

12-1-2011

## Rebuttal in Defense of the Klamath Hydroelectric Settlement Agreement

Michael A. Swiger

Sharon L. White

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wjelp>



Part of the [Energy and Utilities Law Commons](#), and the [Environmental Law Commons](#)

---

### Recommended Citation

Michael A. Swiger & Sharon L. White, *Rebuttal in Defense of the Klamath Hydroelectric Settlement Agreement*, 1 WASH. J. ENVTL. L. & POL'Y 297 (2011).

Available at: <https://digitalcommons.law.uw.edu/wjelp/vol1/iss2/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Journal of Environmental Law & Policy by an authorized editor of UW Law Digital Commons. For more information, please contact [lawref@uw.edu](mailto:lawref@uw.edu).

## REBUTTAL IN DEFENSE OF THE KLAMATH HYDROELECTRIC SETTLEMENT AGREEMENT

Michael A. Swiger & Sharon L. White\*

*Abstract:* This article rebuts certain assertions made by Mr. Thomas Schlosser in a recent article entitled *Dewatering Trust Responsibility: The New Klamath River Hydroelectric and Restoration Agreements*. The Klamath hydroelectric dams are not causing degrading fish disease conditions in the Klamath Basin. *Dewatering Trust Responsibility* overlooks the effects of water diversions for agriculture, pollution from pesticides and industrial operations and habitat degradation from timbering, ranching and other human activities on current Basin conditions. Under the Klamath Hydroelectric Settlement Agreement and the Federal Energy Regulatory Commission license, PacifiCorp is taking extensive measures to protect aquatic resources in the Basin prior to dam removal. The abeyance in the Clean Water Act certification process is necessary to allow the study of anticipated impacts of dam removal and water quality measures that could be implemented during the interim period prior to potential dam removal.

I.	INTRODUCTION .....	298
II.	ENVIRONMENTAL EFFECTS OF DAMS IN THE KLAMATH BASIN ARE MISREPRESENTED .....	298
III.	KHSA'S INTERIM MEASURES ARE BEING IMPLEMENTED TO PROTECT AQUATIC RESOURCES PRIOR TO DAM REMOVAL .....	301
	A. PacifiCorp Has Undertaken Extensive Interim Measures for Resource Protection Pending Dam Removal .....	301
	B. FERC Did Not Violate Its Trust Responsibilities...	305
IV.	THE KHSA IS NOT EXPLOITING THE CLEAN WATER ACT TO AVOID IMPLEMENTATION OF WATER QUALITY MEASURES .....	306
V.	CONCLUSION.....	308

---

\* Michael Swiger and Sharon White of Van Ness Feldman, PC are counsel to a number of FERC hydroelectric licensees, including state and regional power agencies, investor-owned utilities, private developers, municipalities, irrigation districts and investors. Mr. Swiger served as counsel to PacifiCorp in the settlement negotiations for the Klamath Hydroelectric Settlement Agreement.

## I. INTRODUCTION

In a recent article in the Washington Journal of Environmental Law and Policy,<sup>1</sup> Mr. Thomas Schlosser argued, among other things, that the Klamath Hydroelectric Settlement Agreement (KHSa) will provide an indefinite stay of Federal Energy Regulatory Commission (FERC) relicensing proceedings and will “strip FERC of jurisdiction to require actions for the protection of fish and wildlife.”<sup>2</sup> Mr. Schlosser also asserted that the Clean Water Act (CWA) is being utilized “to block water quality improvements rather than to promote compliance with water quality standards.”<sup>3</sup> The purpose of this Article is to rebut the assertions made in *Dewatering Trust Responsibility* concerning adverse impacts related to the Klamath Hydroelectric Project and the nature of the KHSa.

This rebuttal focuses on three particular issues raised in *Dewatering Trust Responsibility*. Part II clarifies that the Klamath hydroelectric dams were not implicated as a cause of the tragic fish kill in the lower Klamath River in 2002 and are not causing degrading fish disease conditions in the Klamath basin. Part III defends the KHSa and explains the extensive measures being taken by PacifiCorp to protect aquatic resources in the interim period prior to dam removal. Part IV addresses the contention that PacifiCorp and others are exploiting the CWA certification process to delay license issuance and avoid implementation of water quality measures. Because PacifiCorp was not a party to the Klamath Basin Restoration Agreement (KBRA), the authors take no position on Mr. Schlosser’s points relevant to that agreement.

## II. ENVIRONMENTAL EFFECTS OF DAMS IN THE KLAMATH BASIN ARE MISREPRESENTED

In *Dewatering Trust Responsibility*, Mr. Schlosser makes a number of assertions concerning existing environmental conditions and the effects of the Klamath Hydroelectric Project on environmental resources. For example, Mr. Schlosser cites the tragic 2002 fish kill and contends that stagnant water

---

1. Thomas P. Schlosser, *Dewatering Trust Responsibility: The New Klamath River Hydroelectric and Restoration Agreements*, 1 WASH. J. ENVTL. L. & POL’Y 42 (2011).

2. *Id.* at 69.

3. *Id.* at 66.

conditions, low dissolved oxygen and increased temperatures, caused in part by dams, have had lethal consequences for fish in the Klamath Basin.<sup>4</sup> This assertion is without basis. A scientific investigation into the 2002 fish kill that occurred more than 140 miles downriver from the Klamath Hydroelectric Project, did not cite impacts from PacifiCorp's hydroelectric dams as contributing factors. The investigation instead found that an outbreak of the fish disease pathogens ich and columnaris caused the fish kill.<sup>5</sup>

The hydroelectric dams, though not without impacts, are convenient scapegoats for the myriad effects of a long history in the upper Klamath Basin of water diversions for agriculture, pollution from pesticides and industrial operations and habitat degradation from timbering, ranching and other human activities.<sup>6</sup> In addition, Upper Klamath Lake, located at the headwaters of the river, is a naturally shallow, nutrient-rich, warm water body susceptible to excessive algae growth and other water quality problems that result in impaired water quality conditions downstream.<sup>7</sup>

*Dewatering Trust Responsibility* also alleges that hydroelectric dams are a cause of an increase in fish disease on the Klamath River. Data from recent studies, however, does not support this view. To illustrate, one recent study indicates that the river reach extending from Iron Gate dam to just above the Shasta River has the lowest fish infection rates observed in the Klamath River.<sup>8</sup> Another study indicates that

---

4. *Id.* at 60-61.

5. CALIFORNIA DEPARTMENT OF FISH AND GAME, NORTHERN CALIFORNIA NORTH-COAST REGION, SEPTEMBER 2002 KLAMATH RIVER FISH KILL: FINAL ANALYSIS OF CONTRIBUTING FACTORS AND IMPACTS (July 2004), *available at* <http://www.pcffa.org/KlamFishKillFactorsDFGReport.pdf>.

6. *See, e.g.*, FEDERAL ENERGY REGULATORY COMMISSION, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR RELICENSING OF THE KLAMATH HYDROELECTRIC PROJECT 3-16, 3-113, 3-173, 3-345 (Nov. 16, 2007) [hereinafter FERC FEIS], *available at* <http://www.ferc.gov/industries/hydropower/enviro/eis/2007/11-16-07.asp>; NATIONAL MARINE FISHERIES SERVICE, BIOLOGICAL OPINION ON OPERATION OF THE KLAMATH PROJECT BETWEEN 2010 AND 2018 72-73 (Mar. 15, 2010) [hereinafter NMFS Biological Opinion], *available at* [http://www.swr.noaa.gov/klamath/FINAL-Klamath\\_Ops\\_031510.pdf](http://www.swr.noaa.gov/klamath/FINAL-Klamath_Ops_031510.pdf).

7. FERC FEIS, *supra* note 6, at 3-2, 3-63, 3-111; NATIONAL MARINE FISHERIES SERVICE, BIOLOGICAL OPINION KLAMATH HYDROELECTRIC PROJECT 45 (Dec. 21, 2007).

8. *See* J.L. BARTHOLOMEW & J. FOOTT, COMPILATION OF INFORMATION RELATING TO MYXOZOAN DISEASE EFFECTS TO INFORM THE KLAMATH BASIN RESTORATION AGREEMENT 6-7, 9 (2010), *available at* <http://klamathrestoration.gov/sites/>

the reservoirs created by the Klamath dams do not support populations of polychaetes, worms that host the fish parasites called *Ceratomyxa shasta*.<sup>9</sup> The evidence from these studies suggests that the reservoirs may actually reduce disease spores in the river by settling and retaining them.<sup>10</sup>

Furthermore, the broader assertion that water quality and fisheries conditions in the basin are actively degrading, whatever the causes, ignores the significant federal and private investments that are being made to improve conditions.<sup>11</sup> For example, the National Marine Fisheries Service's (NMFS) most recent annual Report to Congress on the status of restoration and recovery actions in the Klamath Basin for salmon and steelhead highlights a number of significant restoration projects that NMFS has recently implemented.<sup>12</sup> In 2009, NMFS spent \$2,173,691 to improve in-stream and riparian habitat for salmon on the lower Klamath River tributaries.<sup>13</sup> Total federal and state (California) resource agency outlays in the Klamath basin were more than ten million dollars in 2009 - funding that was aimed at efforts to improve existing environmental conditions.<sup>14</sup> Moreover, as further described below, PacifiCorp is actively funding environmental measures to protect aquatic resources in the Basin.<sup>15</sup> These outlays and funding commitments are helping to improve Basin resources during the interim period prior to dam removal.

---

klamathrestoration.gov/files/Disease%20synthesis\_11-1\_final.bartholomew.foott.pdf.

9. Richard W. Stocking, Distribution of *Ceratomyxa shasta* (Myxozoa) and Habitat Preference of the Polychaete Host, *Manayunkia speciosa* in the Klamath River 24–25 (Feb. 23, 2006) (Unpublished M.S. Thesis, Oregon State University), available at <http://www.klamathriver.org/Documents/ST06-Ceratomyxa-Thesis.pdf>.

10. *Id.*

11. Schlosser, *supra* note 1, at 61.

12. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, KLAMATH RIVER BASIN 2010 REPORT TO CONGRESS 2 (2010), available at [http://www.swr.noaa.gov/klamath/Klamath\\_2010.pdf](http://www.swr.noaa.gov/klamath/Klamath_2010.pdf)

13. *Id.* at 6.

14. *Id.* at 8.

15. See *infra* Section III.A.

### III. KHSa'S INTERIM MEASURES ARE BEING IMPLEMENTED TO PROTECT AQUATIC RESOURCES PRIOR TO DAM REMOVAL

#### A. *PacifiCorp Has Undertaken Extensive Interim Measures for Resource Protection Pending Dam Removal*

*Dewatering Trust Responsibility* argues that because the FERC annual license does not include terms or conditions to protect water quality and resources, the project will operate indefinitely without environmental conditions and without complying with water quality standards.<sup>16</sup> The article further argues that the KHSa “seeks to strip FERC of jurisdiction to require actions for the protection of fish and wildlife during the long hiatus in relicensing.”<sup>17</sup> While it is correct that the KHSa is structured so Congress, and not FERC, must authorize the decommissioning and transfer of the dams, this statement mischaracterizes FERC's ability to regulate the dams and environmental conditions at the dams prior to their decommissioning and removal.

The Klamath Hydroelectric project has operated under annual licenses since 2006.<sup>18</sup> During that time, however, all of the terms and conditions of the expired license have continued to apply to the annual license.<sup>19</sup> The license was amended a total of twenty times over the past five decades to add measures for recreation, fish and wildlife protection and minimum flows.<sup>20</sup> For example, in 1957, the Federal Power Commission (FPC), FERC's predecessor agency, amended the license to require a reasonable minimum flow.<sup>21</sup> In 1963, the FPC amended the license to include a fish hatchery at Iron Gate dam, the operation of which is funded largely by PacifiCorp.<sup>22</sup> In 1970, the FPC amended the license to include minimum flow requirements at Iron Gate dam.<sup>23</sup> In addition,

---

16. Schlosser, *supra* note 1, at 61.

17. *Id.* at 69.

18. See PacifiCorp, Notice of Authorization for Continued Project Operation, FERC Project No. 2082 (issued Mar. 9, 2006).

19. See *id.* § 6.1.3B.

20. See FERC FEIS, *supra* note 6, at 2-15, 2-16.

21. *The California Oregon Power Company*, 18 F.P.C. 364, 367-68 (1957).

22. *Pacific Power & Light Co.*, 30 F.P.C. 499 (1963).

23. *The California Oregon Power Company*, 25 F.P.C. 579, 581 (1961).

biological opinions in 2002, 2008 and 2010 on the Bureau of Reclamation's Klamath Project have more recently prescribed minimum flows at Iron Gate dam.<sup>24</sup>

FERC's authority to regulate the dams and enforce these measures remains unchanged under the annual license.<sup>25</sup> Under this authority, FERC must conduct a preliminary investigation into the threat of environmental resource damage and the availability of interim protective conditions when alerted to the possibility of unanticipated serious impacts resulting from operation of the project.<sup>26</sup> Although FERC may only impose interim conditions, FERC may reopen the terms of the license and revise the conditions.<sup>27</sup> Such "reopeners" are common in FERC licenses.<sup>28</sup>

FERC has completed just such an inquiry in the Klamath relicensing. In 2007, the Hoopa Valley Tribe petitioned FERC for new interim environmental conditions to be imposed on the annual license. After thorough investigation, FERC denied the Tribe's request, finding such interim conditions unnecessary.<sup>29</sup> FERC found that while project operations had certain adverse effects on the trout fishery, such as stranding trout fry from peaking operations, the record did not demonstrate the necessary impacts on the trout fishery as a whole to justify interim conditions on the annual license.<sup>30</sup> On rehearing, FERC determined that the proper test for reopening an existing license is "unanticipated serious impacts" on fishery resources.<sup>31</sup> Applying that standard, FERC found that there were no unanticipated serious impacts at the Klamath Hydroelectric Project, and that the record showed that the trout fishery within the project was "thriving," making interim conditions unnecessary.<sup>32</sup>

---

24. NMFS Biological Opinion, *supra* note 6.

25. See 16 U.S.C. § 15(a)(1) (2006).

26. Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 876 F.2d 109, 116 (D.C. Cir. 1989).

27. Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 32 (D.C. Cir. 1992).

28. See, e.g., FEDERAL ENERGY REGULATORY COMMISSION, STANDARD FORM L-3 5 (Oct. 1975), available at <http://www.ferc.gov/industries/hydropower/gen-info/comp-admin/l-forms/l-03.pdf>.

29. *PacifiCorp*, 125 FERC ¶ 61,196 (2008).

30. *Id.* at 62,035–36.

31. See *PacifiCorp*, 126 FERC ¶ 61,236 (2009).

32. *Id.*

The Tribe sought judicial review before the D.C. Circuit, arguing that FERC's decision was arbitrary and capricious under the Administrative Procedures Act.<sup>33</sup> The court denied the Tribe's petition, affirming FERC's decision to deny interim conditions and holding that FERC's precedents and regulations afford it considerable discretion in deciding when to revise annual licenses.<sup>34</sup> Notably, the court disagreed with the Tribe's assertion that there was sufficient evidence in the record to prove unanticipated serious impacts to the resident trout fishery.<sup>35</sup> While the court acknowledged conflicting evidence and dueling expert testimony, it deferred to FERC's discretion and found that the decision was based on substantial evidence.<sup>36</sup> Despite this decision, *Dewatering Trust Responsibility* asserts continued degradation and imminent threat to fish, which runs contrary to the court's findings.

The assertion in *Dewatering Trust Responsibility* that PacifiCorp will operate the Klamath dams with "minimal operational changes" until at least 2021 and that FERC has been stripped of jurisdiction over the protection of fish and wildlife is incorrect.<sup>37</sup> First, this assertion overlooks the fact that the current license includes measures to protect aquatic resources, such as minimum flows. Second, as a result of commitments made in the KHSA, PacifiCorp agreed to a range of programs to benefit resident trout, listed coho and other anadromous species, and to increase support for improved hatchery operations and make investments to address water quality conditions prior to dam removal.

In addition to the measures currently required by the license, other extensive and costly measures to protect environmental resources will remain in place until the dam is removed. Under KHSA Interim Measure 17, for example, PacifiCorp has increased flow releases at Fall Creek to improve conditions for fish species.<sup>38</sup> Under KHSA Interim Measure 18, PacifiCorp increased its contributions to fund 100 percent of Iron Gate Hatchery operations and maintenance

---

33. 5 U.S.C. § 706(2)(A) (2006).

34. *Hoopa Valley Tribe v. FERC*, 629 F.3d 209, 212 (D.C. Cir. 2010).

35. *Id.* at 213.

36. *Id.*

37. See Schlosser, *supra* note 1, at 69-70.

38. See KHSA, *supra* note 19, at D-5.



costs.<sup>39</sup> PacifiCorp is providing up to \$1.25 million per year for ongoing hatchery operations and maintenance and separately funding implementation of a hatchery and genetics management plan and studying how to continue to meet hatchery mitigation goals even after the dams are removed. Under KHSA Interim Measure 11, if the Secretary of the Interior issues an affirmative decision to proceed with dam removal, PacifiCorp will fund up to \$5.4 million for water quality improvement projects in the main stem Klamath River, developed in consultation with the relevant state water quality agencies.<sup>40</sup> Under KHSA Interim Measure 15, PacifiCorp is providing \$500,000 annually for comprehensive basin-wide water quality monitoring.<sup>41</sup> These are a few of the twenty-one interim measures included in the KHSA that were carefully conceived to improve environmental conditions in the Klamath River Basin pending dam removal in 2020. PacifiCorp began implementing a number of these interim measures before the Settlement was signed, and ongoing implementation of the full suite of interim measures has already begun to improve conditions in the river for the benefit of fish.<sup>42</sup>

The United States Fish and Wildlife Service (USFWS) and the NMFS (collectively, the Services) incorporated some of the KHSA interim measures into an Interim Conservation Plan (ICP) for the protection of ESA-listed species in the Klamath basin.<sup>43</sup> The ICP also includes measures to protect sucker species not included in the KHSA. Under the ICP, PacifiCorp voluntarily committed to fund or implement conservation measures for the enhancement of Coho salmon and suckers listed under the ESA pending final resolution of the relicensing proceeding.<sup>44</sup> The ICP specifically addresses biological concerns raised in the Services' 2007 biological opinions for the Klamath

---

39. *See id.* at D-5, D-6.

40. *See id.* at D-2, D-3.

41. *See id.* at D-4, D-5.

42. *See* PacifiCorp Update on Implementation of Interim Conservation Plan and Interim Measures Provisions of Klamath Hydroelectric Settlement Agreement, FERC Project No. 2082 (July 1, 2011); Klamath Hydroelectric Settlement Agreement Implementation Report (June 2011), *available at* [http://www.pacificorp.com/content/dam/pacificorp/doc/Energy\\_Sources/Hydro/Hydro\\_Licensing/Klamath\\_River/2011\\_KHSA\\_Implementation\\_Report\\_June\\_2011.pdf](http://www.pacificorp.com/content/dam/pacificorp/doc/Energy_Sources/Hydro/Hydro_Licensing/Klamath_River/2011_KHSA_Implementation_Report_June_2011.pdf).

43. *See* PacifiCorp, Interim Conservation Plan – Klamath Hydroelectric Project, FERC Project No. 2082 (Nov. 25, 2008).

44. *Id.* at 1.

project relicensing. The measures include, among other things, contributions to a Coho salmon enhancement fund, a fish disease research fund, development and implementation of a hatchery and genetics management plan for Iron Gate hatchery, implementation of a flow variability program to more closely mimic natural river flows and installation and evaluation of a turbine venting system at Iron Gate dam to increase dissolved oxygen concentrations in the river.<sup>45</sup> PacifiCorp also agreed to seasonal restrictions on turbine operations at the East Side and West Side facilities to reduce impacts to listed sucker species.<sup>46</sup> The ICP measures were developed in collaboration with the Services, are funded by PacificCorp and firmly grounded in the best available scientific information. These measures are in addition to the current license requirements to minimize potential project impacts on species pending dam removal.

PacifiCorp's commitments in the KHSA, the ICP interim measures, the license conditions for protection of aquatic species and the federal dollars actively being spent on the restoration and recovery of fish species in the Klamath Basin, belie Mr. Schlosser's assertion that the project will operate until 2021 without any environmental safeguards and in a condition of regulatory neglect by relevant agencies. Moreover, *Dewatering Trust Responsibility* fails to recognize that in addition to funding significant interim measures, PacifiCorp's customers have begun funding eventual dam removal through \$200 million in customer surcharges provided for in the KHSA.<sup>47</sup>

#### *B. FERC Did Not Violate Its Trust Responsibilities*

*Dewatering Trust Responsibility* also asserts that FERC violated its trust responsibilities to the Tribe by (1) issuing a new license to both California and Oregon despite both states having waived their CWA Section 401 authority, and (2) failing to consider or approve the KHSA.<sup>48</sup> These assertions are inaccurate. FERC sent an ex parte observer to all KHSA

---

45. *Id.* at 2, 5.

46. See Randy Landolt, PacifiCorp, Progress Letter on Interim Conservation Plan, FERC Project No. 2082 (filed Sept. 10, 2009).

47. See KHSA, *supra* note 19, § 4.1.1.

48. Schlosser, *supra* note 1, at 70.

negotiations to preserve its interests and fulfill its trust responsibilities. The KHSA was, however, intentionally drafted to require Congressional authorization and does not require FERC approval.<sup>49</sup> When the parties submitted the KHSA to FERC, they submitted it for informational purposes only, and the parties specifically noted that they did not seek any action from FERC on the KHSA.<sup>50</sup> Furthermore, it is not uncommon in FERC hydropower proceedings for an extended period of time to pass between conclusion of the National Environmental Policy Act analysis and eventual license issuance.<sup>51</sup>

FERC will continue to have jurisdiction over operation of the Klamath dams under the annual license until each dam is transferred to the dam removal entity for removal, around 2020.<sup>52</sup> Contrary to the assertions made by Mr. Schlosser in *Dewatering Trust Responsibility*,<sup>53</sup> the KHSA does not strip FERC of any jurisdiction to require environmental conditions for fish and wildlife pending relicensing. In 2009, FERC fulfilled its responsibility to investigate the need for interim measures, but found they were unnecessary.

#### IV. THE KHSA IS NOT EXPLOITING THE CLEAN WATER ACT TO AVOID IMPLEMENTATION OF WATER QUALITY MEASURES

Contrary to the assertions in *Dewatering Trust Responsibility*, the KHSA has not used Section 401 of the CWA “to block water quality improvements rather than to promote compliance with water quality standards.”<sup>54</sup> The KHSA included a request for abeyance of the state 401 proceedings in order to allow the KHSA parties to focus on implementation of the agreement, including studies of the anticipated impacts of

---

49. See KHSA, *supra* note 19, at Cover Letter.

50. *Id.*

51. For example, in the Oroville Facilities relicensing, FERC issued its Final Environmental Impact Statement in May 2007, and the license has not yet been issued. See FEDERAL ENERGY REGULATORY COMMISSION, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE OROVILLE FACILITIES, PROJECT NO. 2100 (May 18, 2007), available at [http://www.water.ca.gov/orovillere relicensing/docs/FEIS\\_070518/FEIS-FERC%20Part%201.pdf](http://www.water.ca.gov/orovillere relicensing/docs/FEIS_070518/FEIS-FERC%20Part%201.pdf).

52. See KHSA, *supra* note 19, § 7.4.2.

53. Schlosser, *supra* note 1, at 69.

54. *Id.* at 66.

dam removal and of water quality measures for the interim period prior to potential dam removal.<sup>55</sup> Section 6.5 of the KHSA also specifically requires PacifiCorp to withdraw and resubmit its water quality certification applications to avoid a situation in which the states of California and Oregon would be viewed as having waived their respective certification authorities under the CWA.<sup>56</sup> The KHSA did not impose this requirement to avoid the implementation of water quality improvements. Rather, this requirement was designed to avoid waiver of water quality certification and preserve the states' authority to specify water quality requirements under a new license should dam removal not proceed.

In response to PacifiCorp's request on behalf of the KHSA parties, the California State Water Resources Control Board (SWRCB) granted an abeyance that would expire on August 16, 2011 unless Congress enacts federal legislation to implement the KHSA.<sup>57</sup> As a result of congressional schedules and conflicting priorities that have delayed introduction of legislation, PacifiCorp and other Klamath settlement parties, including the California Natural Resources Agency, recently requested that the SWRCB amend the abeyance so it is no longer contingent on introduction of federal legislation. The SWRCB granted the amendment request on August 16, 2011. Even without the legislation condition, the SWRCB still has ample authority under its abeyance order to terminate the abeyance should progress on the KHSA be unreasonably delayed or frustrated.<sup>58</sup> Thus, the CWA process is not suspended indefinitely, but is instead being held in abeyance for a reasonable amount of time to allow the government's dam removal studies to continue and for Congress to pass the implementing legislation.

---

55. See KHSA, *supra* note 19, § 6.5.

56. *Id.*

57. See State Water Resources Control Board, Resolution No. 2010-0049 (Oct. 5, 2010), [http://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2010/](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2010/); State Water Resources Control Board, Resolution No. 2010-0024 (May 18, 2010), [http://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2010/](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2010/). The State of Oregon also granted an abeyance of its 401 proceeding by letter dated March 29, 2010. See Oregon Department of Environmental Quality, Letter to PacifiCorp Granting Abeyance, FERC Project No. 2082 (Mar. 29, 2010).

58. See State Water Resources Control Board, Resolution No. 2010-0024 3 (May 18, 2010), [http://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2010/rs2010\\_0024.pdf](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2010/rs2010_0024.pdf).

Extended delays in issuance of water quality certifications are typical in contested relicensing proceedings.<sup>59</sup> Unlike these typical delays, however, the abeyance of the Section 401 water quality proceedings is not indefinite, and PacifiCorp has committed to a number of water quality studies and measures in the interim to address water quality conditions and benefit aquatic resources.<sup>60</sup>

## V. CONCLUSION

The KHSA is a landmark dam removal agreement supported by a majority of stakeholders in the Klamath Basin. While PacifiCorp has stated that it is not in the business of removing dams, it opted to sign the KHSA because, compared to relicensing, the KHSA framework provides more cost and risk certainty for PacifiCorp's customers.<sup>61</sup>

The KHSA is not an indefinite suspension of relicensing but rather, provides for sufficient time to conduct the necessary scientific research, engineering and environmental review studies to determine how to proceed with dam removal and to obtain appropriate permits and authorizations to remove the dams and conduct site restoration activities. A number of tribes, federal and state agencies, environmental organizations and agricultural interests participated in KHSA negotiations and have endorsed it as a positive development for the Klamath Basin.<sup>62</sup> The California and Oregon Public Utility Commissions have also endorsed the KHSA, as has the State of Oregon through legislation authorizing the collection of customer surcharges to partially fund the cost of dam removal.<sup>63</sup>

The KHSA is not a tool to allow PacifiCorp to operate the dams under the old license and avoid relicensing. All parties

---

59. See Hydroelectric Licensing Under the Federal Power Act, Notice of Proposed Rulemaking, 68 Fed. Reg. 13,988, 13,991 (Mar. 21, 2003) ("the longer the delay [in the relicensing proceeding] . . . the more likely the cause is to be lack of water quality certification.").

60. See *supra* Section III.A.

61. See PacifiCorp, Project Overview, Klamath Hydroelectric Settlement Agreement (FERC No. 2082), <http://www.pacificorp.com/es/hydro/hl/kr.html#> (last visited November 18, 2011).

62. See KHSA, *supra* note 19, at 68-76 (signature pages listing parties).

63. Oregon Surcharge Act, 2009 Or. Laws Ch. 690 (2009) (attached as Appendix F to KHSA, *supra* note 19).

recognize that if the federal legislation does not pass or the Secretary of the Interior determines in 2012 that dam removal is not in the public interest, relicensing could resume and the Section 401 proceedings would proceed. The resumption of relicensing would likely require lengthy litigation before FERC, California and Oregon and reduce the involvement of these actors in interim measures and studies. PacifiCorp's funding of interim measures and studies that are currently in place under the KHSA are not guaranteed absent a settlement. In the meantime, KHSA parties will continue to collaborate to implement the KHSA and its interim measures and push for legislation so that dam removal can proceed.