

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
AUGUST 16, 2011**

ITEM 10

SUBJECT

CONSIDERATION OF A PROPOSED RESOLUTION TO AMEND RESOLUTION NO. 2010-0024 REGARDING THE SECTION 401 WATER QUALITY CERTIFICATION APPLICATION FOR THE KLAMATH HYDROELECTRIC PROJECT

DISCUSSION

PacifiCorp Energy (PacifiCorp) owns and operates the Klamath Hydroelectric Project (KHP), under a license from the Federal Energy Regulatory Commission (FERC), Project No. 2082, which formally expired in 2006. The KHP continues to operate under annual extensions as it undergoes a relicensing process with FERC. PacifiCorp and most interested state, tribal and local government agencies, non-governmental organizations, and other stakeholders negotiated an agreement concerning the relicensing of the facilities and other water-related issues in the Klamath River Basin. The Klamath Hydroelectric Settlement Agreement (KHSA) addresses activities in both California and Oregon. The KHSA provides a framework for decision-making regarding removal of four KHP dams on the Klamath River mainstem, and a framework for removal, if a decision to remove the dams is reached. The KHSA includes, among other things, a need for congressional legislation to halt the FERC relicensing process and to implement other aspects of the KHSA. Execution of the KHSA occurred on February 18, 2010.

As set forth in the KHSA, PacifiCorp requested a stay of the 401 water quality certification process, by letter dated March 17, 2010. On May 18, 2010, the State Water Resources Control Board (State Water Board) adopted [Resolution No. 2010-0024](#), which holds in abeyance the processing of PacifiCorp's KHP water quality certification application. It also includes a set of occurrences, based primarily on the KHSA, that would cause the abeyance to lift, unless cured within 90 days of the specified date, or the State Water Board acts to extend the abeyance period. On October 5, 2010, the State Water Board adopted [Resolution No. 2010-0049](#), amending Resolution No. 2010-0024. The amendment modified the occurrence related to federal implementation of the KHSA that would cause the abeyance to be lifted. The occurrence was changed to require enactment of federal legislation by May 17, 2011, rather than the introduction of federal legislation by June 18, 2010 (as originally adopted in Resolution 2010-0024). Federal legislation regarding the KHSA was not enacted in May 2011 and will likely not be enacted before the 90-day period passes (August 15, 2011).

On June 21, 2011, PacifiCorp requested that the State Water Board further modify Resolution No. 2010-0024 to remove the condition that federal legislation be enacted by a date certain. Removal of the requirement for enactment of federal legislation means the next milestone that would lift the abeyance is April 30, 2012. This is the deadline for a Secretarial Determination.

The Secretarial Determination is a decision by the Secretary of the Department of Interior regarding whether removal of the four KHP mainstem dams will advance salmon restoration and is in the public interest. Per the KHSA, enactment of federal legislation is a pre-condition to the Secretarial Determination.

The Hoopa Valley Tribe and some environmental groups, who are not parties to the KHSA, recently submitted letters to the State Water Board. These letters express concern regarding the effectiveness of the KHSA to achieve dam removal and urge the State Water Board to move forward with the water quality certification process. However, future State Water Board action on PacifiCorp's water quality certification application requires compliance with the California Environmental Quality Act (CEQA). Completion of necessary environmental documentation is also a pre-condition to the Secretarial Determination. The state and federal lead agencies, under the KHSA, are developing information and environmental documentation that covers a range of alternatives to support the Secretarial Determination. Ideally, the environmental documentation produced for the Secretarial Determination, during the abeyance period, will anticipate and address many of the State Water Board's informational needs under CEQA. Therefore, during the abeyance period, State Water Board staff is working closely with the Department of Fish and Game, the lead state agency responsible for preparing the environmental documentation.

If implementation of the KHSA is delayed, the State Water Board may consider whether additional mitigation measures identified during the FERC relicensing process should be required. These would likely address concerns related to the KHP's impacts on water quality, apart from the interim measures included in the KHSA.

The proposed resolution amends the language of Resolution No. 2010-0024, as amended by Resolution No. 2010-0049, by removing the requirement that federal legislation be enacted by May 17, 2011. Additionally, a condition is added allowing the Executive Director or Chief Deputy Director to lift the abeyance if the Executive Director or Chief Deputy Director determines the environmental documentation being prepared to support the Secretarial Determination is not adequate for the State Water Board to use for issuance of water quality certification, should that become necessary.

POLICY ISSUE

Should the State Water Board adopt a resolution to amend Resolution No. 2010-0024, as amended by Resolution 2010-0049, to:

1. Delete the requirement for enactment of federal legislation by May 17, 2011, (the original requirement for introduction of federal legislation by June 18, 2010, was deleted and replaced by Resolution No. 2010-0049) in the first bullet in paragraph 3?
2. Add a new requirement to paragraph 3 that 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?*
3. Add language to paragraphs 2 and 3 authorizing the Executive Director or Chief Deputy Director to lift the abeyance, by adding "or Chief Deputy Director" after "Executive Director"?

FISCAL IMPACT

None.

REGIONAL WATER BOARD IMPACT

None.

STAFF RECOMMENDATION

The State Water Board should adopt a resolution to amend Resolution 2010-0024, as amended by Resolution 2010-0049, to:

1. Delete the requirement for enactment of federal legislation by May 17, 2011, (the original requirement for introduction of federal legislation by June 18, 2010, was deleted and replaced by Resolution No. 2010-0049) in the first bullet in paragraph 3;
2. Add a new requirement to paragraph 3 that 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; and*
3. Add language to paragraphs 2 and 3 authorizing the Executive Director or Chief Deputy Director to lift the abeyance, by adding "or Chief Deputy Director" after "Executive Director".

State Water Board action on this item will assist the Water Boards in reaching Goal 4 of the Water Board's Strategic Plan: to comprehensively address water quality protection and restoration, and the relationship between water supply and water quality, and describe the connections between water quality, water quantity, and climate change, throughout California's water planning processes.

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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2011-

TO AMEND RESOLUTION NO. 2010-0024 REGARDING THE SECTION 401 WATER QUALITY CERTIFICATION APPLICATION FOR THE KLAMATH HYDROELECTRIC PROJECT

WHEREAS:

1. On May 18, 2010, the State Water Resources Control Board (State Water Board) adopted [Resolution No. 2010-0024](#), which holds in abeyance further processing of the water quality certification application for the Klamath Hydroelectric Project and establishes occurrences, based primarily on Klamath Hydroelectric Settlement Agreement (KHSA) goals, that would lift the abeyance if the goals are not met within 90 days;
2. On October 5, 2010, the State Water Board adopted [Resolution No. 2010-0049](#), which amends Resolution No. 2010-0024, modifying the first occurrence under paragraph 3 to cause the abeyance to lift 90 days after May 17, 2011, if the federal legislation contemplated in the KHSA is not enacted by Congress by that date;
3. No federal legislation was enacted by May 17, 2011;
4. On June 21, 2011, PacifiCorp Energy (PacifiCorp) requested that the State Water Board modify Resolution No. 2010-0024 to remove the requirement that federal legislation be enacted by a date certain since federal legislation is not likely to be enacted before August 15, 2011 (90 days after May 17, 2011);
5. PacifiCorp's request states that settlement parties continue to actively pursue such legislation, which is needed to authorize the federal government to implement the KHSA and the associated Klamath Basin Restoration Agreement;
6. PacifiCorp also describes progress towards implementing the KHSA, including:
 - On May 6, 2011, the California Public Utilities Commission approved PacifiCorp's request to collect surcharges from California customers to fund dam removal costs for KHSA implementation;
 - On September 6, 2010, the Oregon Public Utilities Commission approved a similar request by PacifiCorp to collect surcharges from Oregon customers;
 - The Department of the Interior and the California Department of Fish and Game are moving forward in the preparation of a joint document as part of the environmental review process under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA);
 - PacifiCorp has begun to implement and provide funding for interim measures called for in the KHSA that focus on water quality and habitat improvement;

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7. No events triggering dissolution of the KHSA have occurred;
8. NEPA and CEQA development that is underway in support of the Secretarial Determination will provide valuable information that may be useful for issuance of water quality certification, under Clean Water Act Section 401, as part of the Federal Energy Regulatory Commission relicensing process, should that be necessary. Issuance of water quality certification is a discretionary action that requires compliance with CEQA; and
9. Removal of the deadline for enactment of federal legislation from Resolution No. 2010-0024, as amended by Resolution No. 2010-0049, will not affect the Executive Director or Chief Deputy Director's discretion to lift the abeyance if a finding is made that removal of the California facilities is unlikely to proceed in a timely manner, as provided for in Resolution No. 2010-0024.

THEREFORE BE IT RESOLVED THAT:

The State Water Board amends Resolution No. 2010-0024, as amended by Resolution No. 2010-0049, to:

1. Delete the requirement for the enactment of federal legislation by May 17, 2011, (the original requirement for introduction of federal legislation by June 18, 2010, was deleted and replaced by Resolution No. 2010-0049) in the first bullet in paragraph 3;
2. Add a new requirement to paragraph 3 that 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; and*
3. Add language to paragraphs 2 and 3 authorizing the Executive Director or Chief Deputy Director to lift the abeyance, by adding "or Chief Deputy Director" after "Executive Director".

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 Board held on August 16, 2011.

Jeanine Townsend
Clerk to the Board