

*** Cascadia Wildlands * Center for Biological Diversity * Environmental Protection
Information Center * Lane County Audubon * Oregon Wild * Salem Audubon Society *
Umpqua Watersheds, Inc. * WaterWatch of Oregon ***

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

Re: Klamath Basin conservation organizations request the Board exercise its regulatory authority to take action on the Klamath Hydroelectric Project

May 10, 2011

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

As the State Water Resources Control Board once again reviews the Klamath Hydroelectric Project (P-2082) and owner and operator PacifiCorp's Section 401 application, we would greatly appreciate your consideration of the forthcoming concerns. On behalf of our thousands of members in both Oregon and California, the undersigned organizations request that the State Water Resources Control Board (hereafter the "Board") consider swift action that would immediately support improved water quality in the Klamath River under the Clean Water Act's 401 certification process.

As you know, PacifiCorp's 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 much to the dismay 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 permanently stalled 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 at least 14 additional years of unmitigated power generation beyond the date of license expiration. 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.

At this time, and per the terms of the KHSA, PacifiCorp is obligated to once again withdraw and resubmit its Section 401 application in 2011. As you know, the Board's prior Resolution 2010-0024 held in abeyance PacifiCorp's application unless the required federal legislation for the KHSA was not introduced by June 18, 2010. Though legislation was not introduced by June 2010, the Board responded to PacifiCorp's request to extend the abeyance. The Board's more recent agreement in Resolution 2010-0049 extended the abeyance, unless the required federal legislation is not enacted by May 17, 2011. 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.

The intensive legislative process that the Klamath Basin Restoration Agreement (KBRA) and KHSA must undergo will by no means be completed by May 17, 2011, just days away. Therefore, it is with certainty that we recognize no legislation has been introduced by this time, as required by Resolution 2010-0049. The timeline for the highly controversial legislation for the KBRA-KHSA package is very uncertain. Should such legislation surface in the months ahead, it will face intense scrutiny by both the U.S. House of Representatives and the U.S. Senate. With a budget of nearly \$1 billion, the KBRA, and subsequently the KHSA, continue to be opposed by conservationists, legislators, tribal leaders, irrigators, and more. Furthermore, the legislative leadership on these packages is, at present, very limited, while the fervor against them has been well-vocalized by opponents such as Representative McClintock. With the support of the Board, we have an opportunity to move clean water ahead through the 401 process in the Klamath, while the KBRA-KHSA political fight remains costly and controversial.

In keeping with their prior actions, we recognize that PacifiCorp will likely withdraw and resubmit its applications for Section 401 and request the Board once again extend their resolution and subsequently hold the 401 process in abeyance. (*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.") Clearly, this effort by PacifiCorp does not represent a substantive effort to pursue the actual terms of the Section 401 certification process, or improve the water quality of the Klamath River. Without action by the Board that enforces the standard course of the Section 401 certification process, we remain concerned that the State of California is waiving its Section 401 certification authority. We request that the Board not be complicit in PacifiCorp's efforts to circumvent FERC jurisdiction and prevent FERC from issuing a license with mandatory terms and conditions necessary to protect the Klamath River.

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 over 60 months 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. 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.

As the Section 401 certification remains the single and most important obstacle to relicensing of the KHP, we urge the Board to take action this month to enforce Section 401 certification of PacifiCorp’s KHP. Continued delay of this process will only result in sustained poor water quality and habitat for the fish and wildlife of the Klamath Basin.

Thank you for your consideration. We look forward to your response.

Sincerely,

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