Hoopa Valley Tribal Council
HOOPA VALLEY TRIBE
Regular Meetings on the First and Third Thursday of Each Month
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Chairman

February 11, 2009

BRIEFING PAPER ON KLAMATH PROJECT WATER QUALITY CERTIFICATION

On February 17, 2009, the State of California Water Resources Control Board (State Water Board) holds a public meeting to discuss the status of the water quality certification relating to the re-licensing of PacifiCorp's Klamath Hydroelectric Project, located on the Klamath River. We encourage the Board to reject PacifiCorp's proposal to postpone water quality certification proceedings for the Klamath Hydroelectric Project. Indefinite delay of the water quality certification process subverts the Clean Water Act and Congressional intent of restoring our nation's waters.

This paper supplements the Hoopa Valley Tribe's December 3, 2008 letter to the Board. Specifically, we encourage the Board to continue with its certification proceeding. If PacifiCorp refuses to fund the studies necessary to complete the certification process, or withdraws its application, the State Water Board should deny certification.

I. Background on Klamath Hydroelectric Project

The Klamath Hydroelectric Project consists of six project dams spanning sixty-four miles of the Klamath River in northern California and southern Oregon. The Klamath River is listed as a water quality impaired river under Section 303(d) of the Clean Water Act. The Klamath Project dams and associated reservoirs are believed to significantly contribute to water quality impairment.

Warm and calm surface water created by the shallow reservoirs of the Project provide an ideal environment for the growth of large algal blooms. In recent years, public health alerts have issued due to outbreak of the toxic alga *Microcystis aeruginosa* within and downstream of the Klamath Project. For example, in late 2005, scientists recorded the toxic alga at levels that exceeded World Health Organization standards for recreational use by 468 times. The United States EPA has listed the upper Klamath River in California as impaired for excess microcystin toxins.

Combinations of stagnant water conditions, low dissolved oxygen, and increased water temperature caused, in part, by dams have also had lethal consequences for fish. In 2002, Klamath River communities witnessed the largest adult fish kill recorded in U.S. history. Approximately 33,000 chinook, coho, and steelhead salmon were found dead due in part to

degraded water quality in the Klamath River between September 20 and 27, 2002. *See* Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1089 (9th Cir. 2005) (citing fish kill).

Degraded water conditions persist in the Klamath River. An August 22, 2008 State Water Board letter confirms that the Klamath River's "water quality and ability to support healthy fisheries is declining: there is substantial evidence to indicate an increase in fish disease on the river, an increase in the toxic blue-green algae *Microcystis aeruginosa*, and an overall decline in fish populations." The Hoopa Valley Tribe is a "State" for Clean Water Act purposes. Yet the Tribe's federally approved water quality standards for the portion of the reservation through which the Klamath River runs are not being met. In sum, water quality conditions in the Klamath River are seriously impaired and pose an ongoing threat to the health of fish and aquatic species relied upon by both tribal and non-tribal communities.

The FERC license for operation of the Klamath Project expired nearly three years ago, on March 1, 2006. PacifiCorp has continued to operate the Project under the authority of FERC annual licenses without inclusion of terms or conditions to protect water quality or other affected resources. Other than completion of the Section 401 water quality certification process, the Project is ready to be re-licensed with conditions that will provide significant protection, mitigation, and enhancement of environmental resources. In early 2007, the Departments of Interior and Commerce issued final mandatory conditions and prescriptions for fish passage[1] and minimum instream flows pursuant to their authorities under Sections 4(e) and 18 of the Federal Power Act. FERC conducted an environmental review of the Project pursuant to NEPA and issued its Final EIS in November 2007.

The current delay in issuance of the water quality certification allows the Project to continue operating and generating power revenues without the inclusion of the necessary environmental conditions and without complying with water quality standards. In February 2007, the Hoopa Valley Tribe filed a motion requesting FERC to impose ramping restrictions and minimum flow conditions on continued operations based on the federal agencies' mandatory conditions and prescriptions. In November 2008 FERC denied the motion. The Tribe requested rehearing of that order; that request is still pending.

II. Perpetual Delay In Obtaining Section 401 Certification Is Unacceptable.

Prior to obtaining a FERC license to operate a hydroelectric project, a license applicant must seek and obtain certification pursuant to Section 401 of the Clean Water Act that the project will comply with applicable state water quality standards. 33 U.S.C. § 1341(a)(1). No license may be granted by FERC until the state in which the project is located either issues or waives certification.

On September 30, 2008, the California State Water Board initiated its environmental review process and requested scoping comments on the Section 401 water quality certification of the Klamath Project. In November 2008, PacifiCorp and the Resources Agency effectively

[1] The KHP lacks fish passage and blocks more than 300 miles of historic migration, spawning, and rearing habitat in the Upper Klamath River Basin for salmon, steelhead, and lamprey populations.

derailed both the certification and FERC re-licensing process by executing an Agreement in Principle (AIP) that bars the State from imposing on PacifiCorp "significant costs for a Clean Water Act certification of the re-licensing project, including review pursuant to the California Environmental Quality Act." If the State Water Board is paralyzed by the AIP, the Clean Water Act certification and FERC re-licensing processes will remain in a perpetual state of delay.

Although the AIP is being touted as a commitment by PacifiCorp to remove Project dams at some time in the future, the AIP is unlikely to lead to either dam removal or any final settlement that adequately protects water quality. Instead, the AIP appears to be a means to delay re-licensing and allow the project to remain operational without incurring costs of environmental protection measures. A significant flaw in the AIP is that it contains numerous avenues for PacifiCorp to unilaterally withdraw from its commitments. For example, any "final agreement" is contingent on the enactment of specific State and Federal legislation and the contribution of hundreds of millions of dollars from the States of California and Oregon and nearly $1 billion from the federal government. Litigation brought against parties to the AIP is also grounds for withdrawal. Perhaps of most relevance, imposition of costs on the licensee relating to the water quality certification proceedings in Oregon and California gives PacifiCorp the right to withdraw. Without a water quality certification, no license can issue – and until a license issues, no environmentally protective conditions will be imposed on the Project – except for those interim conditions that PacifiCorp might voluntarily agree to.

We are very concerned about the delay in the water quality certification that has resulted from the filing of the AIP. We encourage the State Water Board to proceed with its duties under the Clean Water Act to evaluate the water quality impacts of the Klamath Project. If PacifiCorp refuses to complete the necessary environmental studies, the State Water Board should deny the certification.

There is no justification for the State Water Board to delay processing the Section 401 certification. The alternatives proposed for evaluation in the Board's September 30, 2008 scoping notice are consistent with the dam removal alternatives being negotiated by parties to the AIP. The Board should proceed with its environmental review process simultaneously with the settlement negotiations and continue to work on preparation of its certification decision to minimize delay in the event that settlement discussions break down.

The water quality certification proceedings for the Project can proceed in tandem with ongoing negotiations without any prejudice to the licensee or any other party. For example, the parties are discussing a variety of "interim measures," some of which affect water quality and project discharges. Those measures will undoubtedly become the subject of separate Section 401 applications. However, the Board's analysis of project impacts and appropriate mitigation measures for relicensing the Project need not and should not wait for the conclusion of settlement negotiations that could be derailed at any moment at PacifiCorp's sole discretion. We are encouraging all persons to oppose any further delays in the water quality certification proceeding that is serving to delay the necessary restoration of the Klamath River system. Allowing licensees, state agencies, and FERC to use the Section 401 process as a means to delay necessary river restoration measures is unacceptable.

III. Abuse of Section 401 Certification Process Is Occurring Nationwide.

The Klamath Project offers an extreme example of how the Section 401 certification process is being manipulated by licensees, and willing state certification agencies, to delay implementation of effective environmental enhancement measures. The Water Board should prevent licensees from using the Section 401 process as a means to delay necessary environmental protection measures in the FERC re-licensing process.

Properly implemented, Section 401 certification is a powerful tool to ensure protection of water quality and health of aquatic resources affected by hydroelectric projects. The U.S. Supreme Court has confirmed that states have broad authority to include protective conditions in the Section 401 certification decision. *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (affirming state's authority to condition FERC hydroelectric projects under Section 401); *PUD No. 1 of Jefferson County v. Wash. Department of Ecology*, 511 U.S. 700 (1994) (upholding state's minimum flow conditions on project). Significantly, FERC has no discretion to reject the conditions imposed in the certification. *American Rivers v. FERC*, 129 F.3d 99 (2d. Cir. 1997).

A loophole in the Section 401 certification process is undermining the Congressional intent and subverting the goals of the Clean Water Act. Section 401 requires a state to issue its certification decision within one year from the date of the certification request, or else the certification decision will be deemed waived. 33 U.S.C. § 1341(a)(1). License applicants around the nation are repeatedly abusing the process by: (1) delaying or refusing to conduct necessary studies and environmental analysis within the one-year timeframe, (2) withdrawing their certification request just before the one-year time period expires, and then (3) re-submitting their application to start a new one-year timeframe. This perpetual abuse of process results in continued delay of the Section 401 certification decision, and because a FERC license cannot issue until the certification is obtained, also results in indefinite delay of FERC licensing proceedings. In the meantime, the project continues to operate, generating revenues for the licensee, while the water quality and affected resources suffer.

This abuse of process is being taken to an extreme in the re-licensing of the Klamath Project. PacifiCorp first applied for water quality certification from the States of California and Oregon on March 29, 2006. PacifiCorp withdrew and resubmitted its application in February 2007 and again in February 2008 – restarting the one year clock over again each time. On July 11, 2008, PacifiCorp withdrew its application, but then re-submitted it again on October 2, 2008. Thus, the State now has another one year timeframe, until October 1, 2009 to issue or waive its certification. In the meantime, federal agencies have submitted final mandatory conditions for the re-licensing of the Project and FERC has completed its Final EIS pursuant to NEPA. The Project is ready to be re-licensed except that the states have not yet concluded the Section 401 water quality certification process.

The recent AIP signed by PacifiCorp and the States of California and Oregon proposes to delay the certification decision (and thus the entire re-licensing) for years based on an illusory commitment to remove dams at some point in the future. An express condition of the AIP is that

the States of California and Oregon put the Section 401 proceedings on hold – by agreeing to not require PacifiCorp to spend any money on the certification process. Essentially, the States of Oregon and California have agreed to allow the significantly impaired water quality in the Klamath to continue to suffer and degrade for an additional decade or more based on an agreement that contains no enforceable commitments and that allows the licensee a unilateral right of withdrawal at any time.

Other hydroelectric re-licensing proceedings are similarly delayed because of the repeated withdrawal and re-submission of Section 401 certification applications. For example, the re-licensing of Idaho Power's Hells Canyon Project on the Snake River (FERC Project 1971) remains on hold due to the failure of the States of Idaho and Oregon to issue water quality certifications. Idaho Power filed for re-licensing and water quality certification in 2003. Idaho Power then withdrew and re-submitted its applications in 2005, 2006, 2007, and on August 8, 2008. Like the Klamath Project, FERC and all other federal agencies have completed their environmental reviews and are ready to license the Hells Canyon Project, but the 6-year delay in the certification proceedings has prevented licensing and the imposition of conditions. In the meantime, the licensee Idaho Power continues to generate power revenues under the authority of annual licenses that contain no environmental protection measures.

A similar situation has also occurred in the re-licensing of the Upper North Fork Feather River Project in California (FERC Project 2105). In that case, Pacific Gas & Electric filed for a new license application in 2002. However, due to the repeated withdrawal and re-submission of the related Section 401 certification application, no certification and thus no FERC license has been issued – allowing continued power generation without necessary environmental protection measures.

Delays in certification have also occurred in proceedings where parties have reached agreement to remove a project dam. For example, implementation of the agreement to remove the Condit dam on the White Salmon River in Washington State (Project No. 2342) has been delayed in part by the failure to obtain a water quality certification for the facilities removal. PacifiCorp first applied for a certification for removal of the dams in 2001, and has subsequently withdrawn and resubmitted its application every year – most recently on May 13, 2008.

On the Klamath River, and elsewhere around the nation, implementation of needed environmental protection measures is being postponed due to delays in the Section 401 water quality certification process. The ability of licensees to repeatedly withdraw and resubmit their application without consequence is largely to blame. A related problem is that states are often unable to issue the certification until the licensee funds necessary studies – leaving states with the choice of funding the studies themselves, waiting for the licensee to complete necessary studies, or simply denying certification. The ability of licensees to continue operating their projects under annual licenses that lack environmental conditions allows licensees to benefit from delays in re-licensing. We urge the State Board to fully exercise its authority and to bring into compliance the water quality of the Klamath River.

If you have any additional questions about the Klamath Project, please contact the Hoopa Fisheries Department at 530-625-4267 or Tom Schlosser at 206-386-5200, or at t.schlosser@msaj.com.

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