unlawfully and indefinitely delaying the process.

On August 16, 2011, the Board's Resolution No. 2011-0038 determined that the Board's § 401 certification process must be completed if the Secretary of Interior does not make a determination to remove the PacifiCorp dams by April 30, 2012. It is clear that no such determination will be made by any date in 2012 because, as the Board's resolutions note, complex and expensive federal legislation is a prerequisite to the Secretary's determination. KHSAs ratification legislation was introduced in November 2010, as S. 1851 and H.R. 3398, but no hearings or other action has been taken upon it. Under these circumstances, the Board should discharge its duties and issue an appropriately conditioned § 401 certification.

If the Board fails to approve or deny PacifiCorp's application, FERC may find, pursuant to 40 C.F.R. § 121.16, that the States of California and Oregon have waived their § 401 certification authority in this matter. The D.C. Circuit recently stated that:



In imposing a one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request. This is clear from the plain text. Moreover, the Conference Report on Section 401 states that the time limitation was meant to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.' Such frustration would occur if the State's inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding.

Alcoa Power Generating Inc. (Alcoa) v. F.E.R.C., 643 F.3d 963, 972 (D.C. Cir. 2011) (quoting H.R. Rep. 91-940, at 56 (1970), reprinted in 1970 U.S.C.C.A.N. 2691, 2741). Upon waiver, FERC can proceed to issue a new license to PacifiCorp that includes the mandatory Section 4(e) and 18 terms and conditions prescribed by the Departments of Interior and Commerce in January 2007. The Board should take immediate action on PacifiCorp's application, lest its authority to impose additional needed water quality conditions be deemed to have been waived.

I. History of the Klamath Project Relicensing

In 1954, the Federal Power Commission issued a fifty-year license for operation of the Klamath Hydroelectric Project on the Klamath River in southern Oregon and northern California. The Commission subsequently changed the effective date of the license to March 1, 1956. That license, currently held by PacifiCorp, expired on March 1, 2006. Since license expiration, PacifiCorp has continued to operate the Project on the same terms of the 1954 license under the authority of annual licenses issued by FERC. PacifiCorp's application to relicense the Project (filed in 2004) remains pending before FERC.

In 2006, the Departments of Interior and Commerce filed conditions and prescriptions for inclusion in the Klamath Project license under the authority of Sections 4(e) and 18 of the Federal Power Act. These conditions include minimum flow and fish passage provisions that would provide substantial mitigation to the imperiled water and fish resources of the Klamath River. PacifiCorp challenged these terms and conditions in a trial-type evidentiary hearing pursuant to the Energy Policy Act of 2005, Public Law 109-58, § 241.

In September 2006, after reviewing extensive testimony from federal, tribal, state, and non-governmental entities, Administrative Law Judge Parlen McKenna dismissed PacifiCorp's challenges, finding that the Section 4(e) and 18 conditions were supported by the evidence in the record and necessary for the protection of affected fish and water resources of the Klamath River. In early 2007, the Departments of Interior and Commerce filed their final, mandatory 4(e) and 18 prescriptions. FERC must include those conditions and prescriptions in any new license issued for the Klamath Project. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (holding FERC has no discretion to reject 4(e) conditions imposed by Interior); *City of Tacoma v. FERC*, 460 F.3d 53, 66-67 (D.C. Cir. 2006) (same).

FERC published its Final Environmental Impact Statement (EIS) and completed its environmental analysis of the Klamath relicensing over four years ago, on November 16, 2007. FERC and the respective federal agencies have completed all steps necessary to relicense the Klamath Project with the mandatory protective terms and conditions. The only outstanding step is a § 401 water quality certification (or waiver) from the States of Oregon and California.

PacifiCorp applied for water quality certification from the Board on March 29, 2006. PacifiCorp withdrew and resubmitted its application on February 28, 2007 and again on February 22, 2008, and again in 2009, 2010, and 2011. On February 13, 2009 FERC's Director, Office of Energy Projects, wrote to the Board urging you "to act as soon as possible on PacifiCorp's application for water quality certification."

Under the KHSA, PacifiCorp must again resubmit and withdraw its application in 2012. Significantly, PacifiCorp does not desire the State of California to actually process its application, and the Board has thus far acquiesced in this delay tactic. The Board's Resolution 2010-0024 held in abeyance PacifiCorp's application unless the required federal legislation was not introduced by June 18, 2010. Nothing was introduced. On PacifiCorp's request, however, the Board enacted Resolution 2010-0049, which extended the abeyance unless the required federal legislation was not enacted by May 17, 2011. No legislation was introduced. Again, PacifiCorp requested an extension, and the Board enacted Resolution 2011-0038, which extended the abeyance.

The Department of the Interior (Interior) published a draft EIS in 2011, which includes an alternative to specifically examine the effect of relicensing the Klamath Project on fish passage. Interior issued a press release on February 27, 2012, explaining that its final EIS will be released this spring, and stating that its Secretarial Determination will not be complete by March 31, 2012. The most recent estimated date for completion of the Klamath Facilities Removal Environmental Impact Statement/Environmental Impact Report is May 11, 2012. Plainly, the environmental analysis required by CEQA is essentially complete. The California Department of Fish and Game is a co-lead on the EIS/EIR and is well equipped to provide the environmental review documentation needed by the Board. The Board should not stall this process any longer. It should determine whether to issue a § 401 certification based on the EIR and studies already completed.

The continuous withdrawal and resubmission is merely a contractually-mandated technical charade designed to obscure the fact that the Schwarzenegger Administration chose not to exercise § 401 certification authority. *See* KHSA, Section 6.5 (providing that PacifiCorp agrees to "withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the CWA during the Interim Period"). By continuing to withdraw and resubmit the application, PacifiCorp intends to circumvent FERC jurisdiction, and to prevent FERC from issuing a license with conditions necessary to protect the Klamath River.

In 2008, PacifiCorp, the States, and the United States signed an Agreement in Principle (“AIP”) that prevented Oregon and California resource agencies from imposing any costs on PacifiCorp (absent PacifiCorp’s consent) relating to water quality certification studies during negotiations on the KHSA. In February 2010, PacifiCorp completed negotiations and executed the KHSA, in which the States agreed to put the § 401 certification process in abeyance. See KHSA, Section 6.5 (entitled “Abeyance of Relicensing Proceeding”). PacifiCorp, in signing the KHSA, has effectively suspended the FERC relicensing process until at least 2020, allowing itself at least fourteen additional years of unmitigated power generation beyond the date of license expiration. When the KHSA formally terminates (which is likely), the process will simply return to FERC for additional (but significantly delayed) relicensing proceedings.

PacifiCorp wrongly touts the KHSA as an agreement to remove the dams of the Klamath Project. The KHSA does not require any such thing, but instead establishes a planning process that could potentially lead to the commencement of dam removal after 2020 (nearly ten years from now). Such commencement of dam removal in 2020 is not guaranteed, but is expressly subject to the achievement of contingent events that include, but are not limited to: (a) enactment of federal legislation; (b) California voter approval of a \$250 million bond package; (c) an affirmative determination by the Secretary of the Interior that dam removal is in the public interest; and (d) separate concurrences by the states of Oregon and California that dam removal is in the public interest.

There is no evidence that even one of the required contingencies will occur. To date, no federal legislation supporting the KHSA has been passed. Similarly, no action has been taken on the required California bond package. The bond was originally scheduled for a public vote on November 2, 2010; however, the California State Legislature voted to postpone the measure to the November 2012 election. The Secretarial Determination process is also now in jeopardy due to the fact that the House of Representatives recently approved amendments to terminate federal funding to study dam removal. Given Congressional reluctance to fund less than \$2 million for the KHSA-studies, it is highly doubtful that Congress will fund the \$1 billion necessary to implement the subsidies required by the legislation that the KHSA depends upon. Finally, the concurrence of the Governors of the States of Oregon and California (which is a purely discretionary political decision) is no longer guaranteed as both of the respective Governors that signed the KHSA have now left office. It is highly unlikely that any of the necessary contingencies required for dam removal will occur. The only certainty is continued delay, absent Board action or affirmative FERC intervention.

II. The Board Should Immediately Take Action on PacifiCorp’s Application

FERC regulations require a licensee to diligently pursue water quality certification. A licensee must file within 60 days from the date of issuance of the Ready for Environmental Analysis (REA) Notice: (a) a copy of the water quality certification; (b) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (c) evidence of waiver of water quality certification. 18 C.F.R. § 4.34(b)(5)(i). The regulation shows that FERC expects certification or waiver to have occurred by the time the REA Notice is

issued or shortly thereafter. Here, more than 70 months have passed since FERC issued its REA Notice in December 2005.

Under well-established FERC policy, “indefinite delays in processing applications are not in the public interest.” *Georgia-Pacific Corporation*, 35 FERC ¶ 61,120 (1986); *Town of Summersville, W. Va. v. FERC*, 780 F.2d 1034, 1040 (D.C. Cir. 1986). Failure to diligently prosecute a license application is adequate grounds for dismissal. *In re Mountain Rhythm Resources*, 90 FERC ¶ 61,088 (2000) (dismissing license application for failure to show due diligence in prosecution of CZMA certification); *see also In re Swift River Company*, 41 FERC ¶ 61,146 (1987) (requiring applicant whose 401 certification was denied to exercise due diligence in pursuing any available appeal remedies).

FERC policy clearly requires a licensee to show “due diligence” in pursuing certification, and absent such diligence, FERC has authority, and arguably an obligation under the public interest mandate of the FPA, to dismiss the license application. At this date, PacifiCorp is taking no action whatsoever to obtain a Section 401 certification. In fact, PacifiCorp has contracted with the States of Oregon and California to hold FERC’s relicensing process in abeyance. PacifiCorp is failing to act with “due diligence” and its actions are causing “indefinite delay.” The Board must stop this indefinite delay by either denying or granting the § 401 certification.

III. Alternatively, FERC May Exercise Its Legal Authority to Deem the § 401 Certification Waived and Promptly Proceed to Issue a License That Contains the Mandatory Section 4(e) and 18 Prescriptions

Absent action by the Board, FERC may and should deem the § 401 certifications waived and promptly proceed to issue a license to PacifiCorp for operation of the Klamath Hydroelectric Project in accordance with the Department of Interior and Commerce’s mandatory Section 4(e) and 18 prescriptions, in addition to other mitigation measures deemed appropriate by FERC. Once FERC deems the certification waived, it may issue a license and terminate this unduly protracted relicensing proceeding.

The failure of the States of Oregon and California to exercise their regulatory authority over the Klamath Project and issue a § 401 certification does not bar FERC from taking final action on the license. To the contrary, 40 C.F.R. § 121.16 provides:

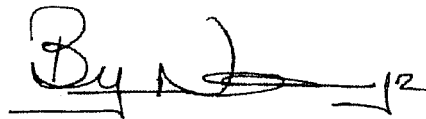
The certification requirement with respect to an application for a license or permit shall be waived upon: (a) Written notification from the State or interstate agency concerned that it expressly waives its authority to act on a request for certification; or (b) Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed one year).

See also 33 U.S.C. § 1341(a)(1) (expressly mandating that certification must occur “within a reasonable period of time (which shall not exceed one year)”); *Alcoa*, 643 F.3d at 972 (determining that a State’s inaction may not frustrate the Federal licensing process); *California Trout, Inc. v. F.E.R.C.*, 313 F.3d 1131, 1138 & n.10 (9th Cir. 2002) (noting that it reserved its opinion of a case where “an annual license has become a *de facto* renewal”). PacifiCorp submitted its initial application for § 401 certification six years ago. Both Congress, in the express language of § 401 of the Clean Water Act, and EPA, in its regulations implementing the Clean Water Act, have mandated that the certification decision occur within one year. FERC regulations also support timely certification. Here, PacifiCorp has wholly frustrated Congressional intent, EPA policy, and FERC policy, by obtaining the agreement of the States of Oregon and California to abandon their regulatory authority, and refuse to certify the Project, solely for the purpose of delaying any and all action on the license by FERC.

The Klamath Project license is ready for issuance. The only obstacle is the lack of a § 401 certification, or formal waiver, from the States of Oregon and California. Plainly, Interior will not meet the April 30, 2012 deadline, and the Board must take immediate action on the § 401 certification process in order to halt PacifiCorp’s continued operation without compliance with current law.

Thank you for your consideration to this important matter.

Sincerely,
HOOPA VALLEY TRIBAL COUNCIL

A handwritten signature in black ink, appearing to read "Byron Nelson, Jr.", with a horizontal line underneath the signature.

Byron Nelson, Jr., Vice-Chairman