



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

Re: Sierra Club requests that the Board exercise its regulatory authority to take action on the Klamath Hydroelectric Project (P-2082) and proceed with Section 401 certification.

May 1, 2012

Dear Ms. Townsend and the State Water Resources Control Board,

On behalf of the Sierra Club's 1.4 million members and supporters, we write to urge the State Water Resources Control Board to reconsider action under the Section 401 certification process for the Klamath Hydroelectric Project (P-2082).

The U.S. Department of Interior's NEPA process related to the Secretarial Determination on dam removal on the Klamath River (discussed further below) has floundered based on an extraordinarily hostile Congressional environment. As a result, the FERC process responsible for ensuring adequate water quality in the Klamath River has been held in abeyance. Recognizing the concerns noted within this letter, the Sierra Club requests that the State Water Resources Control Board (hereafter the "Board") consider immediate action to support improved water quality in the Klamath River under the Clean Water Act's 401 certification process.

We remain hopeful that the Klamath Basin stakeholders, both those associated with the Klamath settlement agreements (also discussed below) and those separate from the agreements, will consider, with a unified voice, the current needs of the Klamath River as an opportunity to support a common goal of improved water quality.

Background

PacifiCorp's, owner and operator of the Klamath Hydroelectric Project, 50-year license to operate the Klamath Hydroelectric Project (KHP) issued by the Federal Power Commission expired on March 1, 2006. Since that time and to the detriment of fish,

wildlife, and the human communities that depend on and support these natural resources, PacifiCorp has continued to operate the KHP under annual licenses that incorporate the terms and conditions originally issued with the 1954 license. Collectively, we recognize that these annual licenses lack any mitigation for the Project's significant impacts to water quality, fish, and other aquatic life in the Klamath River.

While the Federal Energy Regulatory Commission (FERC) has completed all the steps necessary to re-license the Klamath Project with terms, conditions, and mitigation measures required by current law, the re-licensing has been put on indefinite hold due to an agreement between PacifiCorp and the States of California and Oregon, known as the Klamath Hydroelectric Settlement Agreement (KHSA). PacifiCorp, in signing the KHSA, has effectively suspended the FERC re-licensing process until at least 2020, allowing years of unmitigated power generation beyond the date of license expiration. More specifically, the KHSA essentially attempts to abandon the FERC process in favor of the KHSA (which could remove dams in 2020). However, the KHSA requires Congressional approval in order for the Department of Interior to move forward with possible dam removal. Further, if the KHSA fails or terminates, the process will simply return to FERC for additional (though now significantly delayed) re-licensing proceedings. Also under the KHSA, the States have agreed to not process PacifiCorp's application for certification under Section 401 of the Clean Water Act.

Legislative Process

On August 16, 2011, the Board established Resolution No. 2011-0038 which amended Resolution No. 2010-0024, as amended by Resolution No. 2010-0049, such 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. The resolution reads:

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, or the abeyance is lifted for any other reason;

As a result, the Board continues, at present, to hold the KHP relicensing process in abeyance, resulting in ongoing limited and poor water quality throughout the Klamath Basin.

Under the KHSA, the Department of Interior has completed a series of peer-reviewed studies and environmental analyses to support the Secretary of Interior's decision regarding dam removal on the Klamath River, under the KHSA. Plainly, the Secretary is tasked with determining whether or not dam removal on the Klamath River is in the interest of the public. Previously, under the terms of the KHSA, the Secretary had agreed to make an effort to complete said determination by March 31, 2012. However, on

February 27, 2012, Department of Interior Secretary Ken Salazar issued a press release that stated:

Under the terms of the KHSA, the Secretary agreed to use “best efforts” to make a decision by March 31, 2012; however, Congressional action is required to pass legislation authorizing the Secretary to make a Secretarial Determination, which will result in either the removal of the dams eight years from now, or require PacifiCorp to continue its application for a new hydropower license for the dams.

This February press release is misleading as it implies that the Secretary has a duty to comply with the terms of the KHSA. In fact, the Secretary has no legal obligation under the National Environmental Policy Act (NEPA) process (which currently facilitates the Secretarial Determination) to wait to make a determination; instead the Secretary has bound his decision unnecessarily to the KHSA. However, the February release accurately recognizes that Congress has not yet enacted legislation necessary to implement a Secretarial decision, as stated in the KHSA. In addition, the release inaccurately implies that Congressional action is required for the FERC process to resume. This is not true, as that process does not require Congressional approval, but simply independent action by FERC and the states.

Federal legislation, the “Klamath Basin Economic Restoration Act of 2011,” that would ratify the KHSA was introduced November 10, 2011 in both chambers of Congress (S. 1851 and H.R. 3398). However, since introduction, no action has occurred and both await hearings in their relevant committees. To date, no hearings or other actions have been scheduled for either bill, suggesting it is unlikely that action in the near future will occur to complete the legislative process required by the KHSA. This delay continues to postpone both the Secretarial determination and the improved water quality and health of the Klamath River.

Recognizing these circumstances, the Sierra Club urges the Board to reconsider the terms of its Resolution No. 2011-0038, and restart the 401 certification process to support a healthy Klamath River ecosystem.

The timeline for the highly controversial legislation for the Klamath Basin Restoration Agreement (KBRA)-KHSA package is very uncertain. Recognizing the intensely polarized nature of Congress and limited Congressional and agency budgets, the “Klamath Basin Economic Restoration Act of 2011” will face intense scrutiny by both the House of Representatives and the Senate in the months ahead, should it move forward. With a total budget of nearly \$1 billion in 2010, the KBRA’s revised budget (May 2011) still rises to approximately \$800 million for implementation between 2012 and 2026. With this remarkable budget and Congress’ limited patience for and ability to pass new (and old) legislative packages with sizeable budgets, the likelihood of successful legislative action in the near future is little to none. With the support of the Board, we have an opportunity to move clean water in the Klamath Basin ahead through the 401 process while the KBRA-KHSA political fight and legislative package remains uncertain.

FERC Jurisdiction

As you know, under the jurisdiction of FERC, regulations require a licensee, here PacifiCorp, to diligently pursue water quality certification. That is, 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. In the case of PacifiCorp and the KHP years has passed since FERC issued its REA Notice in December 2005.

In this way, 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. Under the KNSA, Section 6.5, 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.” Pursuant to this action of withdrawing and resubmitting their application time and again, PacifiCorp continues to evade FERC’s relicensing/dam-removal jurisdiction, thus disabling proper clean water protection for the Klamath River.

It is clear, after years of delay and inaction, that PacifiCorp is not adequately or “diligently” pursuing an application to legitimately relicense the KHP. We are concerned that the Board’s continued inaction on PacifiCorp’s Section 401 certification application clearly abdicates its authority over the KHP to the benefit of PacifiCorp. As a result, the undersigned conservation organizations formally request that the Board take action immediately and conclude that PacifiCorp has failed to diligently pursue relicensing of the KHP and properly process its Section 401 application. The alternative is for the Board to issue an order denying PacifiCorp’s application. Simply, we request that the Board no longer hold the process in abeyance to the detriment of the Klamath River.

Without action by the Board, we are concerned that FERC may consider the States to have effectively waived their Section 401 certification and therefore pursue relicensing action accordingly. With continued inaction on behalf of the Board, FERC may consider the Board’s delay to be a failure to act within a “reasonable time frame,” per 40 C.F.R. § 121.16.

Conclusion

Recognizing the inevitable delay of the Secretarial Determination due to the obvious lack of action around the “Klamath Basin Economic Restoration Act of 2011” legislation, the Board has the power and opportunity to secure an improved future for the Klamath River ecosystem. The Section 401 certification remains the single and most important obstacle to relicensing of the KHP. Therefore, without further delay, we urge the Board to take action as soon as possible to enforce Section 401 certification of PacifiCorp’s KHP.

Continued postponement of this process will only result in sustained poor water quality and habitat for the fish and wildlife of the Klamath Basin.

Again, it is our hope that this action by the Board will restart the licensing process now held in abeyance, and that this action will result in a more successful re-engagement by the settling parties and other stakeholders, and therefore a more expeditious and certain licensing and permitting action by FERC and the Board.

Thank you for your consideration. We look forward to your response. Please contact our national staffer, Ani Kame'enui at ani.kame'enui@sierraclub.org, with any additional information, questions, or concerns.

Sincerely,

David Scott
Vice President for Conservation
Member, Board of Directors
Sierra Club