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TO: Persons Requesting Extension of Klamath Hydroelectric Project
Water Quality Certification Scoping Comment Deadline

for

FROM: Dorothy Rice, Executive Director
EXECUTIVE OFFICE

DATE: February 21, 2009

SUBJECT: KLAMATH HYDROELECTRIC PROJECT (FERC 2082), WATER QUALITY
CERTIFICATION, REQUEST TO EXTEND THE FEBRUARY 23, 2009
COMMENT DEADLINE FOR SCOPING COMMENTS

This memorandum responds to your request to extend the deadline for California Environmental Quality Act (CEQA) scoping comments on the Notice of Preparation of an Environmental Impact Report (EIR) for the Clean Water Act Section 401 water quality certification application of the Klamath Hydroelectric Project. As discussed below, the scoping comment deadline is designed to allow staff to begin further refining the issues to be evaluated in CEQA documents. To address the parties' concerns while also allowing the Board's internal CEQA work to begin, I am not regarding the scoping comment deadline as a rigid deadline. The State Water Resources Control Board (State Water Board) will continue to accept relevant comments over the next several months. This will allow parties to defer submitting their comments, if they so choose, until after the July 15 date requested in your extension. I also look forward to a further update from the parties in May.

At the State Water Board's February 17, 2009 meeting, parties to an Agreement In Principle (AIP) regarding potential removal of the four mainstem hydroelectric dams addressed the Board, as did others who are engaged in developing a Final Agreement from the AIP. These presentations, as well as those by other stakeholders, were greatly appreciated. While the State Water Board is not in a position at this time to comment on the merits of the AIP or the Klamath Basin Restoration Agreement specifically, a negotiated solution to address basin-wide water quality issues beyond the scope of California's 401 water quality certification is a worthy goal. The State Water Board hopes that you also found the dialogue constructive.

The State Water Board continues to support negotiated solutions to complex water resource issues. However, the State Water Board is obligated both under Clean Water Act Section 401 and under CEQA to act without undue delay. While the State Water Board has in the past exercised some timing flexibility to support a negotiated settlement, the current situation makes it extremely difficult to accommodate further delay in the CEQA process. A February 13, 2009 letter from the Federal Energy Regulatory Commission (FERC) underscores the need for the Board to continue timely work on the water quality certification. If the State Water Board does not process the water quality certification in a timely manner, it risks a FERC determination that

the Board has waived of certification, and the State of California would have no regulatory authority to address water quality issues associated with the Klamath Hydroelectric Project during the FERC relicensing.

The parties requesting delay raised concerns over diverting resources from a difficult and time-consuming negotiation, or of being forced to take inconsistent positions in negotiation and in the public environmental review processes. One possibility to avoid this situation is that the negotiating parties can refrain from, or delay, submitting CEQA scoping comments. This will not prejudice the parties, and allows the State Water Board to continue forward with the next step in its obligations: developing a Draft EIR. In deciding whether you wish to submit scoping comments despite the concerns raised, the following information should be helpful:

- Although CEQA scoping comments would be helpful to the State Water Board and are generally an efficient way to proceed under CEQA, no party forfeits the opportunity to raise the same types of issues at later points during the CEQA process. Public comment will be solicited on any draft EIR.
- CEQA scoping is not an inherently adversarial process. The State Water Board understands that a long history of adversarial relationships regarding the Klamath River's waters exists, and that some parties will avail themselves of any forum to lobby for a particular vision of the basin. However, CEQA scoping is not the appropriate forum for such lobbying, and the fact that some wish to use it this way is not a reason to artificially prolong the process.
- The State Water Board will not regard the time for filing comments as a rigid deadline. This means that if parties withhold scoping comments because of the need to devote resources to a Final Agreement, or to refrain from taking public and negotiation positions that are in tension with each other, the State Water Board will still consider late comments. (Compare CEQA Guidelines, § 15088, subd. (a) [permitting lead agencies to consider late EIR comments]; see also *id.*, § 15082, subd. (a)(4) [the lead agency may begin work on the EIR without waiting for comments].)

Comments regarding the interim conditions portion of the EIR should be less controversial than those regarding the long-term future of the hydroelectric facilities. While the State Water Board does not wish to encourage parties to take any steps that could jeopardize their progress towards reaching a Final Agreement, we would appreciate it if any parties are reluctant to comment on more controversial issues would consider submitting comments on solely the interim conditions portion of the proposed EIR. Doing so would allow the State Water Board to move forward with the best input possible regarding proposed interim measures. This is particularly important in light of the AIP's inclusion of interim measures, many of which will require CEQA evaluation before implementation.

Finally, the State Water Board is aware of provisions in the AIP that provide a potential "off-ramp" from the agreement, should PacifiCorp be required to pay for further work on the 401 water quality certification application. The parties should rest assured that the decision to move forward on scoping does not amount to a decision to charge PacifiCorp for the next stages of the EIR development process. The State Water Board is exploring outside funding options for the CEQA document, as the AIP appears to anticipate.

The State Water Board welcomes the parties' offer to update the Board on May 5, 2009. State Water Board staff will contact you in the near future to discuss this matter further.

cc: Klamath CEQA Distribution List

